

# The impact of the right of access to adequate housing on the enforcement of mortgage agreements and other credit agreements

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## OPSOMMING

### Die impak van die reg op toegang tot geskikte behuising op die afdwinging van verband- en ander kredietooreenkomste

Die reg op toegang tot behuising soos uiteengesit in artikel 26 van die Grondwet van die Republiek van Suid Afrika, 1996 het aanleiding gegee tot die wysiging van artikel 66(1)(a) van die Wet op Landdroshowe 32 van 1944 asook Hooggeregshofreël 46(1) tot die effek dat geregtelike oorsig nou 'n vereiste is in alle gevalle, insluitend verbandooreenkomste met spesiale uitwinbaarheidsklousules, waar eksekusie teen onroerende eiendom wat die "primêre woning" van die eksekusieskuldenaar is, gehef word. Die Nasionale Kredietwet 34 van 2005 bied egter ook sowel omvattende prosedurele beskerming as skuldverligting aan natuurlike persoon-verbruikers wat verbandooreenkomste aangaan. Die doel van hierdie artikel is om die prosedurele impak van die reg op toegang tot behuising hoofsaaklik op verbandooreenkomste wat deur die Nasionale Kredietwet gereguleer word, te ondersoek soos wat dit in regspraak uitgekristalliseer het en sodoende problematiese prosedurele aspekte te identifiseer. Daar word egter uitgewys dat die uitgebreide geregtelike oorsig by eksekusie teen onroerende eiendom ook die afdwinging van ander kredietooreenkomste raak en dus is hierdie bespreking ook in daardie opsig relevant.

## 1 INTRODUCTION

The National Credit Act (hereafter NCA) which became fully operative on 1 June 2007 has significantly extended the range of regulated credit agreements to the effect that it now also generally applies to mortgage agreements where the consumer is a natural person.<sup>1</sup> For purposes of the NCA, a "mortgage" is defined as "a pledge of immovable property that serves as security for a mortgage agreement" and a "mortgage agreement" means "a credit agreement that is secured by a pledge of immovable property".<sup>2</sup> Otto points out that the definition

1 Act 34 of 2005. In terms of s 9(4) a mortgage agreement is always a large agreement. Read together with the exemptions provided for in s 4(1)(a)(i) and 4(1)(b) of the NCA, it has the effect that the NCA does not apply to mortgage agreements entered into with juristic person consumers.

2 The use of the terminology "pledge of immovable property" is not correct and has been criticised as being a "monstrosity". See further Otto and Otto *The National Credit Act explained* (2010) 22 (hereafter Otto and Otto).

of mortgage agreement makes no mention of the charging of interest, fees or charges as a requirement for such an agreement to fall under the NCA.<sup>3</sup>

It is to be noted that a natural person consumer who enters into a mortgage agreement with a credit provider-mortgagee enjoys significant protection under the NCA. This protection is not only of a substantive nature such as capping of interest rates, but entails elaborate procedural compliance by a credit provider who wishes to enforce a mortgage agreement. As such the NCA requires compliance with certain pre-enforcement procedures and also requires that further procedural requirements be met when the matter serves before court.<sup>4</sup> It is submitted that further procedural protection is also afforded to a consumer by virtue of section 130(4) which sets out specific powers of a court when it adjudicates a credit agreement matter. In addition to the extensive procedural protection afforded to a natural person mortgagor by the NCA, the Act also provides extensive debt relief remedies to distressed natural person consumers who are over-indebted<sup>5</sup> and/or to whom reckless credit<sup>6</sup> has been extended. These remedies also bring with them another layer of significant procedural compliance to be observed by credit grantors.<sup>7</sup> Where successfully applied for, these debt relief remedies may have a variety of alleviating consequences, ranging from a temporary moratorium on debt enforcement, to debt restructuring and/or suspension, to partial or complete setting aside of the rights and obligations of the consumer.<sup>8</sup>

The fundamental right of access to adequate housing is enshrined in section 26(1) of the Constitution, 1996.<sup>9</sup> In terms of section 26(2) the state has a positive duty to take reasonable legislative and other measures, within its available resources to achieve the progressive realisation of this right. The concept of adequate housing and the duties of the state to progressively realise this right was extensively traversed in *Government of the Republic of South Africa v Grootboom*<sup>10</sup> where the defendants were indigent squatters who lived in intolerable conditions where they clearly did not have access to adequate housing. Section 26(3), however, further provides that no one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances and that no legislation may permit arbitrary evictions. Execution levied against immovable property that is the debtor's "home" may constitute a significant limitation upon the fundamental right of access to

3 Otto and Otto 22.

4 Ss 129, 130 and 131. For a detailed discussion of debt enforcement in respect of credit agreements, see Scholtz *et al Guide to the National Credit Act (2008 et seq)* ch 12 (hereafter *Guide to the National Credit Act*). S 129(3) of the NCA should also be mentioned in this context as it provides for a credit agreement that has not yet been cancelled to be reinstated. It is, however, difficult to see how s 129(3) would be applied practically with regard to immovable property.

5 Ss 85–88.

6 Ss 80–84.

7 For a detailed discussion of the procedural compliance occasioned by the debt relief remedies in respect of over-indebtedness and reckless credit, see *Guide to the National Credit Act* ch 11.

8 For a detailed discussion of the debt relief remedies in respect of over-indebtedness and reckless credit see *Guide to the National Credit Act* ch 11.

9 Constitution of the Republic of South Africa, 1996. See also Van Heerden and Boraine "Reading procedure and substance into the basic right to security of tenure" 2006 *De Jure* 319.

10 2001 1 SA 46 (CC).

adequate housing if it has the effect that the debtor is as a result thereof deprived of his right of access to adequate housing.

In practice immovable property which is sought to be executed against may be either unbonded or bonded. The debt in respect of which execution is sought may either not have its "root" in the immovable property or it may be inextricably linked to such immovable property, namely in the sense that the debt was incurred specifically in order to buy the immovable property and a mortgage bond was consequently registered over such immovable property in order to secure such debt, thus making the mortgagor a secured creditor. In the context of enforcement in respect of mortgage agreements, should the point of departure be that a consumer-debtor's constitutional right of access to adequate housing also applies to bonded property, it may thus significantly curtail a credit provider's right as a secured creditor, to attach and sell immovable property in execution and may thus limit the extent to which a credit provider is able to enforce a mortgage agreement.

As will emerge from this discussion, judicial oversight is now required in all instances where the right of access to adequate housing may be infringed, regardless of whether such property is bonded or unbonded. It thus can potentially apply to any other credit agreement debt in respect of which the credit provider seeks to execute against immovable property subsequent to judgment and not only where mortgage agreements are concerned. The primary focus of this discussion will be on the impact of the right of access to adequate housing on mortgage agreements that are governed by the NCA, that is, mortgage agreements with natural person consumers. Certain peripheral remarks will however also be made regarding the significance of the right of access to adequate housing in respect of execution where the mortgagee is a juristic person as well as in respect of other types of credit agreements. The discussion hereinafter is by no means exhaustive but attempts to give a brief overview of significant aspects of the impact of the right of access to adequate housing on mortgage agreements (and in the process also potentially on other credit agreements) as it has emerged from various cases.<sup>11</sup> It is submitted that the said right of access to adequate housing does not only have the potential to limit the rights of credit providers to levy execution against immovable property but that it has brought a whole new procedural dimension to the process of execution, which in some respects already have to be observed during the pre-enforcement stage and at the time of issuing summons.

## **2 INITIAL IMPACT OF THE RIGHT OF ACCESS TO ADEQUATE HOUSING ON THE EXECUTION PROCESS**

The debate regarding the influence of section 26(1) on the execution process essentially commenced in *Jaftha v Schoeman; Van Rooyen v Stoltz*<sup>12</sup> where the constitutionality of section 66 (1)(a) of the Magistrates' Courts Act<sup>13</sup> was scrutinised by the Constitutional Court as the said section permitted execution to be levied against the homes of judgment debtors, that could lead to their eviction

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<sup>11</sup> An in-depth discussion of all the cases that have dealt with the right of access to adequate housing is beyond the scope of this article.

<sup>12</sup> 2005 2 SA 140 (CC).

<sup>13</sup> 32 of 1944.

and the permanent loss of access to own a home.<sup>14</sup> It was held that the section was unconstitutional to the extent that it permitted execution to be levied against a debtor's home without judicial oversight and the court administered constitutional reading-in<sup>15</sup> to the said section to the effect that a warrant of execution against immovable property may only be issued by a court, after consideration of all the relevant circumstances. The order of constitutionality made in *Jaftha* was not qualified and is retrospective from the date of commencement of the Constitution.<sup>16</sup>

Although the court declined to compile an exhaustive list of circumstances that might have to be considered before execution against immovable property should be allowed, it provided the following guidance:<sup>17</sup>

"If the procedure prescribed by the Rules is not complied with, a sale in execution cannot be authorised. If there are other reasonable ways in which the debt can be paid an order permitting a sale in execution will ordinarily be undesirable. If the requirements of the Rules have been complied with and if there is no other reasonable way by which the debt may be satisfied, an order authorising the sale in execution may ordinarily be appropriate *unless the ordering of the sale in the circumstances of the case would be grossly disproportionate*. This would be so if the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is to render the judgment debtor and his or family completely *homeless*."

It subsequently indicated that the factors a court might consider, but to which a court is not restricted are:

- (a) the size of the debt, as trifling debts do not justify loss of the judgment debtor's home;
- (b) the circumstances in which the debt arose;
- (c) availability of alternatives which might allow for the recovery of the debt but do not require the sale in execution of the debtor's home;
- (d) any attempts made by the debtor to pay off the debt;
- (e) the financial situation of the parties;
- (f) the amount of the debt;
- (g) whether the debtor is employed or has a source of income to pay off the debt; and
- (h) any other factor relevant to the particular facts before the court.

It is to be noted that, in the context of the circumstances in which the debt arose, the court indicated that if the judgment debtor willingly put his or her house up

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14 The court stated (para 52): "I have held that s 66(1)(a) of the Act is overbroad and constitutes a violation of s 26(1) of the Constitution to the extent that it allows execution against the homes of indigent debtors where they lose their security of tenure. I have further held that s 66(1)(a) is not justifiable and cannot be saved to the extent that it allows for execution where no countervailing considerations in favour of the creditor justify the sales in execution."

15 Para 62.

16 *Menqa v Markom* 2008 2 SA 120 (SCA). See also *Mkhize v Umvoti Municipality* 2012 1 SA 1 (SCA).

17 *Jaftha* paras 56–60.

as security for the debt, execution should ordinarily be permitted unless there has been an abuse of court procedure.<sup>18</sup>

With regard to the appropriateness of judicial oversight over the execution process, Mokgoro J remarked as follows:<sup>19</sup>

“The crucial difference between the provision of judicial oversight as a remedy and the possibility of reliance on ss 62 and 73 of the Act is that the former takes place invariably without prompting by the debtor. Even if the process of execution results from a default judgment the court will need to oversee execution against immovables.”

The so-called “reach of *Jaftha*” became the topic of judicial scrutiny in various cases in order to establish the precise impact of the right of access to adequate housing on execution against immovable property and more specifically whether the orders made in *Jaftha* also extended to mortgaged property or whether it was confined to unbonded property belonging to indigent debtors.<sup>20</sup> Subsequent to *Jaftha* it was held in *Standard Bank of South Africa Ltd v Snyders*<sup>21</sup> (where orders were sought that hypothecated property be declared executable) that a claim for an order that immovable property, which is the home of the debtor, be declared executable has, as a consequence of the applicability of section 26(3) of the Constitution, acquired a significance which is very different from what it had before.<sup>22</sup> The court indicated that the effect of such an order, before the advent of the Constitution, was simply of a procedural nature but that section 26(3) of the Constitution, as interpreted in *Jaftha*, has introduced a prerequisite for the granting of such an order, namely, that the court must consider all the relevant circumstances.<sup>23</sup> Accordingly, the court held that a plaintiff’s summons should contain a suitable allegation to the effect that the facts alleged by it (*which should be identified*) are sufficient to justify an order declaring the property executable in terms of section 26(3).<sup>24</sup>

A full bench was later specially constituted in *Nedbank Ltd v Mortinson*<sup>25</sup> to consider the effect of *Jaftha* upon the High Court practice that a registrar is allowed by High Court rule 31(5) to issue writs against immovable property that was the judgment debtor’s home and had been specially hypothecated to secure the judgment debtor’s obligation towards the judgment creditor.<sup>26</sup> The court

18 Para 58. The court remarked that the need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.

19 Para 55.

20 The property concerned in *Jaftha* was state subsidised housing which, if sold in execution, would have rendered the debtor homeless.

21 2005 5 SA 610 (C).

22 Para 16.

23 *Ibid.* See further para 27 where the court remarks: “In the light of section 26(3) of the Constitution the order sought in these cases is substantive in its effect.”

24 Para 24. It is to be noted that although the court declined to order the hypothecated immovable property executable due to lack of non-compliance in the summons with an allegation to s 26(3) of the Constitution, the court granted judgment for the monetary claim.

25 2005 6 SA 462 (W).

26 The court emphasised (para 21) that *Jaftha* did not deal with s 27(A) of the Supreme Court Act 59 of 1959 (which provides that default judgment may be granted in the High Courts by the registrar in accordance with the provisions of the High Court Rules) and High Court Rule 31(5) (which sets out the manner and circumstances under which the registrar may grant and enter default judgment) but with s 66(1)(a) of the Magistrates’ Courts Act which

disagreed with the *Snyders* judgment that *Jaftha* applied to applications to have specially hypothecated immovable property declared executable.<sup>27</sup> It pointed out that not all specifically hypothecated immovable property is utilised as residential property and where it was not so utilised, section 26 of the Constitution would not come into consideration.<sup>28</sup> The court remarked that a debtor who has hypothecated his immovable property has participated in a commercial transaction and has willingly utilised his or her immovable property as security and thus put it at risk.<sup>29</sup> It indicated that the principle that the creditor is entitled to have the hypothecated property sold in execution and recover from the proceeds of the sale the amount due was also recognised in *Jaftha* where it was held that a sale in execution should ordinarily be permitted where the immovable property has been put up as security for the debt and there has been no abuse of procedure.<sup>30</sup> It further indicated that High Court rule 31(5)(d) contains a valuable safeguard for the protection of the debtor as it provides for reconsideration of a default judgment in certain circumstances.<sup>31</sup> The court subsequently held that where the debtor specifically hypothecated his or her immovable property and there is no abuse of court procedure, the limitation by High Court rule 31(5) on the debtor's right of access to adequate housing is reasonable and justifiable in terms of section 36(1) of the Constitution.<sup>32</sup> It however added that in order to assist the Registrar in detecting abuse of court procedure, a creditor, applying for default judgment in which an order for leave to execute against specially hypothecated property is sought, must simultaneously with the application for default judgment file an affidavit setting out the following:<sup>33</sup>

- (a) the amount of the arrears outstanding on the date of application for default judgment;
- (b) whether the hypothecated property was acquired with a state subsidy or not;
- (c) whether, as far as the creditor is aware, the property is occupied or not;
- (d) whether the property is occupied for commercial or for residential purposes;
- (e) whether the debt sought to be enforced was incurred to acquire the property or not.

In addition, the court held that any matter in which the amount claimed fell within the jurisdiction of the Magistrate's Court had to be referred to the court if the hypothecated property was to be declared specially executable.<sup>34</sup> It further held that the debtor's attention must be specifically drawn, in the warrant issued for purposes of execution of the registrar's order, to the fact that he may apply for rescission of the judgment enforced against the hypothecated immovable property.<sup>35</sup>

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was analogous to High Court Rule 45(1) and that *Jaftha* is therefore distinguishable from the present matter.

27 Paras 31 and 32.

28 Para 22.

29 Para 25.

30 *Ibid.*

31 Para 26.

32 Para 33.

33 Para 33.1.

34 Para 33.2.

35 Para 34.

In *Standard Bank of South Africa Ltd v Saunderson*<sup>36</sup> the Supreme Court of Appeal remarked that the mortgage bond is an indispensable tool for spreading home ownership<sup>37</sup> and that its value as an instrument of security lies in the confidence that the law will give effect to its terms.<sup>38</sup> It indicated that mortgage debt is not extraneous but is fused into the title to the property and that the effect of section 26(1) on such cases was not considered in *Jaftha*.<sup>39</sup> The court cautioned that it must be borne in mind that section 26(1) does not confer a right of access to housing *per se* but only a right of access to adequate housing and that this concept is of necessity relative.<sup>40</sup> The court pointed out that *Jaftha* did not decide that ownership of all residential property is protected by section 26(1) and that it could not have done so bearing in mind that what constitutes “adequate housing” is necessarily a fact-bound enquiry.<sup>41</sup> It further pointed out that a plaintiff is called to justify an infringement of a constitutionally-protected right only once it has been established that the infringement has in fact occurred.<sup>42</sup> The court indicated that until the defendants in the cases before it could show that orders for execution would infringe section 26(1) the plaintiff was not called on to justify the orders as the sole fact that the property is residential in character is not enough to found the conclusion that an infringement of section 26(1) will necessarily occur.<sup>43</sup>

It held that the registrar was entitled to grant orders of execution by default in terms of section 31(5) where the constitutional validity of the order of execution was not disputed, and no infringement to the right enshrined in section 26(1) of

36 2006 2 SA 382 (SCA). This case was an appeal against one of the judgments granted by Bignaut J in *Snyders supra*. The court indicated (para 15) that the way the court *a quo* interpreted *Jaftha* was misplaced as it was not s 26(3) of the Constitution which was at issue in *Jaftha* but rather s 26(1).

37 Para 1. The court further stated in para 2: “A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bondholder’s rights are fused into the title itself.” See also para 19 where the court reiterates that “the bondholder’s claim in its essence is against the property, and that its entitlement springs from a limitation in title the owner chose to accept in obtaining the loan”.

38 Para 3.

39 Para 18.

40 Para 16 with reference to *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC).

41 Para 17. The court remarked that one “need only postulate executing against a luxury home or holiday home to see that this must be so, for there it cannot be claimed that the process of execution will implicate the right of access to adequate housing at all”.

42 Para 20 with reference to Woolman in Chaskalson *et al Constitutional law of South Africa* (2002–) 12-2 where he states: “Constitutional analysis under the Bill of Rights take[s] place in two stages. First, the applicant is required to demonstrate that her ability to exercise a fundamental right has been infringed . . . If the court finds that the law[or measure] in question infringes the exercise of the fundamental right, the analysis may move to its second stage. In this second stage . . . the party looking to uphold the restriction . . . will be required to demonstrate that the infringement is justifiable.”

43 Para 20.

the Constitution was alleged to have occurred.<sup>44</sup> Once such an allegation was made the rule could not apply in any event as the matter would then have to be referred to open court.<sup>45</sup> The court pointed out that the application of the right of access to adequate housing in the case of bonded property has not yet been explored by our courts and that it is not a question that was before it in the present matter.<sup>46</sup> However, it indicated that it is possible that an order for execution<sup>47</sup> might infringe the right to adequate housing and thus the court issued a practice directive requiring the debtor's attention to be drawn to the provisions of section 26(1) in every summons in which action is instituted that includes a prayer for an order declaring immovable property executable and informing the debtor that it is incumbent upon him or her to place information before the court that his or her right to adequate housing would be infringed by the granting of an order of execution.<sup>48</sup> Thus, in terms of *Saunderson*, creditors instituting claims to declare immovable property executable, which property was specially hypothecated in their favour as security for loans made to the debtor, could obtain such orders by default from the registrar, without judicial oversight.

### 3 AMENDMENT OF HIGH COURT RULE 46 AND *GUNDWANA* JUDGMENT

Subsequent to the aforementioned judgments, High Court Rule 46 was amended with effect from 24 December 2010<sup>49</sup> by the substitution for sub-rule (1) of the following sub-rule:

“No writ of execution against the immovable property of any judgment debtor shall issue until

- (i) a return shall have been made of any process which may have been issued against the immovable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or
- (ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall have been issued unless the court, having considered all the relevant circumstances, orders execution against such property.”

After the amendment the Constitutional Court delivered judgment in *Gundwana v Steko Development*<sup>50</sup> (which judgment also has retrospective application), declaring unconstitutional the practice of allowing the registrar to declare immovable property specially executable when ordering default judgment in terms of rule 31(5) “to the extent that this permits the sale in execution of the home of a person”.<sup>51</sup> This decision overrules *Mortinson* and *Saunderson* on this point and

44 Para 23.

45 *Ibid.*

46 *Ibid.*

47 It should be noted that the court did not state “an order declaring hypothecated immovable property specifically executable” but merely used the general term “execution”.

48 Para 27.

49 As published in GN R981 of 19 November 2010.

50 2011 3 SA 608 (CC).

51 The court pointed out (para 36) that rule 31(5) makes no explicit reference to orders declaring mortgaged property specially executable and that for that reference one has to turn to s 45(1) which reads: “The party in whose favour any judgment of the court has been

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all applications for execution against a specially hypothecated property must thus now be judicially overseen by the court. The court in *Gundwana* rejected the contention, based on *Saunderson*, that mortgaged property is not affected by *Jaftha* because mortgagors are willing to accept the risk of losing their property when entering into the mortgage loan agreement<sup>52</sup> and indicated that a mortgagee is in the same position as other creditors.<sup>53</sup> The court pointed out that mortgage bonds do not ordinarily contain clauses describing the purpose for which the mortgaged property is held by the mortgagor and remarked that to agree to a mortgage bond does not without more entail agreeing to forfeit one's protection under section 26(1) and (3) of the Constitution.<sup>54</sup> It referred to the statement by Mokgoro J in *Jaftha* that absent abuse of court procedure in a sale of execution should ordinarily be permitted in respect of immovable property that was put up as security by the debtor and stated that an agreement to put one's property at risk in a mortgage bond "does not equate to a licence for the mortgagee to enforce execution in bad faith".<sup>55</sup>

The court indicated further that the constitutional considerations regarding the right of access to adequate housing do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in

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pronounced may, at his own risk, sue out of the office of the registrar one or more writs for execution thereof as near as may be in accordance with Form 18 of the First Schedule: Provided that, *except where immovable property has been specially declared executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar*, no such process shall issue against the immovable property of any person until a return shall have been made of any process which may have been issued against his immovable property, and the registrar perceives therefrom that the said person has not sufficient movable property to satisfy the writ" (my emphasis). For the history and development of rule 45(1) and the practice of declaring immovable property specially executable see *Gerber v Stolze* 1951 2 SA 166 (T) and *Nedbank Ltd v Mortinson supra*. The Constitutional Court pointed out that "the practice of ordering immovable property specially executable at the time of the judgment arose on the basis of practical expediency, namely to circumvent the necessity of first executing against movables where immovable property had been specially hypothecated as security for the debt. The underlying basis for the lack of judicial control over the whole process of execution was that it was an executive matter which is dealt with by the registrar".

52 Para 49. Froneman J also rejected the argument that neither the person of the applicant nor her property fell within the *Jaftha* protection and gave the following two reasons (para 43) why this argument could not succeed: "The first is that the constitutional validity of the rule cannot depend on the subjective position of a particular applicant. It is either objectively valid or it is not. The second is that, although a preceding enquiry is necessary to determine whether a matter is of the *Jaftha* kind, it requires more than a mere checking of the summons to see whether a cause of action is disclosed. The summons in *Gundwana* did not indicate whether the applicant was indigent or whether the mortgaged property was her home."

53 *Ibid.* In this regard the court stated: "It is true that a mortgagor willingly provides her immovable property as security for the loan she obtains from the mortgagee and that she thereby accepts that the property may be executed upon in order to obtain satisfaction of the debt. But does that particular willingness imply that she accepts that (a) the mortgage debt may be enforced without court sanction; (b) she has waived her right of access to adequate housing or eviction only under court sanction under section 26(1) and (3); and (c) the mortgagee is entitled to performance, in the form of execution, even when that performance is done in bad faith? I think not."

54 Para 46.

55 Para 48.

satisfaction of a judgment debt sounding in money but that what it does is to caution courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who “are poor and at risk of losing their homes”.<sup>56</sup> It indicated that if the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders.<sup>57</sup> The court significantly remarked:<sup>58</sup>

“It must be accepted that execution is in itself not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided.”

#### 4 POSITION AFTER *GUNDWANA*

*Gundwana* sparked a series of cases that attempted to provide clarity on various aspects, such as the actual reach of *Jaftha*, which circumstances a court should consider in deciding whether to allow execution against immovable property which is the judgment debtor’s home and which party must place the relevant information before the court.

In *Firstrand Bank v Folscher*<sup>59</sup> a full bench of the North Gauteng High Court was subsequently constituted to consider the issue. It held that “primary residence” is the same concept as the “home of a person” and that there is thus no conflict between the amended High Court Rule 46 and *Gundwana*.<sup>60</sup> Accordingly, it held that the judicial oversight that is required is therefore limited to those instances where the execution order relates to the debtor’s principal or, usually, the only dwelling that the judgment debtor owns.<sup>61</sup> Execution against a holiday home or a second house that is not usually occupied by the debtor does not trigger the application of the rule.<sup>62</sup>

It further held that the term “judgment debtor” refers to an individual or person and that immovable property owned by a company, a close corporation or a trust, of which the member, shareholder or beneficiary is the beneficial occupier, is not protected by the amended rule requiring judicial oversight by way of an order of court authorising a writ of execution, even if the immovable property is the shareholder’s, member’s or beneficiary’s only residence.<sup>63</sup>

The court further held that the phrase “relevant circumstances” as it appears in section 26(3) of the Constitution must be “legally relevant” circumstances.<sup>64</sup> It remarked that since the Constitutional Court’s judgment in *Jaftha*, it is clear that a court must be mindful in all matters that a judgment debtor, facing execution and subsequent eviction, should not be a victim of an abuse of the process, even

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<sup>56</sup> Para 53.

<sup>57</sup> *Ibid.*

<sup>58</sup> Para 54.

<sup>59</sup> 2011 4 SA 314 (GNP).

<sup>60</sup> Para 22.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

<sup>63</sup> Para 24.

<sup>64</sup> Para 25.

though such would be rare in matters in which a specially hypothecated immovable property is the object of the execution process.<sup>65</sup> It remarked further that it is apparent that the creditor's conduct need not be wilfully dishonest or vexatious to constitute an abuse.<sup>66</sup> The consequences of intended writs against hypothecated properties, although *bona fide*, may be iniquitous because the debtor will lose his home, while alternative modes of satisfying the creditors' demands might exist, that would not cause any significant prejudice to the creditor.<sup>67</sup>

It elaborated on the factors that may need to be taken into consideration by the court when deciding whether or not to issue a writ against immovable property and listed the following factors:<sup>68</sup>

- (a) whether the mortgaged property is the debtor's primary residence;
- (b) the circumstances under which the debt was incurred;
- (c) the arrears outstanding under the bond when the latter was called up;
- (d) the arrears on the date default judgment is sought;
- (e) the total amount owing in respect of which execution is sought;
- (f) the debtor's payment history;
- (g) the relative financial strengths of the creditor and the debtor;
- (h) whether any possibilities exist, that the debtor's liabilities to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence;
- (i) the proportionality of prejudice the creditor might suffer if execution were to be refused; compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;
- (j) whether any notice in terms of section 129 of the NCA 34 of 2005 was sent to the debtor prior to the institution of action;
- (k) the debtor's reaction to such notice, if any;
- (l) the period of time that elapsed between delivery of such notice and the institution of action;
- (m) whether the property sought to be declared executable was acquired by means of, or with the aid of, a State subsidy;
- (n) whether the property is occupied or not;
- (o) whether the property is in fact occupied by the debtor;
- (p) whether the immovable property was acquired with moneys advanced to the creditor or not;
- (q) whether the debtor will lose his access to housing as a result of execution being levied against his home;
- (r) whether there is any indication that the creditor has instituted action with an ulterior motive or not;
- (s) the position of the debtor's dependants and other occupants of the house, although in each case these facts will have to be established as being legally relevant.

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65 Para 40.

66 *Ibid.*

67 *Ibid.*

68 Para 41.

As it is obvious that not each and every one of the above considerations will of necessity have to be taken into account in every matter, it held that the enquiry must always be fact-bound to identify the criteria that are relevant for the particular case.<sup>69</sup>

Regarding the manner in which the relevant information must be placed before a court, the court indicated that if a creditor's claim is opposed, the debtor will ordinarily be in the best position to advance any contentions he may wish to make, and will be able to fully inform the court of any aspect that should be taken into account.<sup>70</sup> The court indicated that in the ordinary course of events the creditor will be fully able to inform the court of the history of the creation of the debt and the repayment thereof.<sup>71</sup> He may also be able to comment on the debtor's ability to effect payment of any arrears, by means other than allowing execution against his home to proceed.<sup>72</sup> In default proceedings, the creditor is in any event in the position akin to that of an applicant in unopposed motion proceedings, and is, as any litigant in that role, in duty bound to make full disclosure to the court of all facts that might influence the court in coming to a conclusion.<sup>73</sup>

The court further indicated that when action is instituted to enforce a debt secured by a special hypothec over the debtor's primary residence, or usual or ordinary residence, the debtor is entitled to be informed in the summons of his or her rights, in terms of section 26 of the Constitution.<sup>74</sup> It also issued a practice directive that, if the summons is preceded by a notice in terms of section 129(1)(a) of the NCA, such notice is to include a notification to the debtor that, should action be instituted and judgment be obtained against him or her, execution against the debtor's primary residence will ordinarily follow and will usually lead to the debtor's eviction from such home.<sup>75</sup> Further, if the debtor does not enter appearance to defend after the service of summons, and the creditor applies for default judgment, either to the court or to the registrar, the creditor must file an affidavit in which he sets out all the applicable circumstances enumerated in *Mortinson*.<sup>76</sup> A creditor applying to court for the granting of a writ of execution, after obtaining judgment by default, must file an affidavit setting out all the applicable circumstances enumerated in *Folscher*,<sup>77</sup> of which the creditor is aware or is able to reasonably obtain from the information at its disposal.<sup>78</sup> A creditor instituting action may include a prayer for a writ of execution in the

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69 Para 40

70 Para 42. The court pointed out that problems may arise where the debtor remains in default, but the court requires further information in respect of some of the relevant circumstances that should be considered before a writ of execution against the latter's home is authorised. The court remarked that a court should ordinarily not be expected to take proactive steps to establish whether the debtor is the victim of abusive litigation, although it will have to do so in the extraordinary instance in which there is reason to suspect that execution should not be levied against the debtor's home, and no alternative way exists of establishing the true state of affairs.

71 *Ibid.*

72 *Ibid.*

73 *Ibid.*

74 Para 52.

75 Para 53.

76 As indicated in para 19.

77 As indicated in para 41.

78 Para 55.

summons, provided that the relevant circumstances identified above are recorded therein.<sup>79</sup> The information is to be verified by an affidavit when application is made for judgment by default, which must be made to the High Court, if the granting of a writ is sought at the same time.<sup>80</sup>

In *Nedbank Ltd v Fraser and four other cases*<sup>81</sup> the South Gauteng High Court made the following preliminary observations<sup>82</sup> in respect of High Court Rule 46: First, the proviso at the end of High Court Rule 46(1)(a)(ii) must be read as qualifying both subparagraphs (i) and (ii) of paragraph (a) of the sub-rule as judicial oversight is required irrespective of the insufficiency of movable property to satisfy the debt. Second, the court was of the opinion that there is an important difference in the wording of the provision and the principle enunciated in *Gundwana*. The proviso makes provision for judicial oversight where the property sought to be attached is “the primary residence of the judgment debtor”. The judicial oversight required by *Gundwana* in terms of the provisions of section 26(3) is where the property sought to be attached is “the home of a person”.

Contrary to the court in the *Folscher*, the court in *Fraser* remarked that it is not uncommon for a person’s home to be held through the vehicle of a juristic person or trustees in trust for a beneficiary and indicated that where the home is held through the vehicle of a company, close corporation or trustees, the constitutional protection afforded by the provisions of section 26(3) extends equally to members of such companies, close corporations and beneficiaries of the trusts, who are living in the immovable properties concerned.<sup>83</sup>

It pointed out that the effect of *Gundwana* is that the court is enjoined to consider “all the relevant circumstances” and it no longer suffices merely that the immovable property is specially hypothecated as security for the debt giving rise to the judgment, although this is in no way an unimportant consideration. It indicated that what is of significance however, is that a residential home is not placed beyond the process of execution.<sup>84</sup> It remarked that although execution is necessary there may nevertheless be circumstances in which resort to execution may be abused, as in the case of a trifling debt.<sup>85</sup> The purpose of the judicial function required in section 26(3) is to act as a check or filter on execution that does not serve the social interests, and which is an abuse.<sup>86</sup>

Thus, the court held that each case should be decided on its facts and that flexibility should be retained in what is required to satisfy the threshold rather than demanding adherence to an inflexible procedure or lists of prescripts before an order of execution is made.<sup>87</sup>

As regards the relevant circumstances, the court indicated that in the context of safeguarding against abuse, it can hardly be said, in the ordinary course, that

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79 Para 56.

80 *Ibid.*

81 2011 4 SA 363 (GSJ).

82 Para 10.

83 Para 12.

84 Para 13. The court remarked that to put residential immovable property which is a person’s home into that class of assets beyond the reach of execution would be “to sterilise the immovable property from commerce thereby rendering it useless as a means to raise credit”.

85 Para 22.

86 Para 24.

87 Para 25.

there is an abuse of process where a judgment creditor seeks to execute against a person's home where the debt arose from providing the funds to purchase the property, the property was specifically hypothecated as security for such credit and there has been a default on the debt.<sup>88</sup> Similarly, where the property has been hypothecated for some other debt the position should be that in the absence of an indication of abuse execution ought normally to follow.<sup>89</sup>

When giving consideration to whether or not execution should be granted to enforce a judgment debt, the court indicated that it is the size of the indebtedness due and owing to the creditor which is more important than the size of the arrears which represent the default giving rise to an accelerated balance.<sup>90</sup> The court held that where there has been an acceleration and the judgment debt is for a significant sum which justifies execution against immovable property, but there exists the possibility that payment of the arrears may reasonably be made to facilitate the reinstatement of the underlying loan agreement, the provisions of section 129(3) and (4) of the NCA relating to re-instatement of credit agreements, ought to be brought to the attention of the judgment debtor.<sup>91</sup>

As regards the existence of reasonable alternatives to the satisfaction of the judgment debt without resort to execution, the court held that the existence of these alternatives will be determined with regard being had to attempts by the debtor to pay off the debt and the debtor's resources.<sup>92</sup>

It indicated that where the matter is contested, a determination of these considerations is made much easier by the ability of the debtor to disclose resources, employment status and any other factor which might militate against an order that execution be levied against the immovable property.<sup>93</sup> However, the court pointed out, the great majority of cases are undefended. Although it is the court's purpose to act as safeguard against abuse, it should take care at the same time not to impose too great a burden on an execution creditor to go out and obtain evidence of matters more readily within the knowledge of the judgment debtor.<sup>94</sup>

The court further held that where the property has been specially hypothecated to secure the judgment debt the scope of a judicial enquiry would be less than where the property has not been so hypothecated, unless there are facts before the court, reasonable grounds to suspect an abuse.<sup>95</sup> Where property has been specially hypothecated for a debt, it held that a court should take care not to insist inflexibly on execution against movables as prerequisite to execution against the immovable property. It further held that where the judgment debt is unrelated to the property, or the amount is relatively insignificant, a greater degree of enquiry and closer scrutiny is called for.<sup>96</sup>

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88 Paras 26–32.

89 *Ibid.*

90 Paras 32–38.

91 Paras 39–41. In the court's opinion this can be enforced by requiring same to be embodied in the order declaring the immovable property executable.

92 Para 43.

93 Para 44.

94 *Ibid.*

95 Para 45.

96 *Ibid.* In such event the court indicated that consideration might be given to postponing the request for an application for execution until after the creditor might first have had resort to s 65A read with s 65M of the Magistrates' Courts Act, in which the financial circumstances of the judgment debtor might fully be ventilated whereafter the grant of an order might then be reconsidered.

As a result of the divergence of views which had arisen a full bench was consequently constituted in the Western Cape High Court in *Standard Bank Ltd v Bekker*<sup>97</sup> to deal with the question what, if any, additional information has to be placed before the court to enable an adequate consideration of all the relevant circumstances as required in terms of amended High Court rule 46(1)(a).

The court pointed out that it agreed with the observation by Peter AJ in *Fraser* that the proviso to High Court Rule 46(1)(a)(ii) must be read to apply also to paragraph (a)(i) of High Court Rule 46(1).<sup>98</sup> Thus, even in a case where a judgment remains unpaid after execution of the judgment debtor's movable property, execution cannot thereafter be levied against immovable property that is the debtor's home unless a court, after consideration of all the relevant circumstances, so orders.<sup>99</sup> The court, however, pointed out that in both *Jaftha* and *Gundwana* the evidence of the facts which supported the allegation that the judgment debtor's section 26 rights would be implicated if their homes were sold in execution was adduced by the judgment debtors, and not by the judgment creditor.<sup>100</sup>

The court further indicated that it was in general agreement with the conclusion reached by the full bench of the North Gauteng High court in *Folscher* that the circumstances which fall to be taken into account include those that would be relevant in matters arising for consideration under section 26(3).<sup>101</sup>

It remarked that the Constitutional Court has not prescribed what the content of the evaluation required in terms of High Court Rule 46(1)(a) should be, nor has it advised how, or by whom, the relevant evidence for the required evaluation should be placed before the court in a default judgment situation, save by suggesting that the practical directions given in *Saunderson* and *Mortinson* to ensure that defendants are alerted to the possibility of the impact that judgment may have on their fundamental rights may be of assistance.<sup>102</sup> The Constitutional Court did, however, make a number of pertinent observations which provide guidance, namely:<sup>103</sup>

- (a) In *Gundwana*, the court emphasised that the constitutional requirement of judicial oversight did not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money.<sup>104</sup>
- (b) Further, while holding that the mere fact that a property owner had agreed to hypothecate immovable property did not put any determination of a

97 2011 4 SA (WCC). This matter involved five applications for default judgment in respect of specially hypothecated immovable property and, ancillary to such judgment, an order declaring the hypothecated property specially executable.

98 Para 4.

99 *Ibid.*

100 *Ibid.*

101 Para 13. The court indicated that it had, however, reached that result by giving effect to the reasoning in *Jaftha* and *Gundwana*, and not with reference to the proviso in rule 46(1)(a). In its view the amendment to rule 46(1)(a) merely gives effect to the constitutional principles enunciated in the two judgments of the Constitutional Court.

102 Para 14.

103 Paras 15–17.

104 With reference to *Gundwana* para 53.

prayer for execution against the property beyond the reach of the decision in *Jaftha*, the court in *Gundwana* appears to have endorsed the observation in *Jaftha*<sup>105</sup> that if the judgment debtor had willingly put his or her home up in some manner as security for the debt, a sale in execution should ordinarily be permitted unless the application for the issue of the writ in such a case amounted to an abuse of procedure.

- (c) The endorsement in *Gundwana* of the remarks in *Jaftha*<sup>106</sup> confirms that in the absence of unusual circumstances, or an abuse of process, execution against hypothecated property which is the home of the mortgagor is *prima facie* constitutionally justifiable, even if its effect would be to infringe the judgment debtor's section 26 rights.

The court further pointed out that in *Standard Bank of South Africa Ltd v Snyders*,<sup>107</sup> Blignaut J held that the appropriate means of equipping the court to effectively discharge the function of judicial oversight in matters in which an order permitting execution against property, which the court had inferred constituted the homes of the defendants, was by requiring the mortgagee plaintiff to include in its summons a suitable allegation to convey to the defendant that the latter's section 26 rights could be relevant in the determination of the relief sought.<sup>108</sup>

The court held that having regard to the importance of the concept of hypothecation of immovable property in the economic context and the crucial part it plays in facilitating private means of access to housing, thereby affording some collateral assistance to the state in the discharge of its obligation to achieve the progressive realisation of the right by the entire population, it would be counter-productive to impede the effective functioning of the concept by introducing, without cogent reasons, novel and onerous procedural impositions on mortgagees seeking to exercise their contractual rights of security.<sup>109</sup> Unnecessarily imposing constraints that would make obtaining orders for execution that the Constitutional Court has confirmed should ordinarily follow in foreclosure cases significantly more costly or cumbersome would in the end, only be to make access to mortgage finance more difficult, and rebound against the wider realisation of rights under section 26(1) of the Constitution.<sup>110</sup>

It pointed out that it is also relevant to bear in mind that the NCA affords a measure of protection to mortgagors who are natural persons.<sup>111</sup> It remarked that these are considerations which, in its view, should also be weighed in determining the extent to which courts should incline to be creatively proactive in seeking out ways to give effect to High Court Rule 46(1)(a) by imposition on the mortgagee plaintiff, as a matter of course, of an obligation to obtain and place before the court information which, in the majority of cases, will not affect the mortgagee's *prima facie* entitlement to realise its security.<sup>112</sup>

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105 Para 58.

106 *Ibid.*

107 2005 5 SA 619 (WCC).

108 Para 18.

109 Para 20.

110 *Ibid.*

111 Para 21. Eg ch 6 which is applicable to mortgage agreements concluded after the commencement of the NCA and also the provisions relating to reckless credit.

112 Para 22.



The court subsequently held that it did not consider that the circumstances in which the secured loan was incurred are relevant, in general, to a determination of whether an order for execution against hypothecated property should be granted or not.<sup>113</sup> It furthermore disagreed<sup>114</sup> with the suggestion by Peter AJ in *Fraser* that a court should be more inclined to order execution in a matter in which the secured debt was incurred for the purpose of acquisition of the property than in a matter in which the debt was incurred for purposes unrelated to the acquisition or improvement of the property.<sup>115</sup> However, the court indicated that it is the duty of a court to act pro-actively to obtain whatever additional information might appear relevant for the purpose of consideration in terms of High Court Rule 46(1) if, in a peculiar case, some or other feature of the matter flashes warning signals.<sup>116</sup>

It remarked that defendant-debtors are the persons best informed and able to appraise the court of any circumstances regarding execution against the property that is their home that might result in an unjustifiable infringement of their section 26 rights.<sup>117</sup> The mere fact that the property concerned is the home of the defendant-debtor does not by itself justify an inference that section 26 rights are implicated. Thus, the court indicated that it is ordinarily for the defendant to alert the court of any facts or circumstances that implicate his or her section 26 rights.<sup>118</sup>

It further indicated that it is desirable that the court should be able to know from the summons whether or not the application for an order authorising execution against immovable property concerns property that is the defendant/judgment debtor's primary residence.<sup>119</sup> An appropriate allegation should therefore thus be included in the summons in matters in which a declaration of special executability is sought ancillary to judgment on the money claim.<sup>120</sup> In matters in which the plaintiff-creditor is unable to make such an allegation positively because of a lack of knowledge of the relevant facts that much should be stated in the summons. In cases which does not contain an allegation that the affected property is not the primary residence of the defendant the court will scrutinise the matter assuming that the property may be the defendant's primary residence unless it is clear from other indications in the papers that it is not so.<sup>121</sup>

The court also considered that it would assist the court in the discharge of its duty to examine applications for execution against immovable property that might be the defendant's home cautiously, if, in a case in which execution is sought against hypothecated property, the mortgagee plaintiff would, in cases in

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113 Para 23.

114 Para 24.

115 *Ibid.*

116 Para 25.

117 Para 26 with reference to the statement by Rogers AJ in *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd (no 2)* 2010 1 SA 634 (WCC) para 30 that "s 26 of the Constitution enshrines a right of access to 'adequate' housing, not a right to continue living in the house of one's choice even though one cannot afford it".

118 Para 26.

119 Para 27.

120 *Ibid.*

121 Para 27. The court subsequently held that matters in which the plaintiff is able to make the allegation that the property is not the primary residence of the defendant can still be disposed of by the registrar.

which the secured debt was repayable in periodic instalments, include in the summons allegations setting out the amounts of such instalments and the amount in which payment in terms of such instalments was in arrears at the time of the foreclosure or the issue of the summons.<sup>122</sup> In matters in which the amount in arrears was relatively low at the time of foreclosure the plaintiff should set out in its summons allegations which might support the resort to direct realisation of the security as reasonable and appropriate in the circumstances.<sup>123</sup>

Thus, the court held that allegations that execution against the hypothecated property would infringe the defendant/judgment debtor's rights or that the application for a writ of execution to issue is an abuse, should, in principle, be pleaded by the defendant or judgment debtor and any rebutting allegations by the plaintiff or judgment creditor.<sup>124</sup> It further held that High Court Rule 46(1)(a) in its current form does not give rise to any new substantive obligation on mortgagees seeking orders for execution against hypothecated property.<sup>125</sup>

The Supreme Court of Appeal recently had to consider the construction and order of the Constitutional Court in *Jaftha* again in *Mkhize v Umvoti Municipality*.<sup>126</sup> The question that arose in this matter was whether the order made in *Jaftha* in respect of section 66(1)(a) of the Magistrates' Courts Act requires judicial oversight in all cases of execution against immovable property or only in those where the debtor can establish an infringement or potential infringement of the right of access to adequate housing as protected by section 26(1) of the Constitution.<sup>127</sup> The court confirmed that it is only where the right of access to adequate housing is infringed by an order for execution against immovable property that a debtor is afforded protection against the sale of its home in execution as envisaged by *Jaftha*.<sup>128</sup> The court, however, held that judicial oversight is required in *all* cases of execution against immovable property conducted under section 66(1)(a) of the Magistrates Court Act.<sup>129</sup> It indicated that the sole object of such oversight is to establish whether the constitutional

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122 Para 29.

123 Para 29.

124 Para 30.

125 *Ibid.* It held that the proviso to the rule gives procedural effect to the constitutional requirement that execution against immovable property that is a judgment debtor's home may potentially entail an infringement of s 26 rights and must therefore occur only under judicial oversight. Apart from the compliance required with Practice note 33 of the Free State High Court in applicable cases, the procedural obligations which a mortgagee claiming an order that a writ of execution issue against the hypothecated property must satisfy are limited in the ordinary case to compliance with the *Saunderson* Practice Note. In addition, any applicant for an order of execution should comply, as far as it is practicable in the circumstances of the case, with the guidelines set out in paras 27–29 of *Bekker*.

126 2012 1 SA 1 (SCA). The plaintiff in this matter never resided in the uncompleted house on the property and also owned other properties. It was contended on his behalf that the judicial oversight in *Jaftha* was required in all cases of execution against immovable property in the magistrate's court regardless of whether or not the right to adequate housing was impaired.

127 Para 1.

128 Para 17.

129 The court indicated (para 19) that there is considerable force in the argument of Du Plessis and Penhold *Bill of Rights jurisprudence* 2005 ASSAL 27 77 81 and 2006 ASSAL 45 83 93 that the only way to determine whether the right to adequate housing has been compromised is to require judicial oversight in all cases of execution against immovable property on a case-by-case basis.

right of access to adequate housing was breached by the order granted and it is required also in the absence of formal opposition and where the debtor is in default or ignorant of his or her rights.<sup>130</sup>

In *Firstrand Bank Ltd v Powell*<sup>131</sup> the court required personal service of the High Court Rule 46(1) application for execution and was not satisfied with service at the defendant's chosen *domicilium citandi et executandi* where the plaintiff applied for execution against immovable property after it had obtained default judgment against the defendant.

Another development regarding the issue also recently occurred in *Nedbank Ltd v Jessa*<sup>132</sup> where it was held that the summons must, in addition to the *Saunderson* notice, include an appropriate notification to the defendant that he or she is entitled to place information regarding relevant circumstances within the meaning of section 26(3) of the Constitution and High Court Rule 46(1) before the court hearing the matter.<sup>133</sup>

Subsequent to *Jessa* a full bench was again constituted in the Western Cape High Court in *Standard Bank of South Africa Ltd v Abduraouf Dawood*.<sup>134</sup> In this matter the court had to consider whether a simple or a combined summons ought to be used in actions based on mortgage loans in respect of residential property where it is sought to have such property declared executable.<sup>135</sup> The court also had to consider whether the *Saunderson* notice ought to be amplified so as to include a reference to section 26(3) of the Constitution.<sup>136</sup> Finally it had to consider whether or not a plaintiff, in applications for default judgment involving a prayer for execution against residential property, should be required to set out "relevant circumstances" contemplated in *Gundwana* and the proviso to High Court Rule 46(1) by way of affidavit.<sup>137</sup> High Court Rule 17(2) requires the use of a simple summons in claims for debt or liquidated demand and the use of a combined summons in all other claims. The court held that it is not irregular to supply in a simple summons the particularity required in a combined summons.<sup>138</sup> It held that it is also not impermissible or irregular to use a combined summons in actions based on mortgage loans in respect of residential property where it is sought to have such property declared executable<sup>139</sup> but it declined to require as an absolute rule of practice that a combined summons invariably be used in matters of this kind.<sup>140</sup> The court further endorsed the suggestion in *Jessa* regarding amplification of the summons to contain a notification that the defendant is entitled to place information regarding relevant circumstances within the meaning of section 26(3) of the Constitution and High Court Rule 46(1) before

130 *Umvoti* para 19.

131 Unreported case no 9130/2011 (GSJ).

132 Unreported case no 6656/2011 (WCC).

133 This requirement was initially laid down in *Snyders supra*.

134 Unreported case no 15438/11 (WCC).

135 Para 3.

136 *Ibid*.

137 *Ibid*.

138 Para 7. The court remarked (para 8): "Nowadays, however the simple summons can no longer be regarded as merely 'a label to the claim', at least not where the NCA is applicable."

139 Para 14.

140 *Ibid*. See the reasons provided in paras 15–19 of the judgment.

the court hearing the matter. It also endorsed the view, expressed in both *Bekker* and *Jessa*, that “if it is intended to place additional facts before the court, they should be alleged in (the) plaintiffs summons and served on the defendant”.<sup>141</sup> In this regard the court, however, added the following two observations:<sup>142</sup>

“First, where a court dealing with an application to declare immovable property executable requires further information relating to any relevant circumstances that have not been specifically mentioned in the summons, it will be necessary and unavoidable to place such further information before the court by way of an affidavit by the creditor. In those circumstances the court will, of course, be astute to protect the rights of the defendant. Secondly, I have noted Blignaut J’s remark in *Jessa* that it offends against the *audi alteram partem* rule and the right to a fair hearing to grant default judgment on the strength of allegations contained in affidavits which have not been served on defendants and to which they have not had an opportunity to respond. *I have reservations as to the correctness of these views. In my view, a litigant who is in wilful default cannot be heard to complain that his or her fair trial rights have been infringed by a court deciding a case against them in their absence.* However, in the absence of full argument of the matter, I do not find it necessary, for purposes of this judgment, to express any final opinion in this regard.”

## 5 DISCUSSION

The constitutional right of access to adequate housing has now been procedurally entrenched in section 66(1)(a) of the Magistrates’ Courts Act as well as in High Court Rule 46(1). It has also been held that judicial oversight is required in all cases of execution against immovable property under section 66(1)(a) of the Magistrates’ Courts Act and it is safe to assume that the same legal sentiments would apply to execution against immovable property in accordance with High Court Rule 46(1).<sup>143</sup> From the above discussion of the various cases dealing with the issue of judicial oversight during execution against immovable property, it is however clear that there is no uniformity in the approach of the different courts towards the exercise of judicial oversight in the execution stage. Creditors in the Gauteng North High Court, for instance, appear to have a different procedural burden occasioned by the information which they have to disclose to court during the execution process than creditors in the Western Cape High Court. The High Court in Gauteng North, for instance, differs from the South Gauteng High Court on whether the protection in terms of section 26 of the Constitution is to be afforded to juristic persons who are the owners of immovable property. There is a divergence of opinion in the Cape and Gauteng on whether the evidence regarding “relevant circumstances” as indicated in section 26(3) has to be adduced by way of affidavit or whether it must already be alleged in the summons. The *Jafitha* and *Gundwana* judgments have, as has been indicated, retrospective effect. This in itself may not be conducive to legal certainty as creditors may be faced with, the often unfounded, but cumbersome and costly “resurrection” of matters that have been finalised a number of years ago such as in *Umvoti*.

In order to consider the impact of the right to adequate housing it is of course necessary, as a point of departure, to understand what the concept “adequate housing” essentially entails. In this regard it is submitted that it may at least be

141 Para 27.

142 Paras 28 and 29; my emphasis.

143 *Mkhize v Umvoti Municipality* 2012 1 SA 1 (SCA).

concluded that “adequate” means “sufficient” or, as indicated in *Grootboom*, “basic”. It is submitted that “adequate”, whilst implying that the housing should be “sufficient”, should be contextualised against the objective of section 26 of the Constitution which, it is submitted, was to impose a duty on the State to at least attempt to progress towards basic housing for all persons which it seeks to protect and that it was essentially motivated by the dire circumstances of poor debtors such as in *Grootboom* who were “homeless” squatters. It is a relative concept which requires a fact-bound enquiry.<sup>144</sup> It is submitted that the interpretation that has been afforded to the concept of “access to adequate housing” in many cases subsequent to *Grootboom* and *Jaftha* is too broad and that a more realistic approach would be that “access to adequate housing” does not necessarily imply that it is to be equated to “ownership” as a person can also be enjoying adequate housing in the form of rental property. In this regard it is submitted that the fact that a person is employed or has an earning capacity should be taken into account to determine whether such person is without access to adequate housing. Thus, a claim of access to “adequate” housing should not be abused to allow a person to stay in a luxury home or even a smaller home or a rented property if the person will not immediately be able to buy another property after his immovable property has been sold in execution. Where buying is no longer an immediate option, it is submitted that renting may constitute an alternative means of acquiring adequate housing. The possibility of applying for state-subsidised housing should also not be overlooked. As has been aptly remarked by Rogers AJ in *Standard Bank Ltd of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd (no 2)*:<sup>145</sup> “S(ection)26 of the Constitution enshrines a right of access to adequate housing, not a right to continue living in the house of one’s choice even though one cannot afford it.”

It is submitted that it should be borne in mind what the actual mischief was that was sought to be addressed by providing for judicial oversight during the execution process, namely that procedure should not be abused to render a person homeless and unable to obtain access to adequate housing. This accords with the requirement in section 26(3) of the Constitution that a person may not be evicted from his home without a court considering all the relevant circumstances. The question of course arises what the situation of the credit provider would be if, in an instance where the debtor is unable to pay the debt (which is not trifling but is actually for a considerable amount) at all in any other manner because he for instance lost his job and is unable to find another, there was no abuse of procedure but the result of execution against the debtor’s immovable property would still be to render the debtor homeless because he is not even in a position to afford to rent alternative housing and the sale of the immovable property which was his home will leave him with no proceeds in his own pocket due to a lack of equity in the property. In such instance, if one has regard to the remark of the court in *Gundwana* that “if there are no other proportionate means to attain the same, then execution cannot be avoided”<sup>146</sup> it would appear that the creditor would be able to sell immovable property that constitutes the home of a debtor even in instances where the debtor would then be deprived of his right of access to adequate housing. It may then be asked where the protection of the

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144 Para 20.

145 2010 1 SA 634 (WCC) para 30.

146 Para 22.

right of access to adequate housing lies. Or would it be regarded of a disproportionality of such a nature that the interests of the creditor, even though he may not have been wilfully dishonest or vexatious as was pointed out in *Bekker*,<sup>147</sup> will be subjected to the interests of the debtor? How fine is the line between abuse and disproportionality and is disproportionality necessarily abuse? Does the fact that a person is rendered homeless as a result of execution against his home constitute prejudice which is disproportional to the advantage to be gained by the creditor from the sale of such property? To conclude otherwise than the court did in the *Gundwana dictum* referred to above, would leave the creditor at a dead end, unable to sell the debtor's house in execution, at least until the debtor's position improves to such an extent that he is able to acquire access to other adequate housing. One may consequently ask whether this is fair towards a creditor who holds security over the home of the debtor as it is clear that such a scenario would effectively render the security useless and relegate the secured creditor to the ranks of concurrent creditors as he would practically be in no better position than they are.

Whilst one can agree that the execution process should not be abused by creditors who render indigent debtors such as *Jaftha* homeless (and unable to have access to adequate housing) in order to obtain payment of trifling debts it is submitted that sight should not be lost of the importance of the mortgage agreement in the economy and as a means of security. Stripping a mortgage agreement of its character as an instrument of security will serve no consumer's interest as it may in fact foreclose the mortgage market to many consumers who would not otherwise be able to acquire ownership of immovable property. It should also be kept in mind that mortgage agreements containing a special executability clause as they almost invariably do, contain a unique element as the debtor expressly agrees to the execution against his immovable property if he fails to honour his commitments, thus by implication expressly agrees to the limitation of his right of access to that specific immovable property. This is a limitation by agreement, not by law. Surely this is different from the situation where execution is levied against immovable property of a debtor who has not so agreed. The requirement imposed by certain courts that the creditor provider must adduce evidence to indicate there is no reasonable alternatives to obtain payment from the debtor other than by execution will now render this special executability clause in a mortgage agreement superfluous as the creditor will have to indicate that he attempted to obtain payment by other means such as for instance execution against movables or section 65 of the Magistrates' Courts Act or emoluments attachments. Without going into an elaborate discussion it can further be remarked that it is not difficult to see how the section 26-protection argument can spill over into insolvency law, upsetting the protection it currently affords secured creditors and that introduction of a general homestead exemption into our law might not be far-fetched.<sup>148</sup>

It must further be borne in mind that the right to adequate housing is not always compromised in every instance where immovable property is sought to be attached. The mere fact that a debtor loses his home as a result of a sale in execution does not necessarily imply that the debtor is thereby deprived of his

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147 Para 40.

148 See Van Heerden and Boraine 2006 *De Jure* 319. See further Els "An insolvent's right to access to adequate housing" 2011 October *De Rebus* 20.

right of access to adequate housing as the debtor, especially if he is employed and has an earning capacity, may be able to afford other adequate housing, even if he rents such property until such time as he is in a financial position to buy property again. Section 26(3) of the Constitution, however, specifically requires judicial oversight prior to the eviction of a person from his "home" due to the possibility that it may cause that person to lose his right of access to adequate housing. Where the immovable property sought to be executed against does not constitute the home of the debtor, the requirement regarding judicial oversight does not apply. Thus it is submitted that judicial oversight is not appropriate in all cases of execution against immovable property as there will be instances where the immovable property sought to be executed against is not any person's home, such as property that is clearly of a commercial nature or vacant land.

The drawback of the judicial oversight-requirement, apart from the fact that it entails a further costly application procedure, is that creditors and especially mortgagees are placed in a very onerous position as they now not only risk being deprived of their security but they are also subjected to various onerous procedural requirements regarding the furnishing of information that might not necessarily be within their peculiar knowledge. The ripple effect of this may be that credit providers in terms of credit agreements such as mortgage agreements and other agreements to which the NCA applies will now have to conduct elaborate assessments in accordance with section 81 of the NCA to ensure that they have some record of the information that a court may require of them when they get to the execution stage. It may also be asked what the purpose would then be of including a notice in the summons alerting the debtor of his section 26 rights and informing him of his duty to place information before the court that such rights are infringed if certain courts actually impose this onerous duty on the creditor. It is further submitted that insofar as the onus to provide information to the court in order to enable it to conduct judicial oversight over the execution process is concerned, the most realistic approach would be that it should be the debtor, being in a position where he is the person who has the more complete knowledge regarding his financial situation, who is to adduce evidence regarding abuse of process rendering him homeless and unable to have access to adequate housing and that in the absence of such allegation and substantiating evidence by the debtor, the court should only probe further into this aspect if, as remarked in, there are warning signals that abuse of process or serious disproportionality may be present. In this regard the remarks alerted to above, by the Supreme Court of Appeal in *Saunderson* regarding the onus where a constitutional right may be infringed is apposite.<sup>149</sup> It is further submitted that the overbroad approach by courts as to when the debtor's section 26(1) rights may be infringed by the execution process has given rise to reverse abuse in many instances where debtors employ this opportunity to stay in luxury homes or to retain ownership of immovable property when they, like the debtor in *Umvoti*, own numerous other properties and do not even stay in the property concerned.

The evidentiary burden imposed on the creditor in undefended cases also appears extremely onerous and has the effect that one may even speculate that it would in certain instances be better for the creditor from a procedural perspective where the matter is defended than where it is undefended. Absent procedural

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149 Para 20.

abuse, it is difficult to comprehend why a debtor who receives a summons informing him of his section 26-rights and who does not defend a matter should be afforded further protection by imposing onerous evidentiary burdens on the creditor. One can of course also ponder on the question whether the loaded evidentiary burden is not actually serving to hamper the creditor's constitutional right of access to court in terms of section 34 of the Constitution as it seems that the road to execution is paved with procedural impediments. The prospect of eventually being able to obtain execution against immovable property offers little consolation to the creditor who has to navigate his way through this procedural maze.

Another trend which is perceived is the emphasis that is being placed on the arrear amount when considering relevant aspects such as the amount of the debt. It is submitted that this approach effectively disregards the significance of acceleration clauses in credit agreements.

In respect of factors that are legally relevant to the question whether the court in a specific instance should order execution against immovable property, it is submitted that aspects such as the value of the mortgaged property and whether the debtor has an income are vitally important to decide whether the debtor will be rendered homeless as a result of the sale of the immovable property. It is, however, notable that neither *Jaftha* nor *Folscher* specifically lists the value of the property as a significant consideration.<sup>150</sup> The mere fact that the debtor will be without the home in which he lived at the time of execution does not necessarily mean that he is without access to adequate housing.

As has been remarked in *Bekker*, account should also, in those instances where the NCA applies to mortgage agreements and other credit agreements governed by the NCA be had to the extensive procedural protection afforded to mortgagees by requiring pre-enforcement compliance with sections 129 and 130 of the Act. It should be borne in mind that the protection afforded by the NCA is not merely procedural in nature but encompasses debt relief remedies relating to over-indebtedness and reckless credit as well. As such a debtor might for instance employ a debt review proposal in accordance with section 86(8)(b) in order to reschedule his mortgage agreement debt and come to an agreement with his credit provider that he may stay in his house as long as he pays in accordance with his proposal.<sup>151</sup> This wide range of protection should thus be considered as relevant factors for purposes of section 26(3). It is submitted that this very aspect may possibly trigger an equality debate given that a debtor who has for instance entered into a mortgage agreement governed by the NCA is privy to a far wider range of procedural protection and debt relief than a debtor whose home stands to be sold in execution in respect of a debt that falls outside the ambit of the NCA.

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<sup>150</sup> Obviously this aspect may be included in the list of relevant factors as indicated in *Jaftha*.

<sup>151</sup> The question whether a debt restructuring order as a result of debt review in terms of s 85 or 86 of the NCA by implication entitles a consumer to retain possession of the credit provider's security has not yet been definitively answered although it has been addressed in a few cases. It is, however, still possible for a debtor to reach a voluntary agreement with his credit provider in terms whereof he will be entitled to stay in a house despite the fact that he is under debt review.



As far as juristic persons as the owners of immovable property are concerned, it is indeed so that many of them fall outside the scope of protection of the NCA completely but then of course, due thereto that they have a significant asset value or annual threshold which puts them in the league of “big business”. Those smaller juristic persons that, however, do fall within the limited scope of application of the Act as set out in section 6 thereof are in a less advantageous position than a natural person who is a mortgagor as such juristic persons, although protected by the Act in a limited manner, are not eligible to the debt relief remedies in the NCA. In many instances immovable property which is held in the name of a juristic person is in fact the only home of natural persons and they may be rendered homeless. On the one hand it may be argued that, just to deprive a juristic person of the right of access to adequate housing merely on the basis that it is a juristic person does not seem to make sense where it actually transpires that the juristic person is but a mere vehicle through which a natural person-debtor enjoys his right of access to adequate housing. Clearly such a situation is very different from the situation where the juristic person has acquired property for commercial purposes or for instance as a holiday home as the right to adequate housing is not compromised in the latter instances. On the other hand, it may be argued that if a debtor chooses to buy his residential property by means of the vehicle of a juristic person which is obviously done to obtain the benefit of the “corporate veil” and such debtor should not be afforded the layered protection of section 26 of the Constitution as well. However, it appears artificial to reason that immovable property which is held by a juristic person, although it constitutes the home of natural persons, is not protected by the requirement of judicial oversight but that the same type of protection is not afforded where immovable property is specially hypothecated.

In the final instance, it may be remarked that the requirement of judicial oversight in all cases where execution against immovable property is concerned implies that, regardless of the nature of a debt, whenever a creditor issues a summons against a debtor, for instance where the creditor, as in *Jafftha*, sold vegetables which were not paid for, such summons should contain allegations informing the debtor of his rights in terms of section 26(1) and 26(3) of the Constitution if it is anticipated that a court may grant a judgment against the debtor which may eventually result in the sale of the debtor’s home should he be unable to satisfy the judgment debt. Many of these creditors may, however, have very little or any information regarding the financial situation of the debtor or whether the property they seek to execute against constitutes the debtor’s home which may impede their ability to execute against such immovable property .

## 6 CONCLUSION

It is submitted that the plethora of court cases on the impact of section 26(1) and (3) of the Constitution has had the unfortunate consequence of clearing up certain problematic aspects regarding the right of access to adequate housing but at the same time creating fragmented approaches in respect of others and consequently requires further judicial scrutiny in order to achieve legal certainty in respect of those matters where a divergence of opinion still exists. It is submitted that the concept of “access to adequate housing” requires further scrutiny as well as the question as to who should bear the onus to provide information to the court regarding possible infringement of the right of access to adequate housing due to the sale in execution of immovable property in satisfaction of a debt. The

extent of such onus also requires clarification. The application of the right of access to adequate housing to juristic persons who hold immovable property that constitutes the homes of natural persons also require further clarification and the impact of applying this right in the context of mortgaged property should be revisited.

Providing judicial oversight of the execution process in order to avoid persons being deprived of their access to adequate housing is indeed necessary. However, layering it with – often conflicting – procedure potentially has severe cost and time implications, with the result that in most instances it will be the debtor, whose rights are sought to be protected, who will have to bear the brunt of these costs, thus making it less probable that he will be in a financial position that would enable him to exercise his right of access to adequate housing.