CHAPTER 8

CONCLUSION

"The strength of a nation derives from the integrity of the home."
-Confucius

8.1 The status quo

Where a person owns a home, it is often his most valuable asset. Where he defaults in respect of a debt that he owes, he and his family and other dependants become vulnerable to the forced sale of their home. Thus, the home may become the focal point around which conflict arises between the interests of the debtor, his family members, including children and other dependants, and the creditors. In South Africa, unlike in some foreign jurisdictions, such as the United States of America, Canada and England and Wales, traditionally, a debtor's home has not enjoyed specific protection against forced sale either in the individual debt enforcement process or in insolvency. Statutory exemptions of specific classes of property from sale in execution have never included the debtor's home.[1] An invariable consequence of the sequestration of a debtor's estate in terms of the Insolvency Act is the liquidation of the assets of the insolvent estate, including the home of the insolvent that is not exempt from sale by the trustee.[2]

In the individual debt enforcement process, the common law position has always been that a judgment creditor is obliged first to attach and execute against a debtor's movables before executing against his immovable property for which a court order is required.[3] However, a mortgagee could execute against hypothecated immovable property without first having to excuss the debtor's movables as long as he obtained a

[1]See 4.4.3.4 and 4.4.4.4.
[2]See 6.3.1 and 6.5.
[3]See 2.2.2, 2.3.2, 4.4.3.3 and 4.4.4.3.

court order declaring the immovable property specially executable.[4] Legislation and rules of court became applicable which empowered a registrar of a high court and a clerk of the magistrate's court to grant default judgment against a debtor who did not respond to a summons or who did not enter an appearance to defend the matter.[5] Legislation and rules of court also empowered a registrar of the high court to issue a writ of execution and a clerk of the magistrate's court to issue a warrant of execution, without an order of court, in respect of the immovable property of a judgment debtor against whom default judgment had been granted.[6]

The introduction of a new constitution, including a bill of rights, brought about fundamental reform to South African jurisprudence and its legal system. This led to changes, in the individual debt enforcement process in relation to execution against a debtor's home, through the recognition of the impact of everyone's right to have access to adequate housing, provided for in section 26 of the Constitution that forms part of the Bill of Rights. The right to have access to adequate housing did not feature in the interim Constitution, which came into operation in 1994, but was introduced for the first time in section 26(1) of the Constitution of 1996 as one of the justiciable socio-economic rights enacted to facilitate the transformation of South African society. Section 26(3) provides that no one may be evicted from their home without an order of court made after considering all the relevant circumstances. Section 26(2) obliges the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of everyone's right to have access to adequate housing. The Housing Act and PIE, as well as other statutes, were enacted in furtherance of this obligation and the National Housing Code was issued in terms of the Housing Act.[7]

The Constitutional Court interpreted and applied section 26 for the first time in *Grootboom*, a case that concerned the eviction of a community from private land. The court stated that subsections (1) and (2)are related and must be read together. The

[4]See 4.3.3.
[5]See 4.4.3.2 and 4.4.4.2.
[6]See See 4.4.3.3 and 4.4.4.3.
[7]See 1.1 and 3.3.1.

effect is that section 26(2) imposes a qualified, positive obligation on the state to devise a comprehensive and workable programme to meet its responsibilities in relation to the provision of housing. Further, at the very least, section 26(1) places a negative obligation on the state and all other persons to desist from preventing or impairing the right of access to adequate housing. This negative aspect of the obligation was viewed by the court as being further spelt out in section 26(3) that prohibits arbitrary evictions.[8]

It was only in the latter part of 2004 that the Constitutional Court's judgment in *Jaftha v Schoeman* heralded implications of section 26 for execution against a debtor's home. *Jaftha v Schoeman* concerned execution through the magistrate's court process against the state-subsidised homes of two indigent debtors in actions to obtain satisfaction of trifling extraneous debts, that is, where the homes had not been mortgaged in favour of the judgment creditors. The Constitutional Court held that execution against a debtor's home may constitute an unjustifiable infringement of the right to have access to adequate housing, provided for in section 26 of the Constitution. It 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 in terms of section 36 of the Constitution. It directed certain words to be read into section 66(1)(*a*) with the effect that, where insufficient movables were found to satisfy a judgment debt, the creditor would need to approach a court to seek an order permitting execution against the immovable property of the judgment debtor. A court was required to consider all the relevant circumstances to evaluate whether, in the circumstances, execution would be justifiable in terms of section 36.[9] The Constitutional Court stated that, in the absence of an abuse of court procedure, execution should ordinarily be permitted where a debtor had mortgaged his home to secure a debt.[10] It also stated that balancing the parties' interests in accordance with section 36 should not be "an all or nothing process" but that there was a need to find

[8]See 3.3.1.1 with reference to *Grootboom* pars 21, 34 and 38.
[9]See 4.4.3.3 and 5.2,with reference to *Jaftha v Schoeman* pars 44 and 55.
[10]See 5.2.3,with reference to *Jaftha v Schoeman* par 58.

"creative alternatives" which allow for debt recovery but which use the sale in execution of a debtor's home "only as a last resort."[11]

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 unjustifiable infringement of the debtor's right to have access to adequate housing. There were discrepancies between the applicable statutory provisions in the magistrates' courts and the high courts. Creditors frequently chose what was for them the more convenient high court process to obtain default judgment and orders declaring debtors' mortgaged homes specially executable, although the claim fell within the magistrate's court's jurisdiction. This created jurisdictional issues from which contradictory judgments emanated in different divisions of the high court. Controversy also surrounded whether and, if so, in what circumstances a mortgaged home ought to be protected from execution. Although the Supreme Court of Appeal settled some controversial issues in *Standard Bank v Saunderson*, it provided little clarity in this regard.[12]

During the period after *Standard Bank v Saunderson*, the judgment of Bertelsmann J, in *ABSA v Ntsane*, is noteworthy for the court's refusal to grant an order of special executability in respect of the mortgaged home of the judgment debtors. This was on the basis that it was regarded as an abuse of the court process to seek execution against a person's home in respect of a trifling arrear amount of R18,46. The court had *mero motu* initiated an investigation into the circumstances of the matter by appointing *amicus curiae* to present argument representing the interests of the absent debtors. Bertelsmann J observed that it might not always be feasible for a court to conduct such an in-depth evaluation and expressed the need for "a compulsory arbitration process" to be established with a tribunal to which courts could refer matters in which the arrear

[11]See 5.2.3, with reference to *Jaftha v Schoeman* par 59.
[12]See 5.3 and 5.4.

amount is very low for "informal and speedy resolution".[13] *FirstRand Bank v Maleke* also stands out during this period. In this case, the court refused to grant default judgment and orders of special executability against four mortgaged homes, regarding it as being more appropriate for the then recently introduced debt relief measures provided by the NCA to be explored as an alternative before execution was permitted against the defendants' homes.[14] Generally, however, reported judgments show a lack of consistency in the application of the provisions of the NCA in cases where execution is sought against a debtor's home.[15] In addition, given the difficulties experienced in the implementation, interpretation and application of the NCA, it has thus far not proved itself as an effective or satisfactory solution for debtors and creditors.[16]

Generally, inconsistencies in judgments reported during this period tend to indicate that the parameters of the effect of *Jaftha v Schoeman* required clearer definition.[17] In late 2010, rules 45 and 46 of the High Court Rules were amended to bring the high court process into line with that in the magistrates' courts, *post-Jaftha v Schoeman*. It may be noted that this is the only development thus far, since the enactment of section 26 of the Constitution, which was *not* brought about through a court judgment following litigation, although the amendment may be regarded as stemming from the decision in *Jaftha v Schoeman*. A proviso contained in rule 46(1) requires a *court*, not a registrar, to issue a writ of execution against the primary residence of a judgment debtor and only after it has considered all the relevant circumstances. Unfortunately, however, the amended rule 46(1) has been drafted in such a way that the proviso applies only to subrule 46(1)(a)(ii), and not subrule 46(1)(a)(i). The result is that there are still discrepancies between the applicable rules and, consequently, between the requirements and procedures in the magistrate's court, as opposed to the high court. Further, conflicts have already arisen in judicial interpretation of rule 46(1).[18]

[13] See 5.5.2.2, with reference to *ABSA v Ntsane* par 97.
[14] See 5.5.4.3.
[15] See 5.5.5.
[16] See 4.5.4 and 4.5.5.
[17] See 5.5.1.
[18] See 4.4.4.3 and 5.6.8.

The effect of the judgment in *Gundwana v Steko* is that now, in every case in which execution is sought against a person's home, including where it has been mortgaged, a court is required to undertake an evaluation, considering "all the relevant circumstances", to determine whether execution should be permitted.[19] The Constitutional Court stated that due consideration should be given to the impact that execution might have on judgment debtors who are poor and at risk of losing their homes. It also stated that, before granting execution orders, courts should consider whether the judgment debt may be satisfied by reasonable alternative means.[20]

Thus, given that, prior to *Jaftha v Schoeman* and *Gundwana v Steko*, a creditor's, especially a mortgagee's, right to execution against the debtor's immovable property had been regarded largely as unassailable, these were groundbreaking changes effected by the Constitutional Court in upholding constitutional imperatives. However, because developments have occurred on a casuistic basis, no established framework of substantive and procedural requirements exists for the determination of whether execution against a debtor's home is justifiable. Further, the precise circumstances in which execution against a debtor's home will, or will not, be permitted are unclear. It was anticipated that the judgment in *Gundwana v Steko* would provide much-needed clarity. However, subsequently reported judgments in *Nedbank v Fraser*, *FirstRand Bank v Folscher* and *Standard Bank v Bekker* reveal that already the courts have applied a variety of interpretations of aspects of the judgment in *Gundwana v Steko* and that a consistent approach by the different branches of the high court is still lacking. Further, the Supreme Court of Appeal's judgment in *Mkhize v Umvoti Municipality* (SCA) tends to cast doubt on whether current practice directives and logistical arrangements in certain high courts conform to the requirements laid down in *Gundwana v Steko*.[21]

Courts have consciously avoided enunciating what would constitute "all the relevant circumstances" for consideration in the required judicial evaluation[22] and no provision is

[19]See 5.6.2.
[20]See 5.6.2.3, with reference to *Gundwana v Steko* par 53.
[21]See 5.6.7.
[22]See 5.2.3, 5.6.2.3, 5.6.3 and 5.6.6.

made for the manner in which pertinent information should be obtained by the court nor for the course which must be adopted where information is lacking. It is unclear to what extent the factors relevant to such evaluation are the same as those relevant to applications for the eviction of persons from their homes, regulated in some instances by the provisions of PIE that was enacted specifically to protect unlawful occupiers' section 26 rights.[23] PIE requires a court to make a just and equitable order by considering the circumstances of all occupiers of the home, "including the rights and needs of the elderly, children, disabled persons, and households headed by women".[24] However, it may be noted that no judgment has been reported in which the rights and needs of persons, other than the debtor, who reside with him in his home, have been considered in the judicial evaluation of whether execution by a creditor against the debtor's home should be permitted. Yet surely, this should be required? On the other hand, the question may be raised whether the fact that the requirements of PIE must be met, if a debtor and his family whose home is sold in execution opt not to vacate it but to "hold over", before they may be evicted, constitutes sufficient protection of their right to have access to adequate housing? It is submitted not. However, greater clarity is required.[25]

Housing, and the concept of home, are highly emotive issues. On the other hand, so are other interests at stake in this context. Courts have stated that the principle of sanctity of contract, as reflected in the maxim *pacta sunt servanda*, and mortgagees' rights to execution against the mortgaged property of a defaulting debtor, should remain intact. This is lest the security of the mortgage bond, an important tool in the acquisition of home ownership and access to finance, should be undermined which, in turn, might lead to reluctance on the part of lenders to provide finance.[26] Similar thinking is evident in *Jaftha v Schoeman*, where the Constitutional Court viewed the notion of an exemption of a debtor's home from sale in execution as potentially creating a "poverty

[23]See 3.3.1.4 and 5.6.8.
[24]See 3.3.1.4 (b).
[25]See 3.3.1.4 (b).
[26]See 5.4.1 and 5.6.6.

trap" if poor homeowners are unable to access capital using their homes as security.[27] However, uncertainty as to circumstances in which execution will, or will not, be permitted by a court leads to a lack of predictability. This, and the lack of clear substantive and procedural requirements for a creditor to be entitled to execute against a debtor's home, may tend in any event to create a potential "poverty trap".

The required judicial evaluation to be carried out, in terms of section 36 of the Constitution, entails balancing the rights and interests of all affected parties.[28] Therefore, not only the rights and interests of debtors and their dependants, and the significance of the loss of their home, ought to be considered but also those of the specific creditors, as well as creditors generally, if, more particularly, real rights of security are not upheld. This would also affect broader commercial interests of property owners and investors and, in turn, on the economy. The state has a duty, in terms of section 26 of the Constitution, to provide persons with access to adequate housing. Therefore, homeless, or potentially homeless, persons place a burden on public funds.[29] To this extent, the interests of the wider community are also relevant.

The Constitutional Court has chosen to confine the basis of its reasoning, in matters concerning execution against a debtor's home, to the latter's right to have access to adequate housing. This has meant that reported judgments lack meaningful analysis of the position in terms of a range of potentially relevant constitutional rights of all parties concerned where the forced sale of a debtor's home occurs. These include the right to dignity that also underlies persons' contractual rights[30] and the right to property.[31] There is a glaring absence in all of the judgments of any consideration having been given to children's rights.[32] To the extent that analogies may be drawn between the forced sale of a debtor's home and the eviction of a person from his home, the right to life, the right to equality and the right to access to courts, which have featured in eviction cases, are

[27] See 5.2.3.
[28] See 3.2.3.
[29] See 3.3.1.4 (c).
[30] See 3.3.2, with reference to s 10 of the Constitution.
[31] See 3.3.4, with reference to s 25 of the Constitution.
[32] See 3.3.3, with reference to s 28(1)(*c*)of the Constitution.

also relevant. Failure on the part of the courts to deal with all of these rights, as well as to address the crucial issue of access to justice,[33] has created *lacunae* in the current dispensation.

Thus far, courts have not considered the potential infringement of section 26 and other constitutional rights posed by the realisation of an insolvent debtor's home by the trustee of an insolvent estate in terms of the Insolvency Act. Realisation of the home occurs automatically in the sequestration process without any specific evaluation of the housing needs of the insolvent or his dependants.[34] It is probably only a matter of time before this state of affairs will be subjected to constitutional challenge. It is also a matter of concern that, when a debtor resorts to statutory debt relief mechanisms available as potential alternatives to the liquidation of assets following sequestration in terms of the Insolvency Act, this does not preclude a creditor from applying for, or obtaining, an order for the sequestration of his estate. This is expressly provided for in section 74 of the Magistrates' Courts Act that regulates administration orders and, although the NCA does not make specific provision in this regard, the courts have held that this is the position where a debtor has applied for debt review.[35] This undermines the potential for debt review and debt rearrangement, in terms of the NCA, to constitute reasonable alternative means for satisfaction of an obligation to avert the forced sale of the debtor's home, particularly where it has been mortgaged.

In Chapter 1, it was posited that legal certainty requires the enactment of appropriate legislative provisions to regulate the forced sale of a person's home in both the individual debt enforcement process and the insolvency process in South Africa. It was also stated that legislation should contain criteria to be met, for forced sale to be permitted, in order to facilitate the balancing of the interests of, on the one hand, the debtor and his dependants and, on the other, the creditor and, in a broader context, the commercial and economic interests of the wider community.

[33] See 3.3.5, with reference to ss 11, 9 and 34 of the Constitution.
[34] See 6.2.
[35] See 6.10.

In terms of section 8(3), where no legislation, or existing common-law rule, applies to give adequate effect to a right, or where a common law rule is deficient, the court is obliged to develop the common law to give effect to the right. Further, the effect of section 39(2) is that, when interpreting any existing legislation, and when developing the common law, a court "must promote the spirit, purport and objects of the Bill of Rights."[36] The state also has a duty, in terms of section 7(2) of the Constitution, to "respect, protect, promote and fulfil" the rights in the Bill of Rights.[37] Section 39(1)(*a*) requires a court, when interpreting the Bill of Rights, "to promote the values that underlie an open and democratic society based on human dignity, equality and freedom." The Constitutional Court has recognised the significance of *ubuntu*, in this context, as one of the values that section 39(1) requires to be promoted.[38] When deciding a constitutional matter, a court also has the power, in terms of section 172(1)(b) of the Constitution, to make any order that is just and equitable.[39] In light of these provisions, one may ask why there is a need for specific legislation to regulate the forced sale of a debtor's home.

An answer is that the need for clarity and predictability, in relation to forced sale of the home is too significant and too urgent for the slow process which casuistic development of the law by the courts unavoidably entails.[40] Further, uniformity and consistency is required to resolve the ongoing divergent approaches of differently constituted courts and practices in various branches of the high court.[41] Constitutional litigation and complex limitation analysis require specialist skills that pose a challenge for many persons performing judicial, legal, administrative, and non-governmental advisory functions within the present system and process. A coherent, streamlined process will facilitate the handling of matters. There is also the question of optimal utilisation of valuable court time. The way in which the Promotion of Access to Information Act 2000 and the Promotion of Administration of Justice Act 2000 have enhanced the

[36]See 3.2.1.
[37]See 3.2.1.
[38]See 3.2.2.
[39]See 3.3.1.4 (b) and 3.4.
[40]See 3.2.3 and 3.3.1.2.
[41]See 5.6.8 and 5.7.

adjudication of matters concerning sections 32 and 33 of the Constitution bears testimony to the merits of statutory regulation.[42] A most important consideration is that poor homeowners, who do not usually know their rights, also do not have the wherewithal, as Mokgoro J so aptly expressed it in *Jaftha v Schoeman*,[43] to instruct attorneys and advocates and to fund litigation in a bid to defend their rights and protect their homes against the claims of creditors. There is an urgent need to enhance their access to justice in this context.

A study of the treatment of the home of a debtor in other jurisdictions reveals that in some legal systems legislative provisions, codes and protocols apply to regulate and, where appropriate, to afford protection against, the forced sale of the home. Comparative analysis of these systems provides useful insights and guidance on ways in which to address current problems and issues that have arisen in the local context. Their legislative provisions give valuable pointers in relation to mechanisms that could be modified appropriately for introduction in South Africa to resolve weaknesses and *lacunae* in, and to enhance, our system and processes.

The purpose of this thesis is thus to identify and discuss the problems arising, and the inadequacies, in the South African law relating to forced sale of a debtor's home. The purpose is also to compare the position in other jurisdictions that provide for statutory regulation of forced sale of the home and to propose that legislative intervention should occur in both the individual debt enforcement process and the insolvency process in South Africa. The research undertaken will be outlined and the principal findings that have significance for the thesis will be set out. Finally, proposals will be made for future treatment of cases concerning the forced sale of a debtor's home by suggesting considerations to be taken into account in the formulation of legislation which, it is submitted, ought to be enacted to regulate the position.

[42] See 3.3.1.2.
[43] See 5.2.3, with reference to *Jaftha v Schoeman* par 19.

8.2 Research undertaken and principal findings

8.2.1 Historical insights

In Roman times, originally, the harsh consequences for defaulting debtors included imprisonment, slavery, and possibly even death. The developed law permitted execution against assets. The home was never exempted from execution. However, a Roman person's home held not only socio-economic but, more importantly, religious significance for it housed not only the living residents but also the spirits of the ancestors as well as the household gods and it included the mandatory hereditary altar.[44] For these reasons, Roman debtors would very likely have avoided the loss of their home at all costs. A common way of doing so was to "work off the debt" in a servile relationship arising out of a contract of *nexum* with the creditor.[45] Patron-client relationships often formed between a creditor and his debtors. Patronage also commonly developed between third parties and debtors when the former came to the aid of the latter by paying their debts on their behalf, thus forming an obligation, in a broader sense, between them. The concept of *amicitia*, between persons of equal status, might also have formed the basis of a third party paying the debt or intervening on the debtor's behalf. These relationships not only arose out of, but also contributed to, the complex but cohesive and, in a large measure, mutually supportive fabric of Roman society.[46]

Two observations may be made. First, submission in a servile relationship to one's creditor to escape the consequences of default, including execution against one's home, could be regarded as *contra bonos mores* in contemporary South African law, as indicated by the Appellate Division in *Sasfin v Beukes*. Secondly, although modern societal structures are very different from those in Roman times, there are discernible parallels between aspects of mutual interdependence and support in the concepts of patronage and *amicitia*, and the concept of *ubuntu*, part of the fabric of South African

[44]See 2.2.6.
[45]See 2.2.2.
[46]See 2.2.6.

law and society, as acknowledged in this "post-Bill of Rights" era.[47]

In the time of Justinian, a debtor could avoid execution against his home by obtaining the grant of a moratorium through a majority vote by creditors[48] or by the emperor.[49] With the development of the legal concept of mortgage, Justinian put protective mechanisms in place to allow for the delay of foreclosure by a creditor for at least two years after judgment and, in appropriate cases, for foreclosure to occur only by judicial decree and, later, only by imperial decree. In the event of foreclosure, a debtor could redeem the property within a two year-period *after* ownership had been transferred to the creditor by paying the outstanding debt and other charges.[50] This, it is submitted, must have influenced a defaulting debtor's ability to retain or redeem his home.

Under the Roman-Dutch law, procedural rules promoted personal service of summonses, requiring a process server specifically to explain the exigency of a summons to the defendant. Where a debtor did not appear in court, before default judgment could be granted in matters that concerned immovable property, four defaults and successive summonses were required to be issued, with substantial intervals between them.[51] A creditor was not entitled to levy execution upon immovable property of great value for small debts unless the property was indivisible. Rules applicable in the complex high court process imposed exacting requirements to maximise the price obtained at a judicial sale of immovable property. These features of Roman-Dutch law are absent from contemporary South African law which is discussed in Chapters 4 and 5. However, it is interesting to note that most of these aspects have received attention recently. For example, rules pertaining to default judgment were reformed by *Jaftha v Schoeman*[52] and by an amendment to rule 46(1) of the High Court Rules[53] as well as by *Gundwana v Steko*.[54] Another example is that *Jaftha v Schoeman* established

[47]See 3.2.2.
[48]See 2.2.4.
[49]See 2.2.3.
[50]See 2.2.5.
[51]See 2.3.2.
[52]See 5.2.3.
[53]See 4.4.4.3.
[54]See 5.6.2.1.

precedent to the effect that execution may not be levied against a person's home in respect of a trifling debt.[55] Further, research is being conducted into ways in which prices obtained at auction sales, held in the process of execution against immovable property, may be regulated.[56] To this extent, related aspects of the Roman-Dutch law may be viewed as being in line with a "post-Bill of Rights" approach.

Debt relief measures available in Roman-Dutch law included composition between a debtor and his creditors with local ordinances regulating the requisite majority of votes. *Remissio* led to a partial discharge of debt.[57] In both the individual and the collective debt enforcement processes, extra-judicial negotiation and compromises between parties were encouraged. For example, as Roman-Dutch law developed, because litigation was complex, necessitating representation by attorneys and advocates, and expensive, a plaintiff was required first to claim payment from his debtor in a friendly manner before he could institute action by serving a summons. In the high court, the parties were required to appear before a commissioner in an attempt to reach a compromise before a summons was issued.[58] In terms of the Amsterdam Ordinance of 1777, which was an important source of South African insolvency law, the commissioners' first duty was to try to make an arrangement with creditors before calling a meeting of creditors for sequestrators to be appointed. Once the sequestration process began, a debtor had one month within which to reach a composition with creditors. This was encouraged by the commissioners.[59] The effect of these features of the Roman-Dutch law must have provided at least some protection for a debtor in the process of the sale in execution of immovable property that constituted his home. They also tend to suggest a policy that forced sale of a debtor's property should occur only as a last resort.

From 1652 onwards, Roman-Dutch law was applied in the Cape. The British revised the judicial system by the two Charters of Justice, in 1828 and 1834, to make it conform to

[55]See 5.2.3.
[56]See 4.4.3.3.
[57]See 2.3.5.1.
[58]See 2.3.2.
[59]See 2.3.3.

English structures, mechanisms and procedures. However, the second Charter of Justice effectively provided for Roman-Dutch law to be retained as the law of the Cape Colony. The "mixed" nature of the South African legal system is evident in this context. Sanctity of contract, expressed in the maxim *pacta sunt servanda*, regarded as "the first premise of contract law", derives from the Roman-Dutch law[60] and the principles applicable in relation to mortgage are based firmly in the Roman law and Roman-Dutch law.[61] It may also be observed that the ways in which settlement, or a compromise, might be reached between debtor and creditor, according to the common law, are derived from Roman law and Roman-Dutch law.[62] However, the specific aspects, mainly procedural rules identified above, of the Roman-Dutch law that might in effect have provided a measure of protection for a debtor's home are not evident in the South African law and procedural rules because English procedures had been adopted in the Cape. It may also be noted that developments in the treatment of a debtor's home, in English law, discussed in Chapter 7, occurred only *after* the English law influences were experienced in the Cape. This would therefore explain why none of the English protective mechanisms is evident in the South African common law or applicable legislation.[63]

In the result, it is submitted that these aspects of Roman and Roman-Dutch law, which effectively protected the debtor's home from forced sale, have not only historical value as sources of South African law but also significant comparative value. They were aspects of legal systems, which operated in another society, and in another time, but which had at least some similar needs and priorities.

8.2.2 Constitutional considerations

The right to have access to adequate housing must be viewed in its broader context as a justiciable socio-economic right. Section 26(2) of the Constitution obliges the state to

[60]See 1.1, 2.3.5.3, 3.1, 3.3.2 and 4.3.
[61]See 2.2.5 and 2.3.4.
[62]See 2.2.4, 2.3.5.3, 3.3.2 and 4.3.2.
[63]See 2.4.

take reasonable legislative and other measures within its available resources to achieve the "progressive realisation" of this right. In *Grootboom*, the Constitutional Court held that section 26(2) imposed on the state a qualified, positive, obligation to devise comprehensive programmes capable of facilitating the realisation of the right. It envisaged that the state should over time lower legal, administrative, operational, and financial hurdles so that housing is "made more accessible not only to a larger number of people but to a wider range of people as time progresses".[64] The negative duty imposed by section 26(1) on the state and private persons to desist from preventing or impairing the right of access to adequate housing was fundamental to the decision in *Jaftha v Schoeman*.[65]

"Progressive realisation" of the right to have access to adequate housing logically entails not only providing persons who are currently homeless with access to adequate housing, but also taking reasonable steps to counter persons with existing access to adequate housing from becoming homeless.[66] As acknowledged by the Supreme Court of Appeal, in *Ndlovu v Ngcobo*, and as indicated by the facts of *ABSA v Murray*, even erstwhile mortgagors are vulnerable to homelessness if they lose their home through forced sale[67] and may increase the burden on the state by requiring it to provide for their housing needs. An argument may therefore be made that there is a duty on the state to provide an appropriate regulatory framework within which the forced sale of persons' homes may occur.

PIE was enacted specifically to protect unlawful occupiers' section 26 rights. In *Ndlovu v Ngcobo*, the Appellate Division held that PIE applies to erstwhile mortgagors.[68] Therefore, where the debtor's home is sold in execution, if he does not vacate his home but instead "holds over", the new owner – and this would include a mortgagee who "buys in" at the sale in execution – will be obliged to meet the substantive and procedural requirements contained in PIE before the debtor and his family may be

[64]See 4.2.1, with reference to *Grootboom* par 45.
[65]See 3.3.1.2.
[66]See 3.3.1.2.
[67]See 3.3.1.4 (a) and (b), 6.3.2 and 6.6.3.
[68]See 3.3.1.4 (b).

evicted. The effect of PIE, in this context, is to delay the enforcement of the new owner's right to possession until a court has determined whether eviction of the previous owner would be just and equitable and, if so, a date on which he should vacate his home.[69] Therefore, in effect, PIE offers a measure of protection to a debtor against being rendered homeless by the sale in execution of his home. However, it is submitted that such protection is unsatisfactory and insufficient, in the circumstances, as it will avail only those debtors who are aware of the provisions of PIE and who have sufficient knowledge of the legal process or access to sound legal advice. The reality is also that, in this context, a debtor's reliance on PIE triggers judicial evaluation of the position at a very late stage in the process, only *after* he has lost ownership of his home and when it may be too late to undo everything that has gone before.[70]

Thus far, except for the amendment to rules 45(1) and 46(1) of the High Court Rules, all developments in the context of execution against a debtor's home in the individual debt enforcement process have occurred through court judgments. At the beginning of this chapter, in the discussion of the *status quo*, the question was raised why specific legislation should be necessary to regulate the position and why courts should not be left to develop the law further as sections 7(2), 8(3), and 39 of the Constitution oblige them to do.[71] The response to this question will be elaborated upon at this point. As mentioned above,[72] clarity and predictability are urgently required. There is also a need for uniformity and consistency to resolve the differences in approach that continue to emerge in judgments in different branches of the high court as well as in differently constituted courts in the same province. High court practices and logistical arrangements vary across the country.[73] The disadvantages of development of the law by the courts have been highlighted by constitutional law specialists such as Botha, Liebenberg, van der Walt and Woolman. These include that it is a protracted process, that courts often adopt an over-cautious, casuistic, incrementalist approach that stifles

[69] See 3.3.1.4 (b), 4.4.4.3 and 5.2.2.
[70] See 5.2.3 and 5.6.2.3, with reference to comparable reasoning in *Jaftha v Schoeman* pars 47 and 49 and *Gundwana v Steko* pars 50 and 58.
[71] See 3.2.1 and 3.2.2.
[72] See 8.1.
[73] See 5.6.8 and 5.7.

the transformative potential of the Constitution and that outcomes often reflect unavoidable, subjective influences of judicial officers.[74]

A further argument in favour of the enactment of specific legislation laying down substantive and procedural criteria is that the constitutional limitation analysis and proportionality assessment that must be carried out in terms of section 36 of the Constitution entail a complicated, nuanced process that is often a challenge for non-constitutional law specialists. In practice, reported judgments often reflect confused terminology and incorrect application of the criteria and required process.[75] Another complicating factor, as pointed out by Liebenberg, is that positive duties imposed by socio-economic rights are subject to "reasonableness review", whereas the negative duties are subject to the limitation clause in section 36 of the Constitution. One cannot anticipate such a sophisticated level of constitutional and limitation analysis and expertise from lower courts, practitioners, creditors, debtors, or advice centre staff who do not necessarily have specialised constitutional litigation knowledge and skills. Commentators have called for a more structured, rigorous, sequential enquiry and clearly articulated rules that would facilitate not only everyone's anticipation of what limitations would or would not be constitutionally acceptable, and their understanding of how to adapt their actions accordingly, but also the application of limitation analysis by the lower courts.[76] It is particularly important to enhance access to justice for poor homeowners, to minimise costs to litigants and to utilise court time optimally.[77] As occurred to enhance the adjudication of section 32 and section 33 rights,[78] it is contended that appropriately drafted legislation is called for in this context as well.

Besides the debtor's right to have access to adequate housing, other constitutional rights potentially affected by the forced sale of a debtor's home include his dependants' right to have access to adequate housing and his, and his dependants', right to

[74]See 3.2.3 and 3.3.1.2.
[75]See 3.3.1.2.
[76]See 3.2.3 and 3.3.1.2.
[77]See 5.2.3, with reference to *Jaftha v Schoeman* par 19.
[78]See 3.3.1.2 and 8.1.

dignity,[79] the rights of any children who reside with him,[80] and the right to property.[81] In *Gundwana v Steko*, and subsequent high court judgments, connections were made, and analogies drawn, between the forced sale of a debtor's home and the eviction of a person from his home.[82] Therefore, constitutional rights that have featured in eviction cases, including the right to life, the right to access to courts, and the right to equality,[83] may also be pertinent. However, aside from the right to dignity, which is inherent in the right to have access to adequate housing, courts have not specifically addressed these other rights in the reported judgments. The lack of judicial attention to children's rights, in this context, is of great concern and our courts are open to criticism in this regard. Thus far, courts have been reluctant to formulate any analysis of the position relating to execution against debtors' homes on the basis of property rights that would necessarily entail consideration of, *inter alia*, the debtor's rights of ownership of his home as well as the real rights of security of a mortgagee.[84] It would be advisable for any legislation drafted to regulate the position to be formulated in such a way as also appropriately to address other applicable rights of debtors and their dependants who reside with them to obviate any potential constitutional challenge on this basis.

In light of analogies that have been drawn between eviction cases and matters in which execution is sought against a person's home, reported judgments in eviction cases provide useful pointers as well as valuable insights into the courts' construction of "relevant circumstances" for the purposes of section 26(3) of the Constitution and section 4 of PIE.[85] An issue that needs to be resolved is that, in relation to execution against a person's home, courts are restricting "relevant circumstances" to *legally* relevant circumstances. This occurred in both *FirstRand Bank v Folscher*[86] and in *Standard Bank v Bekker*[87] following precedent established by the Supreme Court of Appeal's decision, in *Brisley v Drotsky*, concerning section 26(3) of the Constitution. In

[79] See 3.3.2.
[80] See 3.3.3.
[81] See 3.3.4.
[82] See 3.3.1.4.
[83] See 3.3.5.
[84] See 3.3.4.
[85] See 3.3.1.4.
[86] See 5.6.4.2 (b).
[87] See 5.6.6.

that case, it was held that only *legally* relevant circumstances are required to be taken into account and that these did not include the personal circumstances of the lessee facing eviction.[88] This apparently overlooks the judgments of the Constitutional Court, in *Port Elizabeth Municipality* and *51 Olivia Road* (CC), delivered since *Brisley v Drotsky*, in light of which it appears that "relevant circumstances" should no longer be regarded as being confined to legal grounds justifying eviction under the common law. In line with the Constitutional Court's direction that elements of grace and compassion should be infused into the formal structures of the law, in eviction cases, courts have stated that what is required is individualised consideration of occupiers' personal circumstances, including their accommodation needs, and to treat everyone with dignity, care and concern.[89]

ABSA v Murray concerned an eviction application brought in terms of PIE by the mortgagee, after its purchase of the mortgagors' home at the auction sale held at the instance of the trustee of their insolvent estate. In this case, the court took into account the personal circumstances of the insolvent spouses and their family in determining that it would be just and equitable to grant the eviction order.[90] The nature of the evaluation which is required in cases concerning execution against a debtor's home, as explained in *Gundwana v Steko*, tends to suggest that personal circumstances of the debtor should also be considered.[91] However, clarity is required in this regard. It is submitted that any legislation which may be enacted to regulate the position should make specific provision for consideration of the personal circumstances of the debtor and his dependants.

A significant development has been courts' insistence upon "meaningful engagement" between parties before adjudicating upon eviction applications. In *Port Elizabeth Municipality*, the Constitutional Court regarded the lack of any attempt at mediation as a

[88] See 3.3.1.4 (a).
[89] See 3.3.1.4 (d).
[90] See 6.3.2.
[91] See 3.3.1.4 (a) and 5.6.2, with reference to *Gundwana v Steko* pars 43, 49 and 50.

"relevant circumstance".[92] The introduction of such a requirement in the individual debt enforcement process would be in line with an approach, as envisaged by the Constitutional Court in *Jaftha v Schoeman* and *Gundwana v Steko*, that execution against a person's home should occur only as a last resort, where it cannot be avoided by reasonable alternative means. It is also reminiscent of the compulsory mediation process suggested by Bertelsmann J in *ABSA v Ntsane*.[93]

As to who should supply the required information pertaining to "all the relevant circumstances", the judgments in *Port Elizabeth Municipality*, *51 Olivia Road* (CC) and *Shulana Court* (SCA) suggest that it is the duty of the court to devise ways to obtain it. In *Shulana Court* (SCA), the Supreme Court of Appeal held that the court *a quo* had failed to comply with its constitutional obligations by granting an eviction order while in possession of insufficient information about the personal circumstances of the occupiers and the availability of alternative accommodation. It held that the court *a quo* had not considered "*all* the relevant circumstances" as required by sections 4(6) and 4(7) of PIE and that it was clear, from the scant information that *was* available to the court *a quo*, that there was a real prospect that eviction would result in homelessness for the poor occupiers. The appeal court reasoned that the court *a quo* should have proactively taken steps to ascertain all relevant information in order to enable it to make a just and equitable decision.[94]

Thus, this unanimous judgment of the Supreme Court of Appeal reflects a departure from the stance adopted by the majority, in the earlier case of *Ndlovu v Ngcobo*, that the onus was on the occupiers to place before the court information about circumstances that were relevant to the exercise of its discretion.[95] However, no specific reference was made in the judgment in *Shulana Court* (SCA) to this aspect of *Ndlovu v Ngcobo*. After *Jaftha v Schoeman*, Van Heerden and Boraine had expressed concerns about burdening a creditor seeking execution against the home of a debtor with the task of

[92] See 3.3.1.4 (d), with reference to *Port Elizabeth Municipality* par 45.
[93] See 3.3.1.4 (d) and 5.5.2, with reference to *ABSA v Ntsane*.
[94] See 3.3.1.4 (d).
[95] See 3.3.1.4 (d), with reference to *Ndlovu v Ngcobo* par 19.

obtaining information that lies exclusively within the knowledge of the debtor.[96] Similar concerns were expressed in *Nedbank v Fraser*,[97] *FirstRand Bank v Folscher* and *Standard Bank v Bekker*. In the last two judgments, specific reference was made to the *dictum* of Harms JA in *Ndlovu v Ngcobo* that in the context of PIE "it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties".[98] In *FirstRand Bank v Folscher*, the approach of the court was that, when seeking a writ of execution after obtaining default judgment, the creditor should set out the circumstances of which it is aware or is able reasonably to establish and that "the court will have to consider those facts that are available – the known relevant facts."[99] This contradicts the stance in *Shulana Court* (SCA).

In *Standard Bank v Bekker*, the court stated that it is ordinarily up to the defendant to alert the court to any facts or circumstances that implicate his section 26 rights. However, it also stated that the court would have a duty to "act proactively to obtain whatever additional information might appear relevant … if … some or other feature of the matter flashes warning signals" as it observed had occurred in *ABSA v Ntsane*.[100] Where a plaintiff has insufficient knowledge of the relevant facts to be able to make such an allegation, then, the court stated, this should be stated in the summons.[101] No mention was made of the *dicta* issued in this regard by the Supreme Court of Appeal in *Shulana Court* (SCA).[102] Thus, this issue needs to be resolved. Perhaps a compulsory mediation process, as suggested by Bertelsmann J in *ABSA v Ntsane*, would provide the answer.[103] Indications are that clear, uniformly applicable steps ought to be devised to facilitate information pertaining to "all the relevant circumstances" being made available to the court as a matter of course.

[96] See 5.3.3.
[97] See 5.6.3, with reference to *Nedbank v Fraser* pars 44 and 45.
[98] See 5.6.4.2 (g), with reference to *Ndlovu v Ngcobo* par 19.
[99] See 5.6.4.2 (g), with reference to *FirstRand Bank v Folscher* par 44.
[100] See 5.6.6, with reference to *Standard Bank v Bekker* par 25.
[101] See 5.6.6, with reference to *Standard Bank v Bekker* par 27 and *FirstRand Bank v Folscher* par 54.
[102] See 5.6.4.2 (g) and 5.6.6.
[103] See 3.3.1.4 (d) and 5.5.2.

In eviction cases, courts are sometimes prepared to postpone the execution of an eviction order for a reasonable period in order to render it just and equitable. Similarly, it is submitted that it may be appropriate for a court to postpone the forced sale of a debtor's home in order that he might arrange alternative accommodation. In *Standard Bank v Saunderson*, it was anticipated that a court might delay execution where there is a real prospect that the debt might yet be paid. It is submitted that, from the creditor's perspective, it would make little difference whether the reason for the delay was to enable the debtor to arrange finance or alternative accommodation for himself and his dependants.[104] As things stand, in the absence of specific statutory provision regulating the position, a court could justify an order postponing a sale in execution on the basis that it is just and equitable, in terms of section 172(1)(b) of the Constitution.[105] Another aspect of eviction cases which may be pertinent, albeit contentious, is the duty on the state, in line with the recent judgment of the Constitutional Court, in *Blue Moonlight Properties* (CC), to provide emergency accommodation for a debtor and his dependants, particularly his children, who are "desperately poor and … in a crisis", where execution will render them homeless.[106]

8.2.3 Applicable law and policy forming background to the reported cases

8.2.3.1 Housing

South African housing law and policies are contained mainly in the Housing Act and the National Housing Code. These were enacted and issued in accordance with the state's duty, imposed by section 26(2) of the Constitution, to take reasonable legislative and other measures to achieve the progressive realisation of every person's right to have access to adequate housing. In *Jaftha v Schoeman*, the rule in the National Housing Code which provided that only a first-time homeowner could benefit from a state housing subsidy was pivotal to the outcome of the case. This was because the sale in execution of the homes of the indigent appellants disqualified them from obtaining a

[104] See 3.3.1.4 (b), with reference to *Standard Bank v Saunderson* par 20, and 5.7.
[105] See 3.3.1.4 (b).
[106] See 3.3.1.4 (c).

subsidy ever again without which, the court acknowledged, they would be unable to acquire another home. Therefore, execution against their homes amounted to a breach of the negative duty that rests on the state and private individuals not to infringe their existing access to adequate housing.[107]

The National Housing Code has since been amended in a number of respects but the rule remains that a person may not receive a state housing subsidy more than once. As explained in Chapter 4, according to current housing law and policy, apparently, the most state assistance available for a person who has lost his home through its sale in execution, regardless of whether its purchase had been subsidised by the state, is the provision of a vacant serviced site or low-rent leased accommodation.[108] The loss of a home through forced sale not only affects the debtor, who is rendered ineligible for any state housing subsidy in the future, but it also places additional strain on other state housing programmes. A comprehensive approach, providing non-homeowners with access to housing and at the same time allowing existing homeowners, despite being over-indebted, to retain their homes, wherever possible, will serve the broader community and state interests and assist in combating homelessness.

The effect of section 10B of the Housing Act is that, in the event of forced sale by a creditor, including a mortgagee, of a state-subsidised home, it must first be offered to the provincial housing department at a price not exceeding the amount of the original government subsidy that was provided. Ownership cannot pass to the purchaser unless this requirement has been met. In the event of forced sale, the debtor will never again be eligible for a housing subsidy. The Housing Amendment Bill, published for comment in 2006, proposes to introduce a new subsection which will have the effect that the provincial housing department's pre-emptive right will not apply when a mortgagee exercises its rights under a mortgage bond passed over the property upon default by the mortgagor. The thinking behind this proposal may be not to undermine a mortgagee's rights lest this might reduce the ability of owners of state-subsidised homes

[107] See 4.2.1, with reference to *Jaftha v Schoeman* par 34.
[108] See 4.2.1.

to access credit. This was emphasised by the Constitutional Court, in *Jaftha v Schoeman*, in the course of its rejection of the notion of an exemption from sale in execution of state-subsidised houses.[109] However, the effect of the proposed provision tends to ignore the wasted expenditure by the state of public funds if the original subsidy amount were simply to be forfeited. It is hoped that this issue will be thoroughly interrogated, before any amendment is enacted.[110] It is suggested that, after the sale in execution of a subsidised home, as long as the state has recouped its initial subsidy investment, the previous homeowner should be eligible nevertheless to receive future housing assistance in one form or another. Another consideration might be that a person who has previously owned an entirely self-funded home should be eligible nevertheless to receive a subsidy. These issues, as well as the desirability and feasibility of introduction of an exemption from sale in execution of a state-subsidised home, as advocated by Van Heerden, Boraine, and Evans, should receive proper, policy-based consideration by appropriate bodies in an endeavour to find a balanced solution holistically considering all affected interests.[111]

8.2.3.2 The debt enforcement process and consumer debt relief mechanisms

Chapter 4 dealt with the rules applicable in the individual debt enforcement process, in the magistrates' courts and in the high court, as well as consumer debt relief mechanisms that are available at common law and in terms of section 74 of the Magistrates' Courts Act and the NCA. Changes in the law prompted by the cases discussed in later chapters were explained and discussed.

Section 66(1)(a) of the Magistrates' Courts Act has still not been formally amended to reflect the words which the Constitutional Court, in *Jaftha v Schoeman*, directed should be read in. The Magistrates' Courts Rules and the High Court Rules were amended to bring them into line with *Jaftha v Schoeman* and *Standard Bank v Saunderson*. However, a lack of uniformity continues to subsist with existing, as well as newly

[109] See 3.3.1.1 and 5.2.3, with reference to *Jaftha v Schoeman* par 51.
[110] See 4.2.2.
[111] See 3.3.1.1, 4.2.3, 4.4.3.4, 5.2.3, 5.6.8, 6.6 and 6.11.

created, discrepancies between the contexts within which the rules apply. Section 66(1) of the Magistrates' Courts Act is not restricted to immovable property that constitutes the home of the judgment debtor and there is no provision made for judicial oversight in decisions where a mortgagee seeks special execution against the mortgaged immovable property of a mortgagor.[112] Further, the amended rule 46(1) of the High Court Rules has been poorly drafted. The proviso requiring judicial oversight, where the property sought to be attached is the primary residence of the judgment debtor, applies only to subrule (ii) which relates to a declaration by a court that immovable property is specially executable or where a registrar has granted default judgment in terms of rule 31(5). As currently worded, the proviso requiring judicial oversight does not apply to situations where insufficient movables have been found to satisfy a judgment debt, as section 66(1) of the Magistrates' Courts Act covers in the magistrates' courts process. Thus, rule 46(1) requires further amendment.[113]

While it was anticipated that application of the precedent established by *Gundwana v Steko* would introduce a greater measure of uniformity and consistency, already, differences in interpretation of the judgment have emerged and divergent practices have been adopted in the different branches of the high court. What is more, the judgment of the Supreme Court of Appeal, in *Mkhize v Umvoti Municipality* (SCA), has already exposed a problem in relation to logistical arrangements in some of the high courts. It has cast doubt on whether a registrar, or other administrative official, may compile the court rolls by differentiating between matters in which judicial evaluation is required and those that a registrar may handle. In *Mkhize v Umvoti Municipality* (SCA), the court held that the statement of the Constitutional Court, in *Gundwana v Steko*, that it is for a court to determine whether a "matter is of the Jaftha-kind", means that it is the court which must determine whether section 26(1) rights come into play or not. Therefore, logistical arrangements and practices in the various courts will have to be reconsidered in light of this judgment.[114]

[112]See 4.4.3.3.
[113]See 4.4.4.3.
[114]See 4.4.4.3 and 5.6.5.

Since June 2007, a mortgagee who seeks to enforce a debt secured by a mortgage bond passed over the debtor's home has had to comply with the requirements of the NCA.[115] A mortgagor and, for that matter, any over-indebted homeowner with debt arising out of credit agreements may, in response to a section 129 notice or on his own initiative, apply for debt review with the object of having his debts restructured. This provides a potential means whereby a debtor may avoid execution being levied against his home. However, despite initial impressions, it does not necessarily achieve such purpose given the scale of difficulties experienced thus far in relation to the implementation, application, and interpretation of the NCA.[116]

Drawbacks of debt rearrangement, in terms of the NCA, include that its duration is unlimited and it does not provide the debtor with any measure of discharge from liability for debt in order to give him a "fresh start", in accordance with universally acknowledged recommendations.[117] The practical effect is that a debtor might be "locked into" paying off his debts for a considerable number of years. This situation is reminiscent of that identified by the court in *Sasfin v Beukes*, in relation to the illegality of requiring a person to work solely to service his debt,[118] and of the Roman practice in terms of which a debtor would work off his debt to escape the otherwise drastic consequences of default.[119] It may also be borne in mind that even a creditor may prefer more speedy resolution of the matter with earlier payment of less than is due.[120] For similar reasons and, more particularly, by reason of the applicable R50 000 debt limit and the exclusion of *in futuro* debts, an administration order in terms of section 74 of the Magistrates' Courts Act also does not pose a practical solution for a debtor seeking to avert the sale in execution of his home.[121]

The effect of the decision in *Collett v FirstRand Bank* is unsatisfactory from a debtor's perspective. This is because a mortgagee may terminate debt review held in terms of

[115]See 4.5.
[116]See 4.5.4 and 4.5.5.
[117]See 4.5.5.
[118]See 4.5.5, with reference to *Sasfin v Beukes* 13H-I.
[119]See 2.2.2.
[120]See 4.5.5.
[121]See 4.4.3.6.

the NCA, institute legal proceedings to enforce the agreement and execute against the mortgaged property, where the debtor is in arrears in respect of mortgage payments, where 60 business days have elapsed without the court having heard the matter.[122] There is a need for an explicit stay against enforcement of the terms of the mortgage bond, in circumstances where the delay is beyond the control of the debtor, particularly in view of ongoing delays, bottlenecks in the system and backlogs in the finalisation of matters. Another drawback is that only debts arising out of credit agreements are covered by the NCA. In the circumstances, the NCA does not appear to provide a ready solution and a more appropriate consumer debt relief mechanism must be sought which averts execution against the debtor's home yet gives sufficient recognition to the creditor's, including a mortgagee's security, rights. In Chapter 4, it was tentatively suggested that a mechanism along the lines of the pre-liquidation procedure contained in section 118 of the working draft of the document proposing an Insolvency and Business Recovery Bill, compiled in 2010, posed a potential solution.[123]

8.2.4 Treatment of the debtor's home in the individual debt enforcement process

Chapter 5 traced and analysed the case-by-case development of the position in the individual debt enforcement process from the sale in execution, in August 2001, of the state-subsidised "RDP" homes of Maggie Jaftha and Christina van Rooyen, for debts of R250 and R190, respectively, to the ruling in respect of the mortgaged home of Elsie Gundwana, in April 2011. It also covered subsequent cases in which the judgment in *Gundwana v Steko* was interpreted and applied and in which other related issues featured, until December 2011.[124] A fair amount of detail has already been provided in the depiction of the *status quo*, at the beginning of this chapter.

In *Jaftha v Schoeman*, the Constitutional Court rejected an argument that section 67 of the Magistrates' Courts Act was unconstitutional for its lack of exclusion from execution of a person's home below a certain value. It considered a "blanket exemption" to be

[122]See 4.5.4.
[123]See 4.4.3.6.
[124]See 5.1 to 5.7.

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".[125] In *Standard Bank v Saunderson*, the Supreme Court of Appeal confirmed the importance of mortgagees' real rights of security being upheld in this context.[126]

Although, since *Gundwana v Steko*, it is now trite that judicial evaluation is required in every case in which execution is sought against a debtor's home, including one that has been mortgaged, still no clear substantive and procedural requirements have been established. As explained above, uncertainty followed *Jaftha v Schoeman* as a variety of problems emerged including jurisdictional issues, given discrepancies between the requirements in the magistrates' courts and the high court, respectively, as well as divergent practices and approaches in the various branches of the high court. Even after *Standard Bank v Saunderson*, which settled some issues, the judgments reveal inconsistency. The courts' 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*.[127] Further inconsistencies are evident in relation to the impact of the NCA in cases concerning execution against a debtor's home, with courts' approaches vacillating between debtor-orientated approaches, such as in *FirstRand Bank v Maleke* and *FirstRand Bank v Seyffert*, as opposed to the creditor-orientated approach, in *Standard Bank v Hales*.[128]

It is evident from the judgment and the outcome, in *FirstRand Bank v Meyer*, that application of rule 46(1) will not necessarily prevent execution against a debtor's home, nor the family being rendered homeless, despite ill health or desperate personal circumstances.[129] However, a distinctly debtor-orientated approach was adopted, in the same, although differently constituted, court only three months earlier, in *FirstRand*

[125] See 5.2.3, with reference to *Jaftha v Schoeman* par 51.
[126] See 5.4.1, with reference to *Standard Bank v Saunderson* par 3.
[127] See 5.5.
[128] See 5.5.4.
[129] See 5.5.4.6.

Bank v Siebert.[130] 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 subjective perspectives of the particular court, as it is constituted, within the context of the available information in each set of circumstances.[131]

It was anticipated that the Constitutional Court's decision, in *Gundwana v Steko*, would provide much-needed clarity and establish a base for uniformity, consistency, and predictability in relation to treatment of a debtor's home in the individual debt enforcement process.[132] However, as mentioned above,[133] recent judgments of the high court and the Supreme Court of Appeal in which *Gundwana v Steko* has been interpreted and applied reveal that confusion, or at best a lack of clarity, remains, particularly with regard to the application and practical implementation of the precedent which it established.[134] Further, in each of *Nedbank v Fraser*, *FirstRand Bank v Folscher* and *Standard Bank v Bekker*, the court regarded the circumstances that are relevant in eviction cases and where execution is sought against a person's home, respectively, as being the same. However, there is little evidence of considerations applicable in eviction cases informing the courts' treatment of matters in which execution is sought against a debtor's home.[135] It is submitted that the rationale adopted in decisions such as *Port Elizabeth Municipality*, *Shulana Court* (SCA) and *51 Olivia Road* (CC) as well as *Blue Moonlight Properties* (CC), has significant implications for the conduct of cases in which execution is sought against a person's home. Whether the same approach applies as in eviction cases urgently needs to be clarified.[136]

Post-*Gundwana v Steko*, significant differences in interpretation and approach emerge from the judgments. These include *Nedbank v Fraser*, a judgment of the South Gauteng High Court, and *FirstRand Bank v Folscher*, a full bench decision of the North Gauteng

[130]See 5.5.4.5.
[131]See 5.5.5.
[132]See 5.6.2.
[133]See 8.1.
[134]See 5.6.3 - 5.6.8.
[135]See 8.2.2.
[136]See 5.6.8.

High Court, specifically constituted to provide a practice directive. Also included is *Standard Bank v Bekker*, a decision of the full bench of the Western Cape High Court. In this case, the court was specifically called upon to resolve difficulties arising out of the lack of consistency between individual judges' approaches in relation to procedural requirements. Clarity was sought as to whether the creditor or the debtor was "responsible for ascertaining and placing evidence as to the relevant circumstances before the court, and the manner in which this should be done."[137] Ironically, this judgment reflects additional perspectives. Clearly, a uniform approach is called for.

In *Jaftha v Schoeman*, the Constitutional Court stated that execution should not be permitted where it would constitute an abuse of the process. It also stated that, 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.[138] In *Jaftha v Schoeman*, the abuse of the court process that was identified consisted in execution against indigent debtors' homes in order to satisfy trifling extraneous debts.[139] Since then, in *ABSA v Ntsane*, *Nedbank v Fraser* and *FirstRand Bank v Folscher*, the courts have adopted and applied a variety of conceptions of "an abuse of the process" which has consequently acquired an extended meaning in this context.[140] 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".[141] In Chapter 5, concern was expressed that this could contribute to obfuscation of the two stages of constitutional limitation analysis, as discussed in Chapter 3, and could thus render the practical application of the rules and the exercise of judicial discretion even more of a challenge for courts and practitioners, especially in the lower courts.[142]

Another issue is whether "relevant circumstances" extend to those of a non-owner

[137]See 5.6.6, with reference to *Standard Bank v Bekker* par 11.
[138]See 5.2.3, with reference to *Jaftha v Schoeman* par 58.
[139]See 5.2.3, with reference to *Jaftha v Schoeman* pars 30, 43.
[140]See 4.4.3.3, 4.4.4.3, 5.5.2.2, with reference to *ABSA v Ntsane* pars 79-80, 84-85, 5.6.3, with reference to *Nedbank v Fraser* pars 21 and 24, and 5.6.4.2 (d), with reference to *FirstRand Bank v Folscher* par 40.
[141]See 5.6.4.2 (c), 5.6.4.2 (d) and 5.6.8.
[142]See 3.2.3 and 5.6.4.3.

whose home is constituted by the debtor's immovable property in question. Rule 46(1) applies in respect of "the primary residence of the judgment debtor" whereas the ruling, in *Gundwana v Steko*, referred specifically to "the sale in execution of the home of a person".[143] Opposing standpoints are evident in *Nedbank v Fraser* and *FirstRand Bank v Folscher*.[144] It must surely be a constitutional imperative that, in addition to the section 26 rights of the judgment debtor, the rights of his family members and dependants, including children, ought specifically to be addressed.[145]

In *Jaftha v Schoeman*, the Constitutional Court provided guidance regarding the balancing of the various interests involved but, in view of the need to retain sufficient flexibility, it was reluctant to try to delineate all of the circumstances in which a sale in execution would not be justifiable.[146] Since then, courts have provided a range of factors that might constitute "relevant circumstances", depending on the facts of each case, but have also deliberately left these flexible. In *Nedbank v Fraser*, the court was not prepared to "fossick about" in a quest for a "check list" of relevant circumstances.[147] On the other hand, in *FirstRand Bank v Folscher*, the court compiled a useful list of factors to be considered[148] but without any practically orientated direction as to how they should be applied in the required judicial evaluation. In *Standard Bank v Bekker*, the court stated that "relevant circumstances" are incapable of more clear definition or explanation than that emanating from *Jaftha v Schoeman* and *Gundwana v Steko* because they will depend on the facts of each case and the information which is available to the court.[149] However, inevitably, such flexibility has contributed to uncertainty and a lack of predictability. This is not only in relation to the factors which should be applied, in any given circumstances, but also whether they 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

[143]See 4.4.4.3 and 5.6.2.1, with reference to *Gundwana v Steko* par 65.
[144]See 5.6.3, with reference to *Nedbank v Fraser* par 12, 5.6.4.2 (a), with reference to *FirstRand Bank v Folscher* par 32, and 5.6.8.
[145]See 5.6.8.
[146]See 5.3.
[147]See 5.6.3, with reference to *Nedbank v Fraser* par 16.
[148]See 5.6.4.2 (e), with reference to *FirstRand Bank v Folscher* par 41.
[149]See 5.6.6.

Constitution.[150] As mentioned above,[151] an issue that requires urgent correction, in this context, is that, according to more recent Constitutional Court decisions, "relevant circumstances" are not confined to those that are *legally* relevant but include the personal circumstances of affected persons.

Mindful of the complexity of constitutional limitation analysis, the importance, for potential creditors and investors, of predictability, the protracted and inconsistent casuistic development of this area of law, as well as the high cost of litigation, it was submitted, in Chapter 5, that the time is ripe for the legislature to devise legislation to regulate the position. A variety of mechanisms is suggested for application depending on the circumstances of each case. Suggestions include a comprehensive "check list" to facilitate the gathering of relevant information. Recommendations relating to its content are contained in Chapter 5.[152] Specific proposals and recommendations are summarised, below.[153]

8.2.5 Treatment of the debtor's home in the insolvency process

There is no exemption, or provision for special treatment, of the debtor's home in South African insolvency law. Realisation of the home of an insolvent by the trustee happens as a matter of course and there is no formal requirement, as there now is in the individual debt enforcement process, that a court should specifically consider any relevant circumstances.[154] The notion that realisation of the home should occur only as last resort and that a reasonable alternative should be sought, simply does not come into it. Indeed, an application for sequestration is often brought for the very reason that the debtor owns a home which, when realised, will yield a benefit for creditors. And yet it is conceivable that there will be instances where the insolvent and his dependants are rendered homeless, with no access to resources or alternative accommodation, after the trustee has realised the home, and could well be persons who are "desperately

[150] See 3.2.3.
[151] See 8.2.
[152] See 5.7 and 5.8.
[153] See 8.3, below.
[154] See 6.3.1.

poor" and who find themselves "in a crisis".[155]

Various aspects of South African insolvency law may adversely affect the housing position of the insolvent and his dependants. For example, the fact that an inheritance forms part of the insolvent estate means that an insolvent will lose an inherited "family home". Where spouses are married in community of property, even where one spouse inherited the home on the basis that it should be held separately from the joint estate, such separate property may be realised by the trustee to satisfy the claims of creditors of the insolvent joint estate.[156] Where spouses are married out of community of property and the estate of one of them is sequestrated, all of the property of the solvent spouse also vests in the trustee of the insolvent estate, in terms of section 21(1) of the Insolvency Act, as if it were property of the sequestrated estate. A "spouse", for these purposes, includes a husband, a wife, a cohabitant in a heterosexual relationship, and a registered civil union partner. Where the spouses' home is registered in the name of the solvent spouse, it is for the latter to prove, on a balance of probabilities, entitlement to its release by the trustee, failing which it may ultimately be realised to satisfy the creditors' claims against the insolvent estate.[157] Clearly, these provisions do nothing to assist the insolvent and his family members and dependants to retain their home and tend possibly to counter such an outcome.

The absence of any provision in the applicable insolvency law for consideration of the housing rights of the insolvent and his dependants may be explained by the fact that the Insolvency Act, and most of the amendments to it, were enacted well before the introduction of our modern constitution with its Bill of Rights.[158] The South African Law Reform Commission's report on its review of the law of insolvency, completed in February 2000, prior to *Grootboom* and *Jaftha v Schoeman*, did not include any proposal for change in relation to treatment of the home of an insolvent.[159] Neither does

[155]See 3.3.1.4 (b), with reference to *Ndlovu v Ngcobo* pars 16-17, 3.3.5, with reference to *Blue Moonlight Properties* (SCA) par 59, and 6.3.2. See, also, 8.2, above.
[156]See 6.6.1 and 6.7.
[157]See 6.7.
[158]See 6.3.1.
[159]See 6.6.3.

the most recent unofficial working draft of a proposed Insolvency and Business Recovery Bill, despite the developments that have taken place in the individual debt enforcement process, from *Jaftha v Schoeman* onwards. What is more, its section 25, in relation to voidable dispositions made to "associates", similar to the South African Law Reform Commission's clause 22A of the Draft Insolvency Bill of 2000, appears to be more draconian in effect than section 21 of the current Insolvency Act that it is proposed to replace.[160] In the circumstances, in light of the developments in the individual debt enforcement process and the potential infringement of constitutional rights of the insolvent and his dependants, the lack of any current initiatives for legislative reform regarding the home of the insolvent is surprising.[161]

Thus far, the section 26 rights of the debtor and his dependants have not been raised as an issue in insolvency matters. This may be because an applicant in a voluntary surrender, and a respondent in a friendly sequestration, would be giving up his home "willingly" and would most likely have made alternative accommodation arrangements in anticipation of the effect of the sequestration order that he seeks. However, it is conceivable that a spouse, married to him or her out of community of property, and his or her dependants might be averse, and wish to intervene in opposition, to the sequestration of the estate with the consequent liquidation of estate assets, including their home. In such circumstances, a pertinent question might be the likelihood of their finding alternative adequate housing.[162] The right of the insolvent and his dependants to have access to adequate housing, and any children's rights, may also become an issue in compulsory sequestration proceedings where the parties are dealing at arm's length with one another, and, especially, where a spouse, partner, and children, or disabled or elderly persons, rely on the insolvent for shelter and for maintenance.[163]

Another issue may arise as whether different treatment is required where the debtor

[160]See 6.7.
[161]See 3.3.1 and 6.3.1.
[162]See 6.3.2.
[163]See 6.3.2.

mortgaged his home in order to acquire funds to purchase it,[164] or whether he mortgaged it in order to provide security for the debts of, or to acquire working capital for, a business which is a separate legal entity. In the latter situation, the debtor and his family may be exposed to the risk of homelessness where the business fails and is liquidated as insolvent. In the individual debt enforcement process, it is not clear whether differential treatment of the position is required depending on the purpose for which the home was mortgaged.[165] An issue might also be, where a corporate entity owns a house which a director, a member, or an employee of that entity uses as their home, whether the housing position of the latter ought specifically to be addressed in the course of liquidation of such entity's assets in the event of its insolvency. There are conflicting decisions as to whether, in the event of the sale in execution of a house owned by a corporate entity, the section 26 rights of a director, a member or an employee who uses the property as his home, require judicial evaluation.[166]

A reason that the insolvent's section 26 rights have not yet been raised in an insolvency matter may be that, from a practical perspective, generally applications for voluntary surrender are not brought by, and applications for compulsory sequestration are not brought against, apparently indigent debtors for whom, typically, access to "adequate housing" would be an issue. Ironically, the reality is that it is only more "affluent" debtors who can afford to be declared insolvent, given that, in terms of the Insolvency Act, advantage of creditors is required and it entails the cost of a high court application. In addition, in light of the fact that the home is often the most valuable asset in the estate, the situation could well be that, if the home is not sold, sequestration will not be shown to be to the "advantage of creditors".

ABSA v Murray shows how PIE offers a measure of protection for the section 26 rights of an insolvent debtor. However, it also highlights the fact that, if an insolvent wishes to rely on his section 26 rights, his only option would be to "hold over" and to wait until an application is brought for his eviction. In this process, in terms of the provisions of PIE,

[164] See 2.3.4 and 4.3.3.
[165] See 5.6.3 and 5.6.6.
[166] See 5.6.3 and 5.6.4.2 (a).

his personal circumstances and others who reside with him will be considered. Thus, the insolvent mortgagor who with his family vacates their home immediately after the sequestration of his estate, and who becomes homeless as a result, receives less statutory protection than one who "holds over" and resorts to the protection offered by PIE. The point may also be made that it is the most vulnerable who cannot afford to engage in litigation in order to protect their rights.

It is submitted that formal recognition should be given to the significance of section 26 and section 28 rights of an insolvent and his dependants as well as any of their other constitutional rights that may be relevant in this context. Essentially, the issue is whether realisation of the insolvent's home, in accordance with the provisions of the Insolvency Act, constitutes any infringement of the constitutional rights of the insolvent debtor and his dependants. If it does, the question is whether it is justifiable, in terms of section 36 of the Constitution, given the debt collection and other purposes served by the sequestration process and other insolvency law mechanisms. The next question which arises, where realisation of the home of the insolvent will indeed constitute an unjustifiable infringement of constitutional rights, is what should be done to avert, or to remedy, this.

As Evans, as well as Stander and Horsten, point out, in a situation where the insolvent has a duty of support towards his children and other dependants, such support would include the provision of accommodation.[167] If the insolvent is not in a financial position to provide such support, the burden will fall on the state. This, as well as the minimal level of housing subsidy and support available, in the national housing programmes,[168] for persons rendered homeless after falling on hard times supports an argument for allowing funds to go towards the accommodation of the insolvent and his dependants, or at least some form of exemption for the home.[169] Commentators, including Evans, Van Heerden, and Boraine, have suggested an exemption of "low value" and state-subsidised homes to be applied in both the individual debt enforcement and insolvency

[167]See 6.3.2 and 6.6.3.
[168]See 4.2.
[169]See 6.3.2.

processes.[170] Despite the Constitutional Court's rejection, in *Jaftha v Schoeman*, of the notion of a blanket exemption from execution, for a debtor's home, this may merit careful consideration, especially in light of recent developments. Evans advocates that it should become entrenched policy completely to exclude "low value" homes from the reach of creditors in general and he goes further to suggest that the passing of mortgage bonds over "low value" homes, in order to access capital, should be prohibited.[171] It should be noted that, if this change in the law is considered, the proposed amendment to sections 10A and 10B of the Housing Act, mentioned above,[172] would also need to be revisited.

The effect of an introduction of a type of home exemption, in the insolvency process, would be to shift part of the burden to the creditors because whatever is exempted from the insolvent estate shrinks the assets available for realisation for the satisfaction of the insolvent person's debts. On the other hand, the nature and level of exemptions permitted will logically have a bearing on the generosity of the level of any discharge that the insolvent ultimately obtains. As Boraine, Kruger, and Evans explain, exemptions must be viewed within the context of the law of insolvency being the result of a "compact" to which the debtor, his creditors, and society are all parties.[173]

The main controversy exists where the home of the insolvent has been mortgaged in favour of a creditor. The interests of the mortgagee weigh heavily against the notion of the exemption of the insolvent's home, or a limited portion of the proceeds of its sale, from the insolvent estate, especially in light of the adverse effect that it would have on the economy generally, if real security rights are not upheld.[174] This may justify different treatment of the insolvent's home, depending on whether or not it has been mortgaged as security for the payment of a debt. A possibility might be to leave a secured creditor's right intact but to allow an exemption of a portion of any equity which a debtor holds in his mortgaged home. A preferred option might be for a court specifically to be

[170] See 5.2.3, 6.3.2, 6.6.3, and 6.11.
[171] See 6.6.3 and 6.11.
[172] See 4.2.2 and 8.2.3.1.
[173] See 6.6.3.
[174] See 5.2.3, 5.4.1 and 5.6.6.

empowered to grant a moratorium on the realisation of the home by the trustee, in order to allow a period of grace within which alternative accommodation might be arranged for the insolvent and his dependants. This should apply, especially, in cases concerning children, particularly with special needs, the elderly, and the infirm.[175] A delay in the realisation of the home by the trustee of an insolvent estate might even provide the insolvent with an opportunity to reach a mutually satisfactory statutory composition with his creditors or to arrange to refinance the home or even for a family member to purchase it from the insolvent estate.[176]

Evans submits that "this housing issue cannot be addressed without a well considered policy in respect of estate assets". He has argued convincingly that, in South Africa, insufficient attention has been directed to formulating coherent exemptions policy, both in the individual debt enforcement process, and in the insolvency process.[177] Exemptions are generally based on policies, formulated to reflect the result of weighing up the competing interests of the debtor, the creditors, and society. They are designed to fulfil one or more of a variety of purposes. These include: to provide the debtor with property necessary for his survival and maintenance; to protect the debtor's family from the adverse consequences of impoverishment; to preserve the debtor's dignity; to enable the debtor to rehabilitate himself financially, sometimes referred to as providing the debtor with a "fresh start"; to earn income in the future and to make a positive contribution to society; and to avoid the state, or society, from having to bear the burden of providing for the debtor and his family with minimal financial support.[178]

Evans has proposed that measures should be put in place for the housing position of the debtor, and his dependants who share his home, to be considered prior to an application for sequestration. This would be preferable, especially in circumstances where, if the home, often the most valuable asset, were to be placed beyond the reach of creditors, sequestration would not be to the advantage of creditors and, therefore, the

[175]See 6.3 and 6.6.3.
[176]See 6.6.3.
[177]See 6.6.2 and 6.6.3.
[178]See 6.6.3 and 6.11.

sequestration order should not even be granted. It is agreed that consideration of the section 26 and section 28 rights of the debtor and his family should occur as early as possible in the process, but it should also be borne in mind that often not all relevant circumstances are known, at the application stage, but are only revealed after the trustee has commenced his duties. It is therefore important that the evaluation by the court should not be completed until all relevant factors have been ascertained but also, obviously, that it should occur before the home is realised by the trustee.[179]

As in the individual debt enforcement process, *judicial* oversight would be required and, therefore, neither the Master of the High Court, nor the trustee, should determine whether, or when, an insolvent's home may be realised by the trustee of an insolvent estate. By "relevant circumstances" is meant circumstances of the same kind as those referred to in judgments concerning execution against a person's home, in the individual debt enforcement process,[180] taking into account, where appropriate, any differences which exist in the purposes served by the ordinary civil process, as opposed to the insolvency process. During the balancing process in terms of section 36 of the Constitution, in the insolvency context it is important to acknowledge the differences in the weighting of the interests of secured, preferent, and concurrent creditors, respectively, in relation to the interests of the insolvent and his dependants. It is anticipated that there may be circumstances in which, after evaluation of a mortgagee's security interests, where the insolvent is not indigent but has access to at least some resources and, perhaps, some equity in his home, that the sale of the home may be justifiable, in relation to the mortgagee.[181] However, hypothetically, applying the required limitation analysis, where there is no counter-balancing real right of a mortgagee to include in the complex matrix of factors, may lead to the conclusion that it would not be justifiable to sell the home and thereby deprive the insolvent of his equity in the property, for the benefit of unsecured creditors.[182] Thus, it may be a more

[179]See 6.11.
[180]See 5.6.8, 5.7 and 6.11.
[181]See 6.11.
[182]See 5.2.3, with reference to *Jaftha v Schoeman* par 58, and 5.6.2.3, with reference to *Gundwana v Steko* par 50.

practical solution to introduce an exemption of a limited amount of equity, to be retained by or returned to the insolvent, rather than exempting the home itself.

In the insolvency context, it is not only the interests of the applicant creditor, or the mortgagee of the home, that must be balanced with those of the debtor, but the interests of the general body of creditors. In addition, sequestration, in itself, may be regarded as the "last resort" if, through it, a creditor seeks satisfaction of a debt. Where a creditor has failed to obtain payment through the individual debt enforcement process, it might be argued that there are no less restrictive alternative means by which the debt might be satisfied thus rendering justifiable any infringement of the constitutional rights of the debtor and his dependants. However, one should not lose sight of the fact that, even in a situation where a debtor is technically insolvent, consumer debt relief measures may offer an alternative to sequestration. They may also hold the potential to avert the forced sale of a debtor's home, in appropriate circumstances, where the debtor has a regular income that will allow him to service his debt over a longer period.[183]

Consideration of debt review and debt restructuring, in terms of the NCA, as an alternative to sequestration, reveals that it does not provide a realistic solution in this regard.[184] A problem is the lack of a clearly defined interface between insolvency law and the debt review process, as evidenced by *Ex parte Ford*, *Investec v Mutemeri*, *Naidoo v ABSA* and *FirstRand Bank v Evans*.[185] The effect of these decisions is that a mortgagee may bring an application for the compulsory sequestration of a mortgagor's estate while the matter is pending debt review, and even after confirmation of a debt rearrangement plan by the court. This leaves the homeowner debtor in a vulnerable position and undermines the efficacy of the NCA's consumer debt relief measures and its capacity to protect a debtor's home from forced sale.[186]

Another drawback of the NCA's debt review and rearrangement process is that only

[183]See 6.6.3.
[184]See 4.4.3.6, 4.5.5, 6.10.1, 6.10.6 and 6.11.
[185]See 6.10.
[186]See 4.5.4 and 6.10.

debts arising out of credit agreements are included. Most significantly, the fact that the effect of the NCA is that a magistrate's court has the power to impose amended payment obligations on a secured creditor, such as the mortgagee of the debtor's home, to which it has not agreed. The resultant restructured payment terms may be unsatisfactory, or even untenable, from the perspective of the mortgagee who would tend simply to opt for an application for the sequestration of a defaulting mortgagor's estate in order to avoid the application of the NCA's provisions. This might also tend towards abuse of the sequestration process by mortgagees.[187] Mindful of the fact that the NCA was not enacted with the specific objective of protecting a debtor's home against forced sale, indications are that a more appropriate statutory mechanism should be devised to regulate the position in order to achieve a workable, balanced solution.[188]

For years, academic commentators have emphasised that the South African insolvency regime lacks provision for an effective, easily accessible, consumer debt relief mechanism as an alternative to the sequestration, or liquidation, process provided for by the Insolvency Act. They have called for a mechanism which balances the interests of both debtors and creditors, and society generally, by, *inter alia*, allowing the rearrangement of obligations over a reasonable, limited period and, at the end of it, a measure of discharge from liability supporting a policy of providing an "honest" consumer debtor with a "fresh start". They have also expressed the desirability of a legislative and administrative framework that facilitates "single portal access" to the consumer debt relief system.[189] Cases such as *Ex parte Ford*, *Investec v Mutemeri*, *Naidoo v ABSA*, and *FirstRand Bank v Evans* tend to confirm such a need. A study of these cases also reveals that the NCA's consumer debt relief mechanisms fall short, in a number of respects, of contemporary, internationally endorsed recommendations such as those contained in the INSOL International *Consumer Debt Report II*, published in November 2011.[190]

[187]See 6.10.5.
[188]See 6.10.3.3.
[189]See 6.2 and 6.4.1, 6.4.3 and 6.10.6.
[190]See 6.10.6.

It was within this context, as discussed in Chapter 6,[191] that it was submitted that a suitably revised and modified version of the pre-liquidation procedure contained in section 118 of the working draft of a proposed Insolvency and Business Recovery Bill, initially referred to in Chapter 4,[192] holds the potential to be the alternative debt relief mechanism envisaged by commentators. It may also provide the key to a solution for over-indebted homeowners who wish to avert the forced sale of their homes and who have at least some regular income with which they may service their debts, even if this must occur over a longer period than that for which the parties originally contracted. In terms of the proposed section 118, the claims of secured and preferent creditors remain unaffected, unless they consent in writing to an amendment of their obligations, but a debtor may have his debts to concurrent creditors restructured. It was submitted that this aspect of the proposed provision would tend to counter the nature, and level, of opposition to debt restructuring, especially by a mortgagee of the debtor's home, as was encountered in *FirstRand Bank v Evans*, as long as the terms of the restructuring orders are feasible.[193]

An advantage of the proposed section 118 is that it would apply in respect of all types of debts and not only those arising from credit agreements, as is the position, in terms of the NCA. This would rule out the anomaly, alluded to by Boraine and Van Heerden and by Wallis J in *FirstRand Bank v Evans*, that would arise if it were to be held that a credit provider is barred from applying for the sequestration of a debtor's estate after the latter has applied for debt review, in terms of the NCA.[194] Further, in terms of the proposed section 118, where the composition procedure has been successfully completed, the debtor stands to benefit by a measure of discharge from liability. This would address criticisms of the current system and bring it more into line with internationally recognised consumer debt relief policies.[195] Further, an appropriately modified provision could allow the court to determine, within the framework of a single insolvency statute, whether the composition process or the liquidation process would be more appropriate in the

[191] See 6.4.3 and 6.10.6.
[192] See 4.4.3.6.
[193] See 4.4.3.6 and 6.4.3, 6.10.3.3 and 6.10.6.
[194] See 6.10.3.2.
[195] See 6.10.6.

particular circumstances of the case. Provision could also be made for simple, streamlined conversion between the two processes, the need for which might arise, for instance, where the debtor fails to comply with the terms of the composition.[196]

As things stand, in the absence of specific legislative provisions applicable to the treatment of an insolvent person's home, it is possible that a court could exercise its discretion to dismiss an application for a sequestration order,[197] in order to protect the section 26 and section 28 rights of an insolvent and his dependants. In constitutional matters, a court also has the power, in terms of section 172(1)(b) of the Constitution, to make any order that is just and equitable.[198] Theoretically, in the case of a mortgaged home, or where other debts arise from credit agreements, if there is an allegation of over-indebtedness, a court could resort to section 85 of the NCA, with a view to having its debt relief provisions applied to ameliorate the position of an over-indebted person. This might enable him and his family to remain in their home while complying with a debt rearrangement order.[199] However, in light of the apparently creditor-orientated approach adopted by courts in cases, such as *Ex parte Ford*, *Investec v Mutemeri* and *FirstRand Bank v Evans*, in the course of exercising their discretion whether or not to order sequestration, it is doubtful that courts will tend towards assisting financially distressed homeowners in this way.[200]

In the circumstances, it was submitted in Chapter 6 that there is an urgent need for legislative intervention not only to clarify the relationship between the NCA and the Insolvency Act but also more effectively to balance the interests of creditors, especially secured creditors, and consumer debtors in the debt restructuring process by providing more workable alternatives to sequestration. It was the duty of the commissioners of the *Desolate Boedelkamers*, in terms of the Amsterdam Ordinance of 1777, to try to make arrangements with the creditors before sequestration occurred. Therefore, a policy requiring modern-day administrators of the insolvency process first to consider, or even

[196] See 6.10.6.
[197] See 6.4.1 and 6.4.2.
[198] See 3.3.1.4 (b) and 3.4.
[199] See 6.10.4.
[200] See 6.10.

encourage, debt rearrangement, in an endeavour to avert the liquidation of an insolvent estate, may be viewed as being firmly embedded in the historical roots of our system.[201] What is more, it would be in line with the spirit and purport of our modern constitution and commensurate with a post-*Gundwana v Steko* approach to seek reasonable alternative means of satisfying a mortgagee's claim in order to save the debtor's home from forced sale. It would also bring South Africa a step closer to conforming to internationally recognised principles and policies for statutory consumer debt mechanisms and systems.[202]

8.2.6 Comparative observations

8.2.6.1 General

A study of the treatment of the home of the debtor in other jurisdictions provides useful insights and guidance on ways in which to address current problems and issues that have arisen, locally. Traditionally, two approaches are discernible. A formal statutory home exemption has applied for more than a century, in the United States of America[203] and in Canada.[204] On the other hand, a combination of legislative provisions and rules apply in England and Wales, and in Scotland, which grant family members occupation rights and which protect such occupiers against each other, as well as in relation to claims by creditors against the homeowner. In both the individual debt enforcement process and the insolvency process, various provisions also provide for the delay of the sale of the home, where appropriate.[205] Recent developments indicate a blurring of these two, traditionally distinct, approaches. England and Wales now have a "low equity" home exemption in insolvency[206] and a far-reaching home exemption has been proposed for application in both the individual debt enforcement and the insolvency

[201] See 2.3.3.
[202] See 6.10.6.
[203] See 7.2.
[204] See 7.3.
[205] See 7.5 and 7.6
[206] See 7.5.3.3 (d) (ii).

processes in Scotland.[207] Further, the introduction of modifications to the required debt enforcement procedures, entailing mandatory pre-action conferences, mediation procedures and pre-action protocols, in various jurisdictions across the globe, including the United States of America, England and Wales, Scotland, Ireland and various member states of the EU, has brought about greater commonality between the treatment of a debtor's home, in practice. Another common feature, as identified in Chapter 7, is that debtors are able to avert the forced sale of their homes by means of repayment plans for which provision is made in the applicable bankruptcy, or insolvency, legislation.[208]

Summaries of findings in respect of the main aspects of treatment of the debtor's home, in foreign jurisdictions, will follow. Thereafter, brief consideration will be given to features, especially of the English and the Scottish systems, which may be useful for modification, to suit the local context, and application in South Africa. Finally, some proposals and recommendations will be tabled.

8.2.6.2 Home exemption

Home exemptions applicable in the legal systems considered in Chapter 7 commonly do not apply to the home itself but in respect of *equity* that the debtor holds in the home. Therefore, as a rule, they offer no protection against the claim of a mortgagee, or a lien holder, but are effective only against the claims of unsecured creditors.

The amount of the home exemption, in each jurisdiction, varies, usually reflecting differences in purpose. For example, in Canada, the amounts exempted vary according to property values in the respective provinces and territories. In Manitoba, in Canada, a house may not be sold unless it has the statutorily prescribed value and, if so, that amount must be paid to the debtor before anyone may be put in possession of the

[207] See 7.6.4.
[208] See 7.2.3, 7.2.5, 7.3.4, 7.3.5, 7.5.3.3 (d) (iv), 7.6.2 and 7.6.3.2.

home.[209] The "low equity" home exemption, applicable in England and Wales, has the effect that a trustee in bankruptcy may not realise the home of the insolvent debtor where the minimal proceeds and resultant benefit to the creditors generally would not justify its sale. However, the exceedingly low value of £1000, set for this exemption, renders the level of protection virtually meaningless.[210] In certain states of the United States of America, the reality is that the amount of equity exempted is often insufficient to prevent the sale of the home and to allow the debtor to retain it. However, where the home is sold, at least the proceeds, up to the exempted limit, are available to the debtor for the purchase of amore affordable home or for application towards the cost of rented accommodation.[211] A significant proposal, in Scotland, is to exempt the debtor's home from forced sale where he has equity in an amount which is less than £200 000 and, where he has equity of more than £200 000, to exempt such amount so that the debtor may acquire an alternative residence.

No home exemption of any sort applies in South Africa and, in *Jaftha v Schoeman*, the Constitutional Court dismissed the notion. However, commentators have suggested the introduction, in both the individual debt enforcement and the insolvency processes, of an exemption from sale of a debtor's home which is of low value and the acquisition of which was subsidised by the state.[212]

8.2.6.3 Postponement of forced sale of the debtor' home

In the individual debt enforcement process, in England and Wales, a court may delay the sale of the home after taking into account the debtor's ability to repay the arrears and to fulfil the contractual obligations within a reasonable time.[213] In Scotland, recently enacted statutory provisions have the effect that a court must consider the personal circumstances of the debtor and his family and, in the process, the need for a delay in the exercise of a court order for the sale of their home. This must occur in all actions in

[209] See 7.3.2.
[210] See 7.5.3.3 (d) (iii).
[211] See 7.2.2, 7.3.1, 7.3.2, 7.4.1 and 7.6.4.
[212] See 4.2.2, 5.6.8, 6.3, 6.6.1, 6.6.3, 6.11 and 6.12.
[213] See 7.5.3.2.

which the forced sale of the debtor's home is sought by a creditor and not, as used to be the position, only at the instance of the debtor.[214] In Canada, the right to redeem, and rules of civil procedure applicable in various provincial and territorial jurisdictions, place restrictions on the enforcement of a mortgagee's remedies, effectively allowing for a stay of foreclosure proceedings and affording the mortgagor an opportunity to remedy his default within the redemption period or a period specified by the court.[215] Where an acceleration clause operates upon the mortgagor's default, he may apply for a court order to stay foreclosure proceedings commenced by the mortgagee, provided he cures his default and pays arrears and applicable costs within a period specified by the court.

In the insolvency process in England and Wales and in Scotland, respectively, statutory provision is made for a court, in its discretion, to postpone the realisation of the debtor's home by the trustee, in certain circumstances. The provisions applicable in each jurisdiction are not identical but there are common features. Upon consideration of the interests, including the needs and the personal circumstances of the debtor and his dependants, especially children with special needs and, in Scotland, the elderly, the court has unfettered discretion to postpone the realisation of the home of the insolvent for a period of up to one year, in England and Wales, and three years, in Scotland. After a year, in England and Wales, there is a rebuttable presumption that the interests of the creditors outweigh those of the debtor and his dependants, although it is possible for the court to postpone, even further, the realisation of the home by the trustee in deserving cases.[216]

In South Africa, there is no specific statutory provision, in the individual debt enforcement process, for postponement of execution against, nor in the insolvency process, for any delay in the realisation of, the debtor's home. However, *dicta*, in *Standard Bank v Saunderson*[217] and *ABSA v Ntsane*,[218] tend to support an argument in

[214]See 7.6.2.
[215]See 7.3.3.
[216]See 7.5.3.3 and 7.6.3.
[217]See 3.3.1.4 (b), with reference to *Standard Bank v Saunderson* par 20, and 8.2.2.
[218]See 5.5.2.2, with reference to *ABSA v Ntsane* par 69.

favour of a statutory provision permitting a court to delay the forced sale of the home where appropriate.

8.2.6.4 Forced sale as a last resort

A current tendency, apparent in all of the jurisdictions considered in Chapter 7, is to endeavour to save the debtor's home from forced sale wherever possible. The clear purpose, in the European Commission's recent proposal for a Directive of the European Parliament, in recognition of the severe consequences of the recent mortgage foreclosure crisis, is to ensure that forced sale of a person's home, even in insolvency,[219] occurs only as "a last resort".[220] Evidence of this is also seen in the Mortgage Conduct of Business Rules and the Pre-Action Protocol, applicable in England and Wales. These require the creditor to make reasonable efforts to accommodate the debtor by negotiating alternative payment arrangements. In Scotland, the Home Owner and Debtor Protection (Scotland) Act 2010 prescribes pre-action requirements, without any need for the debtor or other affected person to initiate consideration of the specific circumstances, before a court will entertain an application by a creditor for an order for the sale of the debtor's home.[221] Similar, mandatory, pre-action debt settlement conferences, mediation, and negotiation processes and other rules and directives apply, for example, in Ireland, some states in the United States of America and various countries in Europe.[222] These compulsory pre-action procedures often require a minimum period to lapse before a creditor may initiate foreclosure proceedings.[223]

Thus, these requirements ensure that parties earnestly engage with one another in an endeavour to seek alternatives to the forced sale of the debtor's home. Where realisation of the home is unavoidable, the requirements have the effect of delaying it,

[219] See 7.2.4.
[220] See 7.5.4.1, 7.7.2.3 and 7.8.
[221] See 7.5.5 and 7.6.2.
[222] See 7.2.4, 7.5.4, 7.6.2, 7.7.2.2, 7.7.2.3 and 7.8.
[223] See 7.8.

thus affording the debtor and his family a period of grace within which to arrange alternative accommodation.[224]

8.2.6.5 Debt repayment plans

In practice, often the most useful means by which a debtor may avoid the forced sale of his home is by resorting to a statutory debt repayment plan, or a "rehabilitation procedure", as it is referred to in the INSOL International *Consumer Debt Report II*. This is provided for in the form of a Chapter 13 bankruptcy in the United States of America,[225] a consumer proposal in Canada,[226] an Individual Voluntary Arrangement in England and Wales,[227] and the grant of a Debt Arrangement Scheme, or a protected trust deed, in Scotland.[228] In Ireland, Debt Settlement Arrangement[229] has been proposed and, presumably, this would serve a similar purpose.

Typically, a statutory debt repayment plan spans over a period of up to five years. Its success depends on the debtor retaining sufficient income to meet the subsistence needs of himself and his dependants. It is important to note that, in all of the systems considered in Chapter 7, the claim of a mortgagee of the debtor's home would generally remain unaffected unless it specifically agreed to modification of the terms of the obligation.[230] Recently, in the United States of America, contentious proposals for legislation to permit "cram down" modification to mortgagees' claims in the Chapter 13 bankruptcy process were ultimately thwarted by Senate.[231] Thus, a claim by the mortgagee of the home is not included in the statutory repayment plan the terms of which are ideally based on the debtor satisfying any mortgage arrears within a short period and maintaining regular mortgage bond instalments according to the original

[224]See 7.2.4.
[225]See 7.2.3 and 7.2.5.
[226]See 7.3.4 and 7.3.5.
[227]See 7.5.3.3 (d) (iv).
[228]See 7.6.2 and 7.6.3.2.
[229]See 7.7.3.
[230]See, for example, 7.5.3.3 (d) (iv).
[231]See 7.2.4.

agreement.[232] Another typical provision is to require the debtor, before he completes the plan, to refinance the home in order to provide the unsecured creditors with the proceeds of equity that he has acquired in it. In addition, typically, when the debtor completes the payment plan, he receives a measure of discharge from his debts, in line with the policy of affording him a "fresh start".[233] By contrast, in South Africa, the NCA's debt review and debt rearrangement process, which is the closest equivalent to repayment plans applicable in other legal systems, allows modification by a magistrate of terms of a mortgage bond without the consent of the mortgagee. There is also no measure of discharge from liability for a debtor who completes a debt rearrangement scheme under the NCA.[234]

Also significant is that, in all of the foreign jurisdictions considered in Chapter 7, with the exception of Scotland's Debt Arrangement Scheme, the alternative debt relief mechanisms which provide for repayment plans form part of their bankruptcy, or insolvency, legislation. Further, where a debtor is subject to a confirmed repayment plan, the applicable legislation regulates explicitly the circumstances in which a creditor may apply for the liquidation of the debtor's estate. For example, in the United States of America, this may only occur if the debtor defaults in respect of the Chapter 13 repayment plan, or if it cannot be completed, or if it is converted for some other reason to a Chapter 7 bankruptcy.[235] Likewise, in England and Wales, an approved IVA will ordinarily provide for a stay on debt enforcement proceedings by individual creditors during the operation of the payment plan. The Insolvency Act 1986 imposes clear restrictions so that a court may allow a bankruptcy petition to be brought against the debtor only where he has committed a breach of the terms of the payment plan.[236]In Scotland, a protected trust deed in favour of creditors prevents them from thereafter applying for the debtor's sequestration.[237]

[232]See 7.2.3, 7.3.4, 7.5.3.3 (d) (iv), 7.6.3.2 and 7.7.3.
[233]See 7.2.3 and 7.5.3.3 (d) (iv).
[234]See 4.5.5 and 6.10.6.
[235]See 7.2.3.
[236]See 7.5.3.3 (d) (iv).
[237]See 7.6.3.2.

By contrast, in South Africa, as mentioned above,[238] a creditor is not precluded from obtaining an order for the sequestration of the estate of a debtor who has applied for debt review and, even, where a debt rearrangement order has been confirmed and the debtor is complying with it.[239] This undermines the efficacy of debt rearrangement, in terms of the NCA, as a valuable mechanism for avoiding the forced sale of debtors' homes.[240] In the circumstances, it is submitted that comparative analysis tends to confirm submissions, in preceding chapters, that implementation of legislative provisions along the lines of those contained in section 118 of the working draft of a proposed Insolvency and Business Recovery Bill would be advisable in South Africa. Suitably modified, it could more effectively protect the debtor's home against forced sale, where appropriate, and, at the same time respect the rights of a mortgagee.[241]

8.2.7 Aspects providing useful lessons from abroad

Given the numerous essential similarities between the English and the South African debt enforcement and insolvency laws, it is submitted that features of the system that applies in England and Wales would be particularly appropriate to consider for adoption in South Africa. Aspects of the applicable Scots law, similar in many respects to the English law, but also forming part of a so-called "mixed legal system", as we have in South Africa, also provide valuable guidance. However, we should consider only features which are appropriate for the South African context in the sense that they are in keeping with the "local culture" and system[242] but develop, or add to, it by filling a *lacuna* or addressing an issue which it is necessary, or desirable, to resolve.

In England and Wales, the variety of statutory mechanisms that potentially protect the debtor's home against the claims of creditors has the advantage that different options are available for appropriate application, depending on each different set of circumstances. Ordinary rules of civil procedure, supported by principles, policies and

[238] See 4.4.3.6, 4.5.4, 6.10 and 8.2.5.
[239] See 6.10.3.
[240] See 6.10.6 and 7.9.
[241] See 4.4.3.6, 4.7.4, 5.6.8, 6.4.3, 6.10.6 and 6.12.
[242] See Rajak "Culture of Bankruptcy" 25.

protocols, implemented by government and regulatory bodies, provide the framework within which the forced sale of a debtor's home, whether mortgaged or not, is permitted only as a last resort. The Pre-Action Protocol, applied through the employment of a "Mortgage pre-action checklist", attached as Annexure A to this manuscript, makes explicit, for all concerned, the steps required before a court will consider an application for an order for possession or sale of a home. Where the debtor has been declared bankrupt, specific statutory provisions, contained in the Insolvency Act 1986, apply, requiring the trustee in bankruptcy to obtain an order of court before he can sell the bankrupt's home. Where appropriate, the bankruptcy court may delay the sale of the home. The Insolvency Act 1986, as amended, also places restrictions on the way in which the trustee may deal with the bankrupt's home. As mentioned above, a significant provision is that the trustee may not sell a debtor's home where the latter holds equity of less than £1000.[243] Another restriction is that the trustee is obliged to deal with the debtor's home within three years.[244]

Gravells, writing before the Insolvency Act 1986 was enacted in England, identified that "… what English law requires, in particular, is certainty for both creditors and debtors" and stated that "it is possible to confer a discretion on the courts which permits a sufficient degree of flexibility without generating uncertainty and unnecessary litigation."[245] This statement, it is submitted, is equally apposite to South Africa, today. However, despite the apparent success of the present system in England and Wales, it may be noted that it is nevertheless the object of criticism. Commentators have stated that the framework of rules, in England and Wales, lack legal standing and that application of the law is too creditor-orientated. On the other hand, others view the courts as leaning too far in favour of the debtor's family.[246] This, it is submitted, underscores the challenge inherent in balancing the interests of all interested parties. It also alerts one to potential problems and inadequacies for which solutions should be sought before adopting similar mechanisms and it serves as a *caveat* against simply

[243]See 7.5.3.3 (d) (ii) and 8.2.6.2.
[244]See 7.5.3.3. (d) (iii).
[245]See 7.5.5.1.
[246]See 7.5.5.1.

importing foreign provisions into the South African legislative framework. Some of the criticisms are mentioned below.

Fox has criticised the position, in England and Wales, for providing insufficient protection for the individual occupiers in their homes, including single adults and cohabiting couples, regardless of gender, as the emphasis has been on the *family*. However, it may be noted that the interests of child occupiers of homes are required specifically to be taken into account both in section 15 of the TLATA and in section 335A of the Insolvency Act 1986. On the other hand, however, the provisions of the Insolvency Act 1986 do not require specific consideration of aged persons or ailing adults who occupy the home.[247] While the same criticisms do not arise in South Africa, with the focus thus far having been on the section 26 rights of the individual debtor, the criticisms of the English system do tend by contrast to underscore the lack of attention paid, in South Africa, to the debtor's family and other dependants. Thus far, no regard has been had for the rights of children who reside at the debtor's home. Whether the Constitutional Court's decision, in *Gundwana v Steko*, in terms of which a court must consider all the relevant circumstances before an order is made for the sale in execution of the "home of a *person*",[248] effectively requires that the interests of *all* occupiers of the home should be taken into account, requires enunciation.

Commentators on the English system question the validity of arguments that, if creditors' rights were curtailed by extending more effective remedies against possession and sale to home occupiers, lenders would simply not lend money and that this would adversely affect the availability of finance credit, capital investment and the property market. A contrary view has been expressed that the risk of default is inherent to the nature of the business of lending money and that creditors are in a position to protect their own interests.[249] Bearing in mind similar assumptions made in judgments, in South

[247] See 7.5.5.1.
[248] See 5.6.2.1, with reference to *Gundwana v Steko* pars 49 and 65.
[249] See 7.5.5.2.

African cases,[250] these remarks may also be pertinent, in the local context. It is also interesting to note that concerns raised, in the *Cork Report*, are similar to statements made by Mokgoro J in *Jaftha v Schoeman* in relation to a home exemption constituting a potential "poverty trap" and its implications for the mortgage industry, the property market, and the economy.[251] Evans advocates a policy of excluding "low value" homes from the reach of creditors and he suggests that the passing of mortgage bonds over "low value" homes, in order to access capital, should be prohibited.[252] It may be recalled that originally, in New Zealand, the Home Protection Act 1895, which provided protection against creditors' claims for a home that was "settled" upon a spouse, prohibited the settling of mortgaged homes although this prohibition was later modified in the Joint Family Homes Act 1950.[253] It may also be noted that, in Ireland, although consideration was given by the Irish Law Reform Commission to a "low equity" home exemption, it was not included in the draft Personal Insolvency Bill 2010 because the Law Reform Commission preferred to retain flexibility for appropriate arrangements to be made in the circumstances of each case.[254]

If such an exemption is considered for implementation in South Africa, valuable insights may be gleaned from the exemption applied in Manitoba, Canada, in terms of which a debtor's home may not be sold unless it has a prescribed minimum value.[255] One may also learn from the English experience, in relation to the restriction on the sale of a "low equity" home, imposed on the trustee in bankruptcy by section 313A of the Insolvency Act 1986, introduced by the Enterprise Act 2002. Bearing in mind criticisms that, set at £1000, the amount is too low, it would be useful to consider the method by which the prescribed level of equity was determined.[256] It would also be useful to monitor considerations that are taken into account in discussions and deliberations held on the

[250]See 7.5.5.2, with reference to *Jaftha v Schoeman* par 58, *Standard Bank v Saunderson* par 3, *ABSA v Murray* par 46, *FirstRand Bank v Seyffert* par 12 and *Standard Bank v Bekker* par 20.
[251]See 7.5.5.2, with reference to the *Cork Report* pars 20, 21, 24 and 25, and *Jaftha v Schoeman* par 51.
[252]See 5.6.6, with reference to *Standard Bank v Bekker* par 23 and *Jaftha v Schoeman* par 58, 6.6.3 and 7.5.5.2.
[253]See 7.4.1.
[254]See 7.7.3.
[255]See 7.3.2.
[256]See 7.5.3.3 (d)(ii).

proposed home exemption in Scotland.[257]

Tolmie suggests that a better balance between concern for the bankrupt's family and respect for the creditors' rights might have been achieved by exempting the bankrupt's home, under section 238(2) of the Insolvency Act 1986, thus rendering it subject to section 308, which would entitle the trustee to claim it if the value of the property exceeded the cost of a reasonable replacement. This is worthy of consideration. In England and Wales, uncertainty exists as to whether section 313A of the Insolvency Act 1986 has the effect of excluding a "low equity" home from the insolvent estate or, on the other hand, exempting it from sale for three years, after which it re-vests in the insolvent debtor.[258] It is submitted that, in light of this, the specific wording of any provision to be proposed for South Africa should be carefully considered, especially in light of Evans' criticism regarding the lack of an appropriate distinction between excluded and exempt property in our insolvency law.[259]

In South Africa, an issue that has arisen, since *ABSA v Ntsane*, is whether, where the mortgage deed includes an acceleration clause, it is the total amount outstanding or only the arrear amount which ought to be taken into account by a court when deciding whether to declare a person's mortgaged home specially executable.[260] The English solution to a similar dilemma was the enactment of section 8 of the Administration of Justice Act 1973. This section, read with section 36 of the Administration of Justice Act 1970, effectively allowed a court, in its discretion, to adjourn proceedings, to stay or suspend execution of any judgment or order, or to postpone the date for delivery of possession for a reasonable period to enable the mortgagor to clear the arrears or to sell the property.[261] In Canada, where an acceleration clause operates, upon the mortgagor's default, he may apply for a court order to stay foreclosure proceedings commenced by the mortgagee, provided he cures his default and pays arrears and applicable costs within a period specified by the court. Notably, in Nova Scotia, such

[257] See 7.6.4.
[258] See 7.5.3.3 (d) (ii) and (iii).
[259] See 6.6.1.
[260] See 5.6.3, with reference to *ABSA v Ntsane* pars 67-82 and *Nedbank v Fraser* pars 28-38.
[261] See 7.5.3.2 (a).

indulgence is afforded to the mortgagor only once.[262] It is submitted that the introduction of similar provisions in South Africa might pose a balanced solution to the problem without adversely affecting the interests of a mortgagee in the event of repeated defaults by the mortgagor, as occurred in *ABSA v Ntsane*.[263]

Another discernible similarity between contentious aspects of the position that have arisen in England and Wales and in South Africa, emerges from the approach of the court, in the English case of *Alliance and Leicester plc v Slayford*. The court held that it is not an abuse of process for a mortgagee, who is unable to exercise a power of sale in the ordinary debt enforcement process, to seek to place the debtor in bankruptcy. The rationale was that all creditors have the right to petition the court where they are owed an amount in excess of the statutory threshold, or a demand for payment has gone unpaid, and such petitions cannot be unreasonably denied.[264] This approach is apparently similar to that which has been adopted in South African law, as reflected in *Investec v Mutemeri*, *ABSA v Naidoo* and *FirstRand Bank v Evans*.[265]

However, it should also be borne in mind that the English Insolvency Act 1986 explicitly regulates the circumstances in which a creditor may bring bankruptcy proceedings in respect of a debtor who is subject to a confirmed IVA.[266] This strengthens the argument for the need, in South Africa, to regulate the relationship between the Insolvency Act and the NCA and the circumstances in which a creditor may apply for the sequestration of the estate of a debtor who is subject to debt review and debt rearrangement. It also tends to confirm that creating, within the applicable insolvency legislation, a debt relief mechanism involving a repayment plan, possibly along the lines of section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, would be more appropriate, from the perspective of both the debtor and the creditor, including a mortgagee.[267] It also supports the contention that, in the insolvency process, what

[262]See 7.3.3.
[263]See 5.5.2 and 7.5.5.2.
[264]See 7.5.5.2.
[265]See 6.10.
[266]See 7.5.3.3 (d) (iv).
[267]See 4.4.3.6, 4.7.4, 5.6.8, 6.4.3, 6.10.6 and 6.12.

should be required, before a trustee may sell the insolvent's home, is a level of specific judicial oversight, including consideration of "all the relevant circumstances", commensurate with that which is required in the individual debt enforcement process before a creditor, including a mortgagee, may execute against the debtor's home.

Parallels are discernible between England and Wales, and South Africa, in relation to constitutional considerations applicable to forced sale of a debtor's home by virtue of the application of the European Convention on Human Rights through the Human Rights Act 1998. Interestingly, the same reluctance may be detected in England and Wales, as in South Africa, to making decisive pronouncements on the applicability of constitutional property rights, provided by the First Protocol to the Convention, to the issue of forced sale of a debtor's home. Similar issues are apparent in each legal system, for example, in relation to the interpretation and application of provisions of the Insolvency Act 1986 in light of Article 8 of the Convention, which affords every person respect for his home and family life, and, in South Africa, the applicable statutory requirements in light of section 26 of the Constitution. Although the basis for protection is not identical, nevertheless there are useful lessons to be learnt from England and Wales and the decisions of the European Court of Human Rights in relation to recognition of a person's rights to a home, or accommodation.[268]

Given the well-established social security system of England and Wales, which provides housing for the needy,[269] there is an obvious point to postponing the sale of the debtor's home for a period, in order for the local authority to arrange appropriate accommodation for the family where the debtor cannot settle his debt.[270] A significant feature of the recently enacted Scottish legislation is that a creditor, a trustee of an insolvent estate and the trustee of an estate transferred in a trust deed are all obliged to serve notice on the local authority if they intend to bring an application for an order for the sale of a debtor's home. This is for timeous arrangements to be made, where necessary, for alternative accommodation for the debtor and other occupants. These provisions

[268]See 7.5.2 and 7.5.3.3 (c).
[269]See, 7.5.4.2.
[270]See, 7.5.3.3, with reference to *Re Haghighat*.

emphasise the stark realities of the lack of state funded housing support available, in South Africa, to a debtor and his family who are rendered homeless by the forced sale of their home.[271] This, it is submitted, reinforces the argument that, in principle, the personal circumstances and the accommodation needs of the debtor and other occupiers are highly relevant to a court's decision whether to declare their home executable. Further, a more systematic approach, with the explicit inclusion, in housing policies and programmes, of debtors and insolvent persons and their families and other dependants who lose their homes through forced sale, would go a long way to meeting the state's obligations as envisaged by the Constitutional Court in *Grootboom* and, more recently, in *Blue Moonlight Properties* (CC).[272] However, given limited state resources and the current shortcomings in housing delivery, realistically, the primary emphasis, in the context of this study, should therefore be on the forced sale of debtors' homes occurring only as a last resort, as envisaged in *Jaftha v Schoeman* and *Gundwana v Steko*.[273]

In this respect, commonality of purpose is evident in South Africa and in foreign jurisdictions. While developments abroad have occurred largely in response to mortgage foreclosure crises during the recent recessions, the substantive and procedural requirements, some of which have already been incorporated as part of national legislation, and the best practice guidelines serve as an excellent model for proper consideration of relevant circumstances before forced sale is sanctioned by a court. There is also ample precedent, in South African eviction cases, for "meaningful engagement" to be required.[274] It is therefore submitted that emulating selected practices, methods, processes and mechanisms employed in overseas systems, suitably modified, where necessary, for application in the local context,[275] may address inadequacies and needs in our system in order more effectively to achieve the balance sought between the competing interests of all concerned.

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[271]See 4.2.1.
[272]See 3.3.1.4 (c).
[273]See 5.2.3, 5.6.2.3 and 6.12, with reference to *Jaftha v Schoeman* par 59 and *Gundwana v Steko* pars 53-54.
[274]See 3.3.1.4 (d) and 5.7.
[275]See 7.1, with reference to Rajak "Culture of Bankruptcy" 25.

8.3 Proposals

Earlier in this chapter, during discussion of the *status quo*[276] and constitutional considerations relevant to the forced sale of a debtor's home,[277] the question was raised why legislation should be necessary. After all, thus far, all developments, from *Jaftha v Schoeman* onwards, have been court-driven. It may be posited that sections 7(2), 8(3) and 39 of the Constitution,[278] as well as section 172(1)(b) which empowers a court, when deciding a constitutional matter, to make any order that is just and equitable,[279] allow sufficient scope for the development by the courts of appropriate protection for a debtor who owns a home. This thesis has drawn attention to a number of disadvantages of, and problems that have arisen out of, the casuistic development of this area of the law thus far. They have been summarised in this chapter.

It is proposed that a variety of legislative reforms should be introduced in South Africa to make a "menu" of options available for appropriate application, depending on the particular facts and circumstances, where forced sale of a debtor's home is sought. The essence of these proposals lies in the recognition:

- that legal certainty and predictability are required in the interests of all concerned;
- that it is the duty of the legislature, and not the judiciary, to formulate policy in this regard;
- that it is the state's duty to achieve the objective of the nation having access to adequate housing, as set out by the Constitutional Court, in *Grootboom*; and
- of the need to establish a workable framework of substantive and procedural requirements, involving minimal cost to parties, occasioning as little burden as possible on court time, and providing mechanisms and processes which are accessible to the poor and indigent. This framework should be devised in order to give effect to the Constitutional Court's rulings, in *Jaftha v Schoeman* and

[276] See 8.1.
[277] See 8.2.2.
[278] See 3.2.1 and 3.2.2.
[279] See 3.3.1.4 (b) and 3.4.

Gundwana v Steko, that the forced sale of a debtor's home should take place only as a last resort and only where no reasonable alternative means exist for the creditor to obtain satisfaction of his debt.

The following legislative intervention is proposed in the individual debt enforcement process.

- *Mandatory pre-action mediation and settlement process*

  A mandatory mediation and settlement process should be introduced as a prerequisite in all matters where execution is sought against a debtor's home. This should be a streamlined, non-judicial process requiring parties to provide relevant, detailed information using a standard "check list", as suggested in Chapter 5,[280] and, where appropriate, sworn affidavits. This would facilitate the compilation of information regarding "all the relevant circumstances" and assist practitioners and other legal advisors, as well as the parties themselves, to appreciate the significance and purpose of providing specific information and properly to present their cases and possible defences. Meaningful engagement between the parties in an earnest endeavour to find alternative means by which the debt may be satisfied and to avoid execution against the debtor's home should be required.

  Should parties be unable to reach a settlement, the completed "check list" will serve as a useful and, it is submitted, necessary source of information for the court in the second, judicial stage of the process, to carry out a properly considered evaluation of "all the relevant circumstances" to determine whether execution against the debtor's home should be permitted. The legislation should provide for a simple, logically sequential process, guiding the court, while leaving its discretion intact, 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.[281] Essentially, this would involve balancing the respective parties'

[280] See 5.7.
[281] See 4.3.3, 4.5.2 and 4.5.3.

rights including debtors', and their families' and dependants', housing and other constitutional rights, creditors' commercial and security 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.

As mentioned above,[282] courts have not pronounced upon the implications of execution against a debtor's home for other constitutional rights such as, for example, property rights of the debtor and creditor and children's rights. It is suggested that further research and specific analysis be conducted with a view to formulating appropriate legislative provisions and guidance for judicial officers in this regard.

- *Postponement of execution against debtor's home*

  It is open to the court to postpone execution against a person's home by relying on section 172(1)(b) of the Constitution.[283] However, despite this, it is proposed that the court should specifically be empowered in its discretion to postpone execution against a debtor's home. Legislation should guide the court by drawing its attention to specific circumstances in which this might be appropriate, such as, for example, where there is a need to acquire additional information, or where there is a reasonable possibility that the debt, or arrear amounts owing, might yet be paid.[284] Specific provision should be made, as in English law and Canadian law discussed above,[285] for postponement, where operation of an acceleration clause has rendered a debtor's home susceptible to execution by the creditor, in order to grant the debtor an opportunity to remedy his default and retain his home. Specific provision should also be made for the court to postpone execution against the home where this is unavoidable but where, in light of the personal circumstances of the debtor and his dependants, a period of grace should be afforded to them for alternative

[282] See 8.2.2.
[283] See 3.3.1.4 (b) and 3.4.
[284] See 5.3.2.3, with reference to *FirstRand Bank v Mashiya* par 52, and 3.3.1.4 (b), with reference to *Standard Bank v Saunderson* par 20, and 5.7.
[285] See 8.2.7, with reference to 7.3.3 and 7.5.3.2 (a).

accommodation arrangements to be made.[286]

- *A more effective statutory debt rearrangement mechanism*

  It is proposed that the NCA should be amended to clarify the relationship between it and the Insolvency Act and, more specifically, to preclude sequestration of the estate of a debtor who has applied for debt review as well as a debtor who is complying with a debt rearrangement plan confirmed in terms of the NCA. Appropriate amendments should also be effected to the NCA so that a magistrate's court should not be entitled, as is presently the position, to modify the obligations existing between debtors and secured creditors, including a mortgagee, in the absence of reckless lending on the part of the latter.[287]

  It is also recommended that the Insolvency Act should be amended to include a debt rearrangement process, similar to debt repayment plans that are available in foreign jurisdictions. Consideration might be given to a mechanism along the lines of the section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill. Such mechanism should be specifically devised to offer a workable alternative, where appropriate, to the forced sale of a debtor's home, and the sequestration of an insolvent debtor's estate. This proposal is also discussed, below, in relation to proposals for legislative intervention in the insolvency process.

- *Provision of housing for indigent debtors*

  Provision should be made for a court order to include, where appropriate, a direction that an indigent debtor and his family should be provided with emergency, or temporary, state, or municipal housing pending more permanent accommodation arrangements being made, or access into a formal housing programme.[288] This should occur where the court, having considered all the relevant circumstances, determines that execution cannot be avoided, as no reasonable alternative exists,

[286]See 5.5.2.2, with reference to *ABSA v Ntsane* pars 69, 84 and 97, and 5.5.4.3, with reference to *FirstRand Bank v Maleke* par 8, and 5.7.
[287]See 6.10.3, 6.10.6 and 6.12.
[288]See 3.3.1.4 (c), 6.3.2, and 6.6.3.

and that the circumstances of the debtor and his family are such that execution will render them homeless and that they are "desperately poor and …in a crisis".[289] It is submitted that this would be in line with the state's duty, as recognised by the Constitutional Court, in *Grootboom*, to provide persons with access to adequate housing, and in line with the reasoning in *Blue Moonlight Properties* (CC). While it is acknowledged that this raises further, complex issues, given the shortfall in delivery of housing by the state, thus far,[290] it is submitted that there would be no sense in delaying addressing the impending homelessness of the debtor until the eviction stage. A new provision would necessitate amendment to definitions in existing legislation and regulations and other documents, such as, for example, the National Housing Code,[291] and the interface between it and PIE[292] would have to be spelt out explicitly.

- *Exemption from sale in execution of "low value" and state-subsidised homes*
  Finally, despite the rejection in *Jaftha v Schoeman* of the notion of a so-called "blanket exemption" and criticisms of it in *Standard Bank v Bekker*, it is proposed that earnest consideration should be given to introducing a limited, statutory home exemption to prohibit the sale in execution of homes of "low value" and state-subsidised homes.[293] The purpose would be to avoid execution of such homes rendering persons homeless and consequently imposing an additional burden on the state with regard to the provision of housing. It is acknowledged that this would be a major, and probably controversial, reform, with significant implications, and that this issue will need to receive thorough consideration with in-depth research having to be conducted before its possible introduction. It is suggested that, ideally, consideration of this type of home exemption should form part of comprehensive analysis of exemptions and the formulation of a coherent exemptions policy as advocated, notably, by Evans.[294] Analysis would have to be carried out with regard to an

[289] See 3.3.1.4 (c) and 3.3.5, with reference to *Blue Moonlight Properties* (SCA) par 59, and 6.3.2.
[290] See 4.2.3.
[291] See 3.3.1.4 (c) and 4.2.1, with reference to *Blue Moonlight Properties* (CC) par 47.
[292] See 3.3.1.4 (b).
[293] See 4.4.2, 5.6.8, 5.7, 6.6.3, 6.11 and 6.12.
[294] See 3.3.1.1, 4.2.2, 4.4.3.4, 5.2.3, 5.6.8, 6.6 and 6.11.

appropriate value to be set and, in the case of a state-subsidised home, whether the state ought to be reimbursed the amount of the subsidy investment. Any necessary adjustments to currently proposed amendments to section 10A and 10B of the Housing Act would also need to be reconsidered.[295] Consideration of the introduction of such an exemption should include specific comparative research into home exemptions, as discussed in Chapter 7.

The following legislative intervention is proposed in the insolvency process.

- *Specific judicial evaluation of insolvent's housing position*

  It is proposed that statutory provisions should require a court, specifically and invariably, without any need for any person to raise the issue, to address and evaluate the housing position of the insolvent and his family and dependants. Ideally, this should occur before a sequestration order is granted but, if insufficient information is available to the court at that early stage, it should occur thereafter, as long as it happens before the trustee's realisation of the insolvent's home.[296]

  As in the individual debt enforcement process, the purpose of the required judicial scrutiny would be to discern and identify any abuse of process and to ascertain whether realisation of the insolvent's home by the trustee will constitute an unjustifiable infringement of his and his family members' and dependants' rights to have access to adequate housing and other rights. The relevant rights and interests of any children would also need to be addressed. More specifically, the purpose would be to determine whether, in the circumstances, any reasonable alternative to the liquidation of the debtor's estate exists, or any other appropriate means is indicated whereby the loss of their home might be averted. Thus, the object of the judicial evaluation should be not only to prevent the insolvent and his dependants from being rendered homeless as a consequence of sequestration, but also to support a policy, as reflected in the individual debt enforcement process, that realisation of his home should occur only as a last resort, where no reasonable

[295]See 4.2.2, 5.6.8 and 8.2.1.
[296]See 6.3, 6.6.3, 6.11 and 6.12.

alternative exists.[297] It may be noted that a proposal for such policy to be extended to, and applicable in, the insolvency process, is predicated not only upon the circumstances of the insolvent being such that he has the capacity ultimately to fulfil the terms of any alternative arrangement, but also upon the legal system's provision of effective and workable alternatives to sequestration. Some suggestions follow.

- *Debt repayment plan*

  As discussed in Chapter 6, for the NCA's debt review and rearrangement process to become a more effective and satisfactory tool for saving the debtor's home, it should be amended in a number of respects. These include prohibiting a court from being able to restructure an obligation to a secured creditor and regulating the relationship between the NCA and the Insolvency Act, barring sequestration applications in appropriate circumstances.[298]

  Further, as already mentioned above, in relation to the individual debt enforcement process, it is proposed that the Insolvency Act should be amended by introducing an additional statutory consumer debt relief mechanism, providing for a debt repayment plan. Such mechanism should be specifically devised to accommodate arrangements between debtors and creditors that avert the forced sale of the debtor's home. What is proposed is a debt repayment plan that leaves secured creditors' rights intact and, by being located within the applicable insolvency statute, allows for regulated, but streamlined, mobility between the alternative options of sequestration, on the one hand, and a debt repayment plan, on the other, where circumstances require it. Such proposed statutory provision should specifically preclude the bringing of an application for sequestration, with the consequent liquidation of a debtor's assets, while he is subject to, and is complying with the confirmed terms of, a debt repayment plan, unless this occurs with the express permission of the court.[299]

[297] See 6.11 and 6.12.
[298] See 6.10.3, 6.10.4, 6.10.5, 6.10.6, 6.11 and 6.12.
[299] See 6.10.6, 6.11 and 6.12.

As also mentioned above, such a mechanism might be devised along the lines of the proposed pre-liquidation composition procedure, as reflected in section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill.[300] This would however, require appropriate modification to render it more effective as an appropriate tool for averting the forced sale of a debtor's home. Attention would also need to be given to addressing the debate surrounding, and criticisms which were levelled at, an earlier version of it, as reflected in the South African Law Reform Commission's then proposed section 74X of the Magistrates' Courts Act, published as an appendix to the Draft Insolvency Bill, in 2000.[301]

It is envisaged that the proposed required judicial evaluation of the insolvent's, and his dependants', housing position would provide a convenient opportunity for the court to determine whether the liquidation process, or the proposed composition process, or repayment plan, should be adopted. It may be noted that this ties in with insights expressed and recommendations made by Boraine and Roestoff more than a decade ago in relation to the proposed section 74X of the Magistrates' Courts Act. Such a provision would also accord with internationally recognised consumer debt relief principles and policies.[302] In the circumstances, it is proposed that a worthwhile study would be one dedicated to the formulation of an optimally effective version of the pre-liquidation composition, reflected as section 118 in the unofficial working draft of a proposed Insolvency and Business Recovery Bill, for inclusion into South African insolvency legislation. It is submitted that this should be encouraged as necessary future research to be conducted in this field.

- *Postponement of realisation of the home by the trustee*

  It is proposed that a court should be expressly empowered to postpone an application for sequestration for proper consideration of any suitable alternatives to liquidation of the debtor's estate. It is also proposed that a court should be expressly empowered, in its discretion, where it deems it just and equitable, to order the

[300] See 4.4.3.6, 4.7.4, 5.6.8, 6.4.3, 6.10.6 and 6.11.
[301] See 6.10.6.
[302] See 6.10.6.

postponement of the realisation of the insolvent's home for a limited period. This might occur, for example, to allow the insolvent to arrange for the refinancing of the home, or to make alternative accommodation arrangements for himself and his dependants. This might also occur in circumstances where an alternative consumer debt relief process, such as debt rearrangement under the NCA or one along the lines of the proposed pre-liquidation composition process, is *not* indicated as being appropriate. This would also be appropriate, for example, where children, or the elderly, or persons of poor health will be affected by the realisation of the home by the trustee.[303] It may be noted, in this regard, that some overseas jurisdictions permit postponement of realisation of the home, in appropriate circumstances, initially, for a period of up to one year, subject thereafter to evaluation and a possible further extension of time. In Scotland, this period was recently extended to three years.[304]

- *Provision of housing for indigent insolvent and his dependants*
  As was proposed in relation to the individual debt enforcement process, special provision should be made for circumstances in which the liquidation of an insolvent debtor's assets, including his home, cannot be avoided. This would be where the debtor and his family, who will be rendered homeless, are "desperately poor and …in a crisis". The court should be empowered, where appropriate, to direct that an indigent insolvent debtor and his dependants should be provided with emergency or temporary state-funded housing, pending more permanent accommodation arrangements being made, or access into a formal housing programme.[305]

- *Similar exemptions to those applicable in the individual debt enforcement process*
  It is proposed that, if exemptions from sale in execution of "low value" and state-subsidised homes are introduced into the individual debt enforcement process, then provisions having the equivalent effect should be introduced into the insolvency process. An alternative that might also be considered is for a capped amount of the proceeds of the sale of such a home to be exempted. This might allow for a portion

[303]See 6.3 and 6.11.
[304]See 7.1, 7.5.3.3 (a), (b), and (c), and 7.6.3.1.
[305]See 3.3.1.4 (c), 6.3.2, and 6.6.3.

of any equity held by the debtor to be paid to him for application towards obtaining alternative accommodation. A portion of the proceeds could also be transferred to the state, as reimbursement of any subsidy investment originally made.[306] As mentioned, above, in relation to the individual debt enforcement process, any consideration of an exemption of "low value" and state-subsidised homes would require the proposed amendments to section 10A and 10B of the Housing Act to be reconsidered.[307] In the process, consideration might also be given to whether it would be appropriate, even where moderately valued homes are concerned, to allow a portion of any equity in the home to be reserved for the insolvent.[308]

- *Repeal of section 21 of the Insolvency Act*
  Finally, it is recommended that section 21 of the Insolvency Act should be repealed but not replaced with a provision such as clause 22A of the Draft Insolvency Bill of 2000, or section 25 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, compiled in 2010. The position in relation to the effect of sequestration on the property of the solvent spouse should be fully interrogated, taking into account constitutional imperatives and applying proper policies, as advocated by Evans, which are applicable to, and appropriate for, our modern society.[309]

It is suggested that the enactment of appropriate legislation would create a more coherent contextual framework within which the forced sale of a debtor's home may occur, in both the individual debt enforcement and in the insolvency processes. Legislative amendments, and the introduction of new statutory provisions, should also be directed at establishing effective debt relief mechanisms, as alternatives to the sequestration, or liquidation, process, to constitute reasonable means by which a debtor may satisfy his obligations without necessarily losing his home, in appropriate cases. Establishing viable alternatives to sequestration will facilitate the achievement of the

[306] See 6.6.3 and 6.11.
[307] See 3.3.1.1, 4.2.3, 4.4.3.4, 4.7.1, 5.2.3, 5.6.8, 6.6 and 6.11.
[308] See 6.6.1, 6.6.3 and 6.11.
[309] See 6.7 and 6.12.

position, as envisaged by the Constitutional Court in *Jaftha v Schoeman* and *Gundwana v Steko*, in which forced sale of a debtor's home will indeed occur only as a last resort.

Janus, the Roman spirit of the door,[310] is traditionally depicted as having two faces in order that he might simultaneously guard the home against intrusion from without as well as watch over and protect members of the household within. Casting our eyes abroad, we note that the European Commission services concluded, with regard to forced sale of a debtor's home, that:[311]

> … common sense and humanity should always prevail at all levels … and throughout the whole procedure. In particular, the full economic and social situation of the defaulting borrower should be taken into account, and the implications of a given repossession should be carefully assessed, notably when a primary residence is at stake. For example, losing the family home after having lost one's job has intolerable social and human implications for both borrowers and their families. In these critical economic times our society must put the human dimension at its very heart.

As we return our gaze homewards, we are reminded of the constitutional imperative to "infuse elements of grace and compassion into the formal structures of the law" and the spirit of *ubuntu* is brought home to us as a vital key to the building of our nation.[312]

[310]See 2.2.6.
[311]See 7.8.
[312]See 3.2.2 and 3.3.1.4 (d), both with reference to *Port Elizabeth Municipality* par 37.