COMPULSORY DEBT REORGANISATION IN SOUTH AFRICAN MORTGAGE LAW: A 'SHARING' REMEDY*

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Since the Jaftha *judgment about 15 years ago, South African mortgage foreclosure law has undergone dramatic changes in the light of the protection afforded to mortgage debtors against the unjustified limitation of their constitutional housing rights. Previously the approach of mortgage enforcement law was to give effect to the proven rights of creditors without much question, but* Jaftha *changed the approach to one where creative alternatives should be pursued before the home is sold only as a last resort. This contribution focuses on one of the major alternatives to normal foreclosure, namely the debt rearrangement order that can be granted to an over-indebted consumer as part of the National Credit Act's debt-review process. A particular aim is to link this compulsory debt reorganisation remedy with arguments made by Dyal-Chand with regard to so-called 'sharing' remedies based on an interest–outcome model. I therefore illustrate that debt rearrangement can be regarded as a 'sharing' remedy that does not solely focus on the parties' formal title to the mortgaged property, but indeed pays more attention to their respective interests in, and uses of, the property. This perspective can arguably help to uphold debtors' housing interests while also giving effect to creditors' economic interests.*

I INTRODUCTION

When a mortgage debtor defaults, the creditor's natural remedy is to foreclose against the property that serves as collateral for the loan. In South Africa, mortgage foreclosure is achieved by the creditor obtaining, first, a money judgment ordering the debtor to pay the full outstanding debt on the basis of an acceleration clause that renders the full capital debt due and payable upon default, and, secondly, a court order authorising the sheriff to attach and sell the property and to use the proceeds to discharge the outstanding judgment debt. Effective mortgage enforcement is a staple of any functioning real-estate financing system. It is also commonly accepted that effective credit security encourages financiers to lend large amounts at affordable rates, while also facilitating property ownership, especially home-ownership.

The necessary converse of the benefits of mortgage financing, of course, is that default can lead to the loss of the debtor's home. Worldwide, the loss-of-home dimension of mortgage foreclosure has become more acute in recent years, not least of which are the high foreclosure rates in the fallout of

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the 2008 global financial crisis. In the United States of America, for example, there have been calls to amend chap 13 of the Bankruptcy Code to lift restrictions on the modifying of residential mortgage debt.[1] The general theory is that many homes can potentially be saved if struggling debtors are permitted to restructure their mortgage debts by filing for bankruptcy.

The purpose of this contribution is to consider the situation in South African law where the National Credit Act 34 of 2005 ('NCA') provides a procedure in terms of which over-indebted consumers can apply to be placed in 'debt review' and can potentially have their debts rearranged while retaining their property. The process can include mortgage debts where the collateral is the debtor's home. Under the debt-review process, debt rearrangement is achieved by means of a court order that, on the advice of a debt counsellor, compels the creditor to accept modified repayment terms. The South African example is rendered particularly interesting because of the way in which constitutional housing rights have transformed the mortgage foreclosure procedure from one where it was a given that the creditor will 'win', to a process where it is expected that alternative remedies must be explored before the sale of the debtor's home is permitted, and then only as a last resort. In this respect the primary alternative remedy has, almost coincidently, transpired to be the debt rearrangement order in terms of the NCA.

In a broad sense, debt modification can include various strategies, such as changing the interest rate, reducing the principal debt to the value of the collateral or by otherwise imposing a partial debt discharge. However, as will be explained below, the main debt-modification remedy in South Africa involves a mere rearrangement of the debt — meaning that the repayment schedule is adapted to make the monthly instalments more affordable, by extending the repayment period. A reduction of the principal debt is only possible in certain limited situations, such as if the loan was granted recklessly. Despite the limited reach of the debt-rearrangement remedy, it has proven to be a useful (albeit imperfect) alternative to the judicial sale of homes under circumstances where a loss of home could be constitutionally suspect. In fact, the availability of this remedy, the increasing reluctance of courts to grant orders allowing the sale in execution of the home, as well as an exponentially cumbersome enforcement procedure, have led most mortgage creditors to

[1] See for example Liana Mikhlenko 'Fighting the foreclosure flu: A proposal to amend 11 USC sec 1322(b)(2) to authorize residential mortgage modification in bankruptcy' (2011) 15 *Chapman LR* 227; Susan E Hauser 'Cutting the Gordian knot: The case for allowing modification of home mortgages in bankruptcy' (2010) 5 *J of Business & Technology L* 207; Melissa B Jacoby 'Bankruptcy reform and the financial crisis' (2009) 13 *North Carolina Banking Institute* 115; Adam J Levitin 'Resolving the foreclosure crisis: Modification of mortgages in bankruptcy' 2009 *Wisconsin LR* 565; Eric A Posner & Luigi Zingales 'A loan modification approach to the housing crisis' (2009) 11 *American L & Econ R* 575; Alexandra P Everhart Sickler 'Mitigating the foreclosure crisis with bankruptcy mortgage modifications' (2008–2009) 9 *UC Davis Business LJ* 85.

offer in-house alternatives to their clients before resorting to formal debt collection.

In addition to setting out the developments in South African mortgage law pertaining to the impact of a debtor's housing rights and the debt-rearrangement remedy as a foremost mechanism to save homes from foreclosure, this article attempts to link these developments with Rashmi Dyal-Chand's arguments regarding an interest–outcome model for seeking 'sharing' — as opposed to 'exclusionary' — remedies in property disputes.[2] In the context of finding the appropriate remedy for a dispute concerning property, Dyal-Chand argues for greater emphasis on seeking so-called 'sharing' remedies that are fashioned to give effect to the parties' interests in, and uses of, the property, as opposed merely to basing the remedy on the parties' respective title (or lack thereof) to the property. The latter approach would almost certainly lead to the granting of an exclusionary remedy where there is a clear 'winner' and 'loser', whereas the former seeks a middle way in terms of which the parties can, as it were, 'share' the property. Hence, a sharing of the property would mean that the outcome of the dispute is based on an attempt to give effect to the parties' true interests in, and uses of, the property. Solely focusing on title (in other words, the parties' formal rights) leaves little room for 'sharing', while an investigation into interests and uses arguably opens up interesting avenues for a more balanced and efficient remedy, and which also takes broader social factors into account.[3]

Therefore, my ambition in this contribution is to apply this 'sharing' perspective to the developments in mortgage foreclosure law in South Africa. I aim to show that compulsory debt reorganisation, if designed carefully, creatively, and within constitutional bounds, can amount to a valuable 'sharing' remedy with an outcome that is potentially more in step with the actual interests of the parties involved than the traditional rights/title-based foreclosure remedy that has the sale of the home as its default outcome.[4] Importantly, I do not mean for this perspective to be a pro-debtor initiative, but rather hope to show that the interests of both debtors and creditors can be served appropriately by viewing debt reorganisation in light of the sharing model.

In part II an explanation is provided of how South African mortgage law has changed as a result of the rights contained in the constitutional housing clause, and I particularly focus on the pivotal role that a seminal Constitu-

[2] Rashmi Dyal-Chand 'Sharing the cathedral' (2013) 46 *Connecticut LR* 647.

[3] For good summaries of Dyal-Chand's 'sharing' argument, see also for example A J van der Walt 'Sharing servitudes' (2015) 4 *European Property LJ* 162 at 162–4; Z T Boggenpoel *Property Remedies* (2017) 29–33.

[4] Therefore, this contribution builds on research that I have previously published on the impact of housing rights and consumer credit law on the mortgage foreclosure process in South Africa; see especially Reghard Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (unpublished LLD dissertation, Stellenbosch University, 2012); Reghard Brits *Real Security Law* (2016) 68–100 (and other sources cited there).

tional Court judgment has had in this regard. Also, this discussion will show how the court's pronouncements regarding the foreclosure remedy have initiated a new way of thinking that is reminiscent of Dyal-Chand's 'sharing' ideas. In effect, the point is to illustrate how 'sharing' has become constitutionally mandated in South African mortgage law. In part III the discussion then moves to the main debt-modification remedy in South Africa, namely the debt-rearrangement order that can be granted in terms of the NCA. As part of this analysis I also briefly explain how debt modification is not without limits. In fact, in as much as it is constitutionally necessary, it is also constitutionally constrained — and it is within this tension that an appropriate debt reorganisation remedy ought to be designed. Part IV then explains in more detail how I envision debt reorganisation as a 'sharing' remedy in South African mortgage law.

II THE SHIFT IN DIRECTION IN MORTGAGE ENFORCEMENT LAW

(a) Introduction

The discussion that follows pivots on the influential 2004 judgment of the Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Stoltz*,[5] since it represents the point at which South African law experienced a fundamental shift in direction when it comes to debt enforcement and execution against residential property. It set the tone for all the developments that were to follow in case law and statutory law.

The main point I take from the judgment is how the court used the constitutional protection of housing rights to introduce a shift in philosophy when it comes to deciding on the appropriate remedy in a debt-enforcement case that involves a home. The court rejected the formalistic approach of regarding debt enforcement against homes as a mere procedural mechanism that gives effect to a creditor's contractual and security rights. In the place of the conventional formalistic approach, which went virtually unchallenged up until that point, the court laid the foundation for a more context-sensitive approach, which is reminiscent of the arguments Dyal-Chand makes for an interest–outcome model and the notion of 'sharing' in property remedies.

(b) A general summary of the debt-execution process

Assuming a loan agreement in terms of which the debt must be repaid in instalments, the South African debt-enforcement and execution process can generally (and without going into every detail) be summarised as follows.[6] When a debtor commits a breach of contract (typically by falling in arrears

[5] 2005 (2) SA 140 (CC) ('*Jaftha* (CC)').

[6] These debt-execution procedures are set out in the Uniform Rules of Court (also known as the High Court Rules) (especially rules 45–6), the Magistrates' Courts Rules (especially rules 41–2) and the Magistrates' Courts Act 32 of 1944 (especially ss 61–79).

with his or her agreed repayment obligations), this triggers the creditor's right immediately to reclaim the full outstanding debt under the acceleration clause. Because the debt becomes due and payable at this point, the creditor may apply for a judgment that orders the debtor to pay accordingly. If the judgment is granted and the debtor cannot satisfy it, the creditor may execute the judgment against the debtor's assets.

If the debt is unsecured, the creditor must first seek to attach the debtor's movable property. The clerk of the magistrate's court or the registrar of the high court will issue the relevant warrant (or writ) of execution authorising the sheriff to attach and sell the assets at a public auction. If there is no (or insufficient) movables to discharge the judgment, the sheriff will issue a return indicating such insufficiency. The creditor can then apply to the clerk or registrar for a warrant of execution against the debtor's immovable property. If the immovable property is residential, court authorisation is required to have it attached and sold in execution. In other words, execution targets first movables, then immovables. The only exception to this sequence is if the court grants an order declaring the immovable property specially executable. The effect is that direct execution against the immovable property is permitted, which renders it unnecessary to seek execution against movables first. This exception typically applies if the immovable property in question serves as security for the repayment of the relevant debt.[7]

(c) The position before 2004

Before the Constitutional Court's 2004 judgment in *Jaftha*, South African debt-enforcement and insolvency law provided little to no meaningful substantive protection for a mortgage debtor against the loss of his or her property. As explained above, if the debtor committed a breach of contract by defaulting on his repayment obligations, the typical result was that the bank relied on its right to accelerate repayment of the entire outstanding capital debt, which inevitably culminated in the sale of the property. This remedy was so powerful that the bank's decision to foreclose could not be overturned — not even by getting the arrear amounts up to date.[8]

During the whole process there was no meaningful opportunity for the debtor to force a stay,[9] or to receive some kind of relief in the form of, for instance, a reorganisation of the debt. The law clearly favoured giving effect to the proven contractual and proprietary rights of the mortgage creditor, with no opportunity for the debtor to resist the creditor's claims on the basis of, for example, his housing rights or other socio-economic considerations.

[7] *Gundwana v Steko Development* 2011 (3) SA 608 (CC) para 37. See also *Gerber v Stolze* 1951 (2) SA 166 (T) at 171–2; *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) paras 12ff.

[8] See for example *Boland Bank Ltd v Pienaar* 1988 (3) SA 618 (A); *TG Bradfield Coastal Properties (Pty) Ltd v Toogood* 1977 (2) SA 724 (E) at 730.

[9] The stay on execution when a sequestration order is granted under the Insolvency Act 24 of 1936 represents only a temporary reprieve, since the property will ultimately still be sold.

No alternative procedure or remedy was available for a struggling debtor who, for instance, might have only needed a small adjustment to his or her payment plan, or a temporary breather. A relatively minor exception was (and still is) the administration order that can be granted under s 74 of the Magistrates' Courts Act ('MCA') to rearrange a debtor's debts, but this option is only available if the debtor's total (not only mortgage) debt is R50 000 or less.[10] Although it may be that there are struggling mortgage debtors with total outstanding debts low enough to qualify, this procedure is not a realistic option for the vast majority of home-owning mortgage debtors. Of course, it was open to mortgage creditors to provide voluntary programmes in this regard, but the point is that there was no such legal obligation to pursue any recourse other than formal debt enforcement and execution.

Furthermore, the Insolvency Act has not ever provided any exception for a debtor's home or any kind of modification regarding the debt secured by a mortgage over the primary residence.[11] Therefore, except for a possible voluntary modification, compromise or refinancing agreement entered into between the debtor and his or her bank, there was no formal opportunity for a mortgage debtor to receive a modification or reprieve of any sort.

The debt-execution process was also so mechanical that, under certain circumstances, the law did not require a court to grant the relevant order. If a debtor failed to appear to defend against the creditor's enforcement action, the clerk of the magistrate's court or the registrar of the high court could grant a judgment by default and issue a warrant of execution against the property. Neither of these officials are judicial officers, but in such instances it was deemed unnecessary for a magistrate or judge to hear the case because — on the assumption that the debtor had no reasonable defence — there was nothing of substance to decide on. In effect, the enforcement and execution of the debt was regarded as a mere procedural matter.[12]

Another problematic aspect of the process (and which was only addressed in late 2017)[13] was the fact that there was little to no regulation regarding the price at which a property could be sold at a public auction. The secured creditor(s) could set a reserve (minimum) price, but could waive it if the set price was not reached at the auction. However, neither the debtor nor the court could insist on a minimum price. As a result, it often happened that properties were sold at prices that were significantly and unconscionably below market value. This loophole meant that speculators could (and often did) snatch up properties at bargain prices to then re-sell them at huge

[10] See GN R1411 *GG* 19435 of 30 October 1998.

[11] Compare for example Lienne Steyn 'Treatment of a debtor's home in insolvency: Comparative perspectives and potential developments in South Africa' (2013) 22 *Int Insolv Rev* 144; R G Evans 'Does an insolvent debtor have a right to adequate housing?' (2013) 25 *SA Merc LJ* 119.

[12] See *Standard Bank of SA Ltd v Snyders* 2005 (5) SA 610 (C) paras 20–2.

[13] With the addition of rule 46A in the High Court Rules and rule 43A in the Magistrates' Courts Rules; see GN R1272 *GG* 41257 of 17 November 2017. These rules now grant the court the power to set a reserve price based on certain factors.

profits.[14] Sometimes the banks themselves would buy the properties and re-sell them.[15]

At that point in time, consumer credit law also had little impact on the mortgage industry. None of the consumer credit statutes in place[16] applied to mortgage loans in any noteworthy manner. The NCA, which does apply to mortgage loans, was adopted in 2005 but only became fully operative in 2007.[17]

In other words, by the mid-2000s the prevailing philosophy behind the enforcement and execution of mortgage loans was essentially limited to the theory that 'where there is a right there is a remedy' (ubi ius ubi remedium).[18] If the creditor could show a valid contractual right to claim payment of the moneys owed, could rely on a valid right of mortgage to execute the debt against the relevant property, and if the debtor could not raise any defence strong enough to undo the creditor's rights, then the court would inevitably grant the creditor its requested remedy without more.

The possible defences that a debtor could raise were very limited. Basically, the debtor's only options were to show that he or she did not breach the loan agreement, or perhaps that the creditor failed to follow the procedural rules. A defence that did not directly negate the creditor's right could therefore not succeed. The fact that the debtor and his or her family would be left homeless was not a mitigating factor.

Arguments in favour of the strict enforcement of creditors' rights in the mortgage context are usually based on the common logic that we need to give effect to creditors' rights and allow them to enforce their security against the relevant property, otherwise they will stop making funds available for people to buy property or their losses will be passed down to consumers in the form of higher costs.[19] This accepted wisdom is a strong argument in a creditor's arsenal, but it is also not a false assertion of the economic realities surrounding real estate financing. The problem is that an overemphasis of this assumption inevitably leads to the handing down of binary remedies with a clear winner and a clear loser, instead of allowing room for alternatives that could still give effect to the economic interests of mortgage lenders. In the

[14] See for example R Brits 'Sale in execution of property at unreasonably low price indicates abuse of process: *Nxazonke v ABSA Bank Ltd* [2012] ZAWCHC 184 (4 October 2012)' (2013) 76 *THRHR* 451.

[15] See for example *ABSA Bank Ltd v Bisnath NO* 2007 (2) SA 583 (D) at 589 and the discussion by Susan Scott & Eric Dirix 'Calling up a mortgage bond of immovable property' (2009) 73 *THRHR* 575 at 591–7.

[16] For example the Credit Agreements Act 75 of 1980; the Usury Act 73 of 1968; the Alienation of Land Act 68 of 1981.

[17] See part III below.

[18] See for example *Nedcor Bank Ltd v Kindo* 2002 (3) SA 185 (C) at 187.

[19] See also Lorna Fox *Conceptualising Home: Theories, Laws and Policies* (2007) 12, 79–80, 122–8, who makes similar observations and criticises the 'creditor must win' assumption in English law.

next part I discuss how these assumptions were shook to the core by a series of developments inspired by the housing clause in the Bill of Rights.

(d) The Jaftha *case*

(i) *Background*

A striking example of the gaps in the debt-enforcement system explained above was revealed by the facts in *Jaftha* where, on the authority of default judgments and warrants of execution issued by the clerk of the magistrate's court, miniscule unsecured debts were sought to be enforced by having state-subsidised housing of vulnerable persons sold at prices far below market value. The case was taken all the way to the Constitutional Court on the primary contention that the process was unconstitutional due to the failure to protect debtors' housing rights. Before discussing the case in more detail, it is necessary to provide a brief summary of the housing clause and its application to the sale in execution of a home. Since an expansive explanation is not possible or necessary here, the following summary is admittedly cursory.

The Constitution of the Republic of South Africa, 1996 is formally categorised as the supreme law of the country.[20] Chapter 2 of the Constitution contains the Bill of Rights, which includes numerous provisions pertaining to rights such as equality, freedom of speech, political rights and so forth. The Bill also contains several socio-economic rights such as housing, health care and social security.

The Bill of Rights 'applies to all law' and it 'binds the legislature, the executive, the judiciary and all organs of state'.[21] The Bill is not only binding on the state but it also applies directly to natural and juristic persons to the extent that the nature of the right or duty can be applied to such private persons.[22] Furthermore, when any statute is interpreted or when the common law is developed, this must be done in accordance with the spirit, purport and objects of the Bill of Rights.[23] In other words, private law (including mortgage law) must also conform to the rights in the Bill.

Section 26 of the Constitution — the housing clause — stipulates as follows:

> '(1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> (3) 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. No legislation may permit arbitrary evictions.'

A full discussion of everything this section entails is not possible or

[20] Section 2 of the Constitution.
[21] Section 8(1).
[22] Section 8(2).
[23] Section 39(2).

necessary here.[24] To summarise, subsecs (1) and (2) read together place a duty on the state, within its financial means, to provide housing to the homeless. However, it has become generally accepted that subsec (1) also entails a negative duty — not only on the state, but on all persons — not to limit someone's existing access to adequate housing.[25] However, a home occupier's right not to be disturbed in his or her access to adequate housing is not absolute, since the Constitution also allows for the valid limitation of most rights in the Bill.

In this regard, s 36 of the Constitution stipulates that a right in the Bill (including the right contained in s 26(1)) 'may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.[26] It then lists five non-exhaustive factors that must be taken into account when evaluating whether the limitation is reasonable and justifiable, namely the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and — most pertinently — whether there exists less restrictive means to achieve the said purpose.[27] It is generally accepted that the justification enquiry involves a strict proportionality test,[28] which has also been confirmed with reference to the judicial sale of a home.[29]

Therefore, ss 26(1) and 36(1) read together add an additional layer to the debt-enforcement process when it comes to deciding whether to grant an execution order against a residential property. In addition, s 26(3) prohibits the eviction from a home without the authority of a court order, and furthermore requires that such an order may be granted only after having considered all the relevant circumstances of the case. It also states that no law may permit the arbitrary eviction from a home.[30]

Although the Constitution came into effect in 1997, the above-mentioned provisions were not applied to — or even considered in — the debt-enforcement context until 2003 when *Jaftha* reached the high court. Instead, the emphasis was on the application of the housing rights in the context of unlawful occupiers of land. Special statutes were also enacted to

[24] For general discussions of the housing clause, see for example Kirsty McLean 'Housing' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* vol 4 Revision Service 6 (2014) ch 55; Geraldine van Bueren 'Housing' in M H Cheadle, D M Davis & N R L Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed Service Issue 24 (2018) ch 21.

[25] See for example *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 32; *Jaftha* (CC) supra note 5 para 34; *Government of the Republic of South Africa & others v Grootboom* 2001 (1) SA 46 (CC) para 34.

[26] Section 36(1).

[27] Section 36(1)*(a)*–*(e)*.

[28] See for example *S v Makwanyane* 1995 (3) SA 391 (CC) para 149; *S v Manamela (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) para 32.

[29] *Gundwana* supra note 7 para 54; *Jaftha* (CC) supra note 5 paras 36, 40–2.

[30] For more detail on how the housing clause applies in the mortgage context, see Brits *Real Security Law* op cit note 4 at 68–100.

give effect to s 26(3) of the Constitution and thus to regulate the orderly procedures for evicting someone from land, most notably the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (the 'PIE Act').[31] But none of this ever came up in cases involving debt-execution measures against homes. It was however decided that, when ownership of a home is lost due to foreclosure, the PIE Act must be followed when seeking to evict the previous owner,[32] but housing rights never came up in the actual foreclosure and execution stage of the process.

(ii) *The facts of* Jaftha

The judgment concerned two cases with similar facts involving Ms Jaftha and Ms Van Rooyen respectively.[33] Ms Jaftha was unemployed, poor and had health problems that prevented her from working. She lived with her two children in a home she acquired with the help of a state housing subsidy. She borrowed a small sum of money (R250) that had to be repaid in instalments. When this unsecured debt was not repaid, the creditor took judgment against her in the magistrate's court for the escalated amount of R632.45. For reasons unclear, the claimed amount subsequently escalated to R7000, despite her having made some payments. After she was compelled to vacate the property, it was sold in execution for R5000 despite probably being worth much more.

Ms Van Rooyen found herself in a similar situation. She was unemployed, had three children, and was poor and uneducated. She inherited the property from her husband who had acquired it with the help of a state subsidy. Ms Van Rooyen purchased vegetables on credit for around R190. When she was unable to pay this debt, the creditor obtained a judgment against her and subsequently her home was sold in execution for R1000 (also significantly below market value).

A lawyer from Cape Town had heard of the two women's predicament and assisted them to launch proceedings in the high court. The most important aspect of their case was their plea to have certain sections of the MCA declared unconstitutional because it permitted the sale in execution of people's homes under circumstances where their right to have access to adequate housing[34] would be unjustifiably limited.

The essence of the problem with the MCA, especially s 66(1)*(a)*, was that under certain conditions it allowed the whole process to go through without proper judicial oversight.[35] The theory is that proper judicial oversight would ensure that homes are only sold in execution if the ensuing limitation

[31] Other examples include the Extension of Security of Tenure Act 62 of 1997.

[32] See for example *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA).

[33] The following summary of the facts is based on *Jaftha* (CC) supra note 5 paras 3–5. See also *Jaftha v Schoeman; Van Rooyen v Stoltz* 2003 (10) BCLR 1149 (C) paras 2–10 ('*Jaftha* (C)').

[34] Section 26(1) of the Constitution; see part II(d)(i) above.

[35] See part II(c) above.

of the debtor's housing rights would be justifiable under all the circumstances of the case. It would furthermore be the judge or magistrate's duty to make the necessary evaluation and exercise a proper judicial discretion on the facts of the case. As explained below, the Constitutional Court ultimately agreed with this supposition regarding the role of judicial oversight in upholding debtors' housing rights.

(iii) *The high court's judgment*

The high court[36] took a rather formalistic approach to the challenges raised against the MCA. The court acknowledged that, as the facts of these cases illustrate, the court processes can be abused by unscrupulous creditors to sell their debtors' homes for less than their market value to satisfy relatively minor debts. However, the court found that this did not render the relevant provisions in the Act unconstitutional as such.

Regarding the possible violation of the debtor's housing rights, the high court found that it was not the debt-enforcement and execution proceedings that violated their housing rights. If, after the home is sold, the debtor voluntarily vacates, the loss of home is due to the exercise of the debtor's own free will. However, should the debtor refuse to leave the property, the purchaser (new owner) would have to apply for an eviction order, and thus would have to comply with the procedures and requirements in the PIE Act. Hence, so the reasoning went, the eviction and loss of home would only come about as a consequence of the separate eviction process in terms of the PIE Act and not as a result of the debt-execution process under the MCA. In other words, the loss of home is not caused by the debt-execution procedure as such, but by the subsequent (and separate) eviction action.

The court reasoned that, because the housing clause protects home occupation and not home ownership, the housing clause is not implicated when the house is sold in execution and transferred to the buyer. Although s 26(3) of the Constitution requires judicial oversight when someone is sought to be evicted from their home, the court essentially reasoned that an execution order is technically not an eviction order, and therefore no judicial oversight is required at the execution stage of the process.

(iv) *The Constitutional Court's judgment*

Unlike the high court, the Constitutional Court did not draw a strict distinction between the execution process and the eviction process, but in effect it regarded the execution machinery itself as forming part of the broader process that leads to the debtor's loss of home.[37] It concluded that 'any measure which permits a person to be deprived of existing access to

[36] This summary of the high court's judgment derives from *Jaftha* (C) supra note 33 paras 46–7.

[37] See also *Changing Tides 17 (Pty) Ltd NO v Erasmus; Changing Tides 17 (Pty) Ltd NO v Cleophas; Changing Tides 17 (Pty) Ltd NO v Frederick* [2009] ZAWCHC 175 para 7.

adequate housing limits the rights protected in [s] 26(1)' but qualified that this 'measure may, however, be justified under [s] 36 of the Constitution'.[38]

The court clearly endorsed a broad definition of the kind of actions ('any measure' — not just an eviction in the technical sense) that could implicate the housing clause. The court then focused on the circumstances under which such a violation could be justifiable — in other words, the substantive test for when a home can be sold in execution. One of the key factors was the size of the debt, and the court emphasised that this factor is not relevant for determining whether s 26(1) is violated; rather it is relevant when establishing the justification of such violation.[39] Regarding the justification test, the court deduced from s 36 of the Constitution (which sets out the rules for justifying a violation of a right in the Bill of Rights)[40] that 'the nature of the right and the nature and extent of the limitation are of great importance when weighed against the importance of the purpose of the limitation'.[41]

The purpose of the limitation of the debtor's access to adequate housing in this context is, in sum, the effective enforcement of debt.[42] The court accepted this as undoubtedly a valid and important purpose, but contrasted this purpose with the severe limitation of the debtor's housing rights caused by the lack of judicial oversight in s 66(1)*(a)* of the Act.[43] Indeed, 'the trifling nature of the debt' diminished 'the importance of the purpose'.[44] The court reasoned that

> '[i]t is difficult to see how the collection of trifling debts in this case can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated, possibly permanently, especially where other methods exist to enable recovery of the debt'.[45]

However, the court emphasised that the size of the debt is not the only factor, since it might nevertheless be justifiable to sell the house in view of all the circumstances. Although

> 'it will ordinarily be unjustifiable for a person to be rendered homeless where a small amount of money is owed, and where there are other ways for the creditor to recover the money lent ... [t]here might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighs the harm caused to the debtor'.[46]

In other words, the court stressed that the process of deciding whether a home should be sold in execution 'must be seen as a balancing process'.[47] For example, the sale might be unjustifiable if 'the advantage that attaches to a

[38] *Jaftha* (CC) supra note 5 para 34.
[39] Ibid para 35.
[40] See part II(d)(i) above.
[41] *Jaftha* (CC) supra note 5 para 36.
[42] Ibid para 37.
[43] Ibid paras 39–40.
[44] Ibid para 40.
[45] Ibid.
[46] Ibid paras 41–2.
[47] Ibid para 42.

creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor'.[48]

The court concluded that s 66(1)*(a)* of the MCA was 'so broad that it permits sales in execution to occur without judicial intervention and even where they are unjustifiable' because '[s]o long as the possibility exists within the legislative scheme for sales in execution to occur in circumstances where debtors' rights have been unjustifiably violated, the scheme is overbroad'.[49] Regarding the appropriate way to remedy the situation, the court reasoned as follows:

> 'An appropriate remedy should be sufficiently flexible, therefore, to accommodate varying circumstances in a way that takes cognisance of the plight of a debtor who stands to lose his or her security of tenure, but is also sensitive to the interests of creditors whose circumstances are such that recovery of the debt owed is the countervailing consideration, in a context where there is a need for poor communities to take financial responsibility for owning a home.'[50]

The court therefore settled on introducing judicial oversight as the appropriate way to remedy the constitutional defect in the MCA because it would allow a judicial officer 'to consider all the relevant circumstances of a case to determine whether there is good cause to order execution', which would then prevent 'the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act'.[51]

In addition to establishing the need for judicial oversight, the Constitutional Court gave guidance as to how a court is to exercise its discretion during its oversight over the execution process. The central principle was expressed as follows:

> '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 that 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 likely to render the judgment debtor and his or her family completely homeless.'[52]

[48] Ibid para 43.

[49] Ibid para 48; see also paras 44 and 52.

[50] Ibid para 53.

[51] Ibid para 55. The other remedies referred to are those in ss 62 and 73 of the Magistrates' Courts Act. The former allows a debtor to apply for the setting aside of a warrant of execution upon good cause shown and the latter allows the debtor to apply for an administration order that allows the repayment of his or her debts in instalments. See paras 46–9.

[52] *Jaftha* (CC) supra note 5 para 56.

The court furthermore made mention of what the approach should be if the debt originated in a mortgage loan:

> 'If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.'[53]

The court finally referred to the need to seek alternative measures that 'might allow for the recovery of debt but do not require the sale in execution of the debtor's home'.[54] This aspect is especially important for the purpose of this article because it set the scene for the debt-rearrangement remedy that was to be introduced afterwards. At the point in time when *Jaftha* was decided, there was no meaningful debt-restructuring mechanism available to debtors, except for the administration order that could be granted to debtors with a total debt of R50 000 or less. [55] However, the court nevertheless referred to this option and explained that 'the concept of paying off the debt in instalments is important and the practicability of making such an order must be ever present in the mind of the judicial officer when determining whether there is good cause to order the execution'.[56] The following conclusion of the court regarding its task to find an appropriate solution in each case, is particularly enlightening:

> 'The balancing should not be seen as an all or nothing process. It should not be that the execution is either granted or the creditor does not recover the money owed. Every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort.'[57]

This statement reveals the Constitutional Court's instinct towards finding a 'sharing' remedy that could result from an interest–outcome model in terms of Dyal-Chand's arguments. The formalistic rights/title-based model that was the norm pre-*Jaftha* would mean that 'execution is either granted or the creditor does not recover the money owed' — in other words without any alternative middle ground. However, henceforth the Constitutional Court expects execution to be the last resort and thus no longer the default position, despite the fact that execution is the natural remedy to give effect to the mortgagee's rights. It is arguably rather radical to deny the granting of a natural remedy that is traditionally expected to be the first choice and, in its place, to establish the seeking of 'creative alternatives' as the default course of action. From both a practical and doctrinal perspective, South African law is still coming to grips with the implications of this new approach to resolving mortgage foreclosure cases.

[53] Ibid para 58.
[54] Ibid para 59.
[55] Section 73 of the Magistrates' Courts Act; see part II(c) above.
[56] *Jaftha* (CC) supra note 5 para 59.
[57] Ibid.

In summary, the *Jaftha* judgment essentially requires that a creditor's right to have the property sold in execution can only be upheld by a court if the outcome would be justifiable on the basis of a strict proportionality test. Hence, for a creditor it is no longer enough to prove a valid contractual right to receive payment and a valid security right with respect to the relevant property. This is the case since the enforcement of these rights is not dependent on the objective validity of these rights alone but more so on the effect that their enforcement would have on the debtor. Even if the right is valid, and even if the creditor's entitlement to enforce the right has been triggered, the court will not enforce it if the creditor's purpose (interest) is not proportionate to the effect on the debtor.

(e) The aftermath of Jaftha

Much has happened in the years since *Jaftha*. For present purposes I only provide a brief overview to round off the context. As can be imagined, the *Jaftha* judgment led to legal uncertainty because it was not clear how far-reaching the judgment would be for the every-day business of mortgage lending and enforcement. Because the facts of *Jaftha* involved such exceptional situations and because it dealt with the procedure in the magistrates' courts, it was not clear whether it should have any impact on normal mortgage enforcement cases brought before the high courts. Early high court decisions after *Jaftha* went back and forth on these questions.[58]

The Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson*[59] attempted to stabilise the situation. It laid down a practice rule that, when suing for foreclosure, the creditor must inform the debtor of the latter's rights under the housing clause, allowing the debtor the opportunity to argue why his or her rights will be unjustly violated by the sale of his or her home.[60] However, the court did not require judicial oversight in all instances. It decided to allow the registrar of the court to continue granting default judgments and execution orders, unless the facts indicated that a violation of housing rights is at stake, in which case the registrar had to refer the matter to a judge.[61] The court also did not believe that there was a strong prospect that a mortgagee's remedy could ever be impacted by a debtor's housing rights.[62]

Despite the Supreme Court of Appeal's assumption that housing rights would rarely impact normal mortgage cases, several subsequent cases placed this assumption in doubt. Some cases arose where the relatively small size of the default amounts led the courts to decide that it would be unjustifiable to

58 See for example *Snyders* supra note 12; *Mortinson* supra note 7.
59 2006 (2) SA 264 (SCA).
60 Ibid para 25.
61 Ibid paras 22–4.
62 Ibid para 19.

have the homes sold in execution.[63] A degree of certainty came when, in 2010, High Court rule 46(1)*(a)*(ii) was amended expressly to require judicial oversight over all cases where a judgment debtor's home is sought to be sold in execution, and also in mortgage cases.[64] Soon afterwards, in 2011, the Constitutional Court in *Gundwana v Steko Development*[65] confirmed that the principles laid down in *Jaftha* also apply in mortgage cases brought before the high courts. In addition to affirming the need for judicial oversight,[66] the court confirmed the need to apply a proportionality test and to seek alternatives before selling the home as a last resort.[67]

In the years since *Gundwana* and the changes to rule 46, numerous further cases have been handed down by the high courts, and many of them have provided useful insights as to the interpretation and application of the new legal regime.[68] In addition to the changes to the court rules and the principles set out in the case law, some divisions of the high court have also issued practice guidelines to help facilitate the adjudication of foreclosure cases.[69] A practice that has become particularly common is to postpone the creditor's application for about six months to allow the parties time to devise an alternative solution or for the debtor to settle the arrears.[70] The court rules were also amended again in 2017 to provide more detailed procedural requirements for debt-execution cases that involve residential property.[71] As explained below, however, the most important legal development was arguably the enactment of the NCA in 2005.

The purpose of the foregoing discussion was not to provide a detailed overview of current mortgage foreclosure law, since that would be impossible, but to illustrate how *Jaftha* has brought about serious changes — not only to the procedure but even more so to the philosophy surrounding a mortgage creditor's remedy. The main lesson from that judgment is the Constitutional Court's insistence that all-or-nothing remedies should be avoided in favour of an approach where creative alternatives to the sale of the debtor's home are sought first. In the next part I discuss how the NCA has provided such an alternative, which — although not perfect — represents a 'sharing' remedy that seeks to give effect to both parties' respective interests in the property.

[63] See for example *ABSA Bank Ltd v Ntsane* 2007 (3) SA 554 (T); *FirstRand Bank Ltd v Maleke* 2010 (1) SA 143 (GSJ).

[64] GHN R981 *GG* 33689 of 19 November 2010.

[65] Supra note 7.

[66] Ibid paras 38–41.

[67] Ibid paras 53–4.

[68] Highlights include *Nedbank Ltd v Fraser* 2011 (4) SA 363 (GSJ); *FirstRand Bank Ltd v Folscher* 2011 (4) SA 314 (GNP); *Standard Bank of South Africa Ltd v Bekker* 2011 (6) SA 111 (WCC).

[69] A prominent example is ch 10.17 of the Practice Manual of the Gauteng Local Division of the High Court of South Africa (16 February 2018).

[70] See for example *FirstRand Bank Ltd v Mdletye* 2016 (5) SA 550 (KZD); *FirstRand Bank Ltd t/a First National Bank v Zwane* 2016 (6) SA 400 (GJ).

[71] GN R1272 *GG* 41257 of 17 November 2017, introducing High Court rule 46A and Magistrates' Courts rule 43A.

III DEBT REORGANISATION IN TERMS OF THE NCA

(a) Background

The NCA was enacted in 2005 to replace some outdated statutes[72] and to introduce a new consumer credit regime in South Africa.[73] The Act covers a range of facets, such as the establishing of a new National Credit Regulator as well as rules regarding the conclusion of credit agreements, unlawful contractual terms, pre-contractual affordability assessments, remedying the consequences of reckless lending, the requirements and procedures for enforcing credit agreements and — most notably for present purposes — a novel debt-review process aimed at providing relief for over-indebted consumers.[74]

One of the differences between the new and old regimes is that the NCA applies to mortgage loans as well, which was not the case with previous statutes. Along with the constitutional and procedural developments described above, the Act has significantly changed mortgage law. For example, a bank must now do a pre-agreement affordability assessment to ensure that the loan is affordable, failing which the consumer has certain remedies at his or her disposal.[75] Furthermore, when a bank seeks to enforce its rights, a more strenuous procedure must be followed. For instance, in addition to the normal procedural debt-enforcement rules, the consumer must now also be specifically notified of his or her default and given an opportunity to purge the default, apply for debt review or approach an alternative dispute resolution agent.[76] Another innovation is a right included in the Act for a debtor to remedy the default and thereby to 'reinstate' the credit agreement to a position as if there had never been a default.[77]

The most significant impact of the NCA on mortgage law is that a mortgage debtor (as credit consumer) can apply for debt review if he or she is over-indebted, and in so doing can possibly obtain relief in the form of a debt rearrangement order which reorganises his or her repayment plan. Importantly, this remedy is not merely an exceptional measure but is of general application, and has consequently become a normal feature of consumer mortgage law in South Africa.

[72] Such as the Credit Agreements Act 75 of 1980 and the Usury Act 73 of 1968.

[73] See in general the Department of Trade and Industry's report that preceded the promulgation of the Act, *Making Credit Markets Work: A Policy Framework for Consumer Credit* (2004).

[74] For detailed discussions of the Act, see for example J W Scholtz et al (eds) *Guide to the National Credit Act* Service Issue 9 (2017); J M Otto & R-L Otto *The National Credit Act Explained* 4 ed (2016); Michelle Kelly-Louw *Consumer Credit Regulation in South Africa* (2012).

[75] See ss 80–4; see further R Brits 'The National Credit Act's remedies for reckless credit in the mortgage context' (2018) 21 *PELJ* 1.

[76] Section 129(1).

[77] Section 129(3)–(4).

(b) Over-indebtedness

Defaulting on a mortgage loan is logically the result of being unable to pay according to the terms of the loan agreement, which in turn is likely the result of having more debt than what one can service optimally. Of course, intentional refusals to pay can also happen, but for present purposes it will be assumed that most defaults result from the debtor being in a state of 'over-indebtedness'. The NCA defines 'over-indebtedness' — and only with reference to debts arising from credit agreements to which the Act applies — as follows:

> 'A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's —
> *(a)* financial means, prospects and obligations; and
> *(b)* probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.'[78]

It is notably one of the main aims of the NCA to both prevent and remedy consumer over-indebtedness.[79] The natural supposition is that, if indebtedness levels are kept under control and consumers are prevented from becoming financially over-committed, foreclosure rates should remain within manageable bounds as well. There are two pillars through which the NCA seeks to achieve lower levels of over-indebtedness — ex ante by preventing unaffordable loans, and ex post by providing relief to those who have become over-indebted.[80]

One of the obvious ways to prevent mortgage default and foreclosure is to ensure that the borrower is able to afford to repay the loan in the first place. It is also one of the assumptions of the NCA that unaffordable borrowing is a recipe for consumer over-indebtedness and should therefore be avoided.[81] The Act seeks to achieve this goal by requiring that a pre-agreement affordability assessment must be done before a loan is granted.[82]

The second pillar of the fight against over-indebtedness involves debt relief provided to consumers who find themselves unable to service their debts. These include consumers who have fallen victim to reckless lending but also those who could initially afford to conclude the credit agreement but thereafter fell into financial difficulty.

[78] Section 79(1).
[79] Section 3*(g)*.
[80] For a detailed discussion of the NCA's debt relief measures, see C van Heerden 'Over-indebtedness and reckless credit' in J W Scholtz et al (eds) *Guide to the National Credit Act* Service Issue 9 (2017) ch 11.
[81] Section 3*(c)*(ii).
[82] Sections 81–2.

(c) The debt-review process

The debt-review process begins when the consumer approaches a debt counsellor to apply to be declared over-indebted.[83] The debt counsellor must then notify all the consumer's creditors of the application,[84] from which point on there will be a moratorium on any debt-enforcement action for the period in which the debt counsellor conducts the investigation.[85] During this time the consumer may also not conclude further credit agreements, but if he or she does, these new debts cannot be rearranged or declared reckless.[86]

A debt review cannot include a debt if the particular creditor has already commenced formal court proceedings by issuing summons to enforce the debt.[87] Therefore, for a debtor to rely on debt review to achieve the reorganisation of a mortgage debt, the application to the debt counsellor must be made before any foreclosure proceedings commence. However, debt relief is not completely impossible after the commencement of debt-enforcement proceedings, since the court has a discretion to refer the matter to a debt counsellor or summarily to provide debt relief itself.[88] All that is required is for the consumer to allege his or her over-indebtedness before the court in any proceeding concerning a credit agreement. Notwithstanding this door through which a debtor can enter debt review after commencement of debt-enforcement action, experience has shown that courts are very strict with the exercise of this discretion.[89] The better option therefore is to apply for debt review before the bank commences with legal steps to enforce the mortgage. However, the availability of debt review after enforcement has begun is an important way to ensure that worthy cases are referred to a debt counsellor, despite the consumer's failure to apply for debt review on time. For instance, it is arguable that if it reasonably appears that debt review could lead to a feasible reorganisation that would save the home, then the court should seriously consider referring the matter to a debt counsellor first, before allowing foreclosure to go ahead.[90]

During the debt-counselling process, the debt counsellor must evaluate the debtor's affairs and make a recommendation regarding his or her level of indebtedness, whether or not he or she is over-indebted as meant in the Act, as well as whether any of the credit agreements appear to be reckless.[91] If the

[83] Section 86(1).

[84] Section 86(4)*(b)*(i).

[85] Section 88(3).

[86] Section 88(1), (5).

[87] Section 86(2).

[88] Section 85.

[89] For a summary of the case law on this discretion, see Van Heerden op cit note 80 ch 11.3.3.5.

[90] R Brits & A J van der Walt 'Application of the housing clause during mortgage foreclosure: A subsidiarity approach to the role of the National Credit Act (part 2)' 2014 *TSAR* 508 at 515–16; Reghard Brits 'Sale in execution of mortgaged homes may not result in arbitrary deprivation of property' (2013) 29 *SAJHR* 536 at 550–1.

[91] Section 86(6).

debt counsellor concludes that the consumer is not over-indebted, the application must be rejected (even if there appears to have been reckless credit involved).[92] In such instances, the consumer may apply directly to the magistrate's court for a debt rearrangement order.[93]

If the debt counsellor concludes that the consumer is not over-indebted but is experiencing, or is likely to experience, difficulty in satisfying all his or her obligations timeously, the counsellor may recommend that the consumer and his or her credit providers should voluntarily consider and agree on a debt rearrangement plan.[94] If the consumer and each relevant credit provider accept the debt counsellor's proposal, the counsellor must record the proposal and file it as a consent order with the magistrate's court.[95]

If the debt counsellor concludes that the consumer is indeed over-indebted, the debt counsellor must make a recommendation to the magistrate's court regarding the granting of an order that one or more of the relevant credit agreements be declared reckless, and/or that the consumer's obligations be rearranged.[96] The NCA provides four ways in which a consumer's obligations can be rearranged: (1) by extending the period of the agreement but reducing the amount of each instalment; (2) by postponing the dates on which instalments under the agreement are due; (3) by extending the period of the agreement and postponing the dates on which instalments are due; or (4) by recalculating the consumer's obligations.[97]

If the debt counsellor makes a proposal to the magistrate's court, or if the consumer applies directly to the court, a hearing must be held and, after considering the proposal and any other information before it, the court may reject the case or it may declare the agreement reckless and/or grant an order rearranging the consumer's obligations accordingly.[98] Significantly, the debt rearrangement order may not include a discharge or reduction of the debt. The interest rate may also not be amended, unless the parties have specifically agreed to this themselves.[99] Indeed, the Act states that debt rearrangement must place 'priority on the eventual satisfaction of all responsible consumer obligations under credit agreements'.[100] Hence, the repayment plan will be reorganised in a way that renders the payment plan more affordable, but ultimately everything must still be paid.

[92] Section 86(7)*(a)*.
[93] Section 86(9).
[94] Section 86(7)*(b)*.
[95] Section 86(8)*(a)*.
[96] Sections 86(7)*(a)*(i)–(ii), 86(8)*(b)*.
[97] Section 86(7)*(a)*(ii)*(aa)*–*(dd)*. The fourth option only applies if chap 5 parts A–B or chap 6 part A of the Act were contravened. These provisions refer, for example, to situations where the contract contained unlawful provisions, if certain pre-agreement disclosures were not made, if proper collection practices were not adhered to etc.
[98] Section 87(1)*(a)*, *(b)*(i)–(ii).
[99] On the general prohibition see *Nedbank Ltd v Norris* 2016 (3) SA 568 (ECP); *Nedbank Ltd v Jones* 2017 (2) SA 473 (WCC). That this may be relaxed if the parties agree, see *Pettenberger-Perwald v Vosloo & others* 2018 (5) SA 206 (WCC).
[100] Section 3(i).

The debt-enforcement moratorium during the debt-review process[101] may not go on in perpetuity, since the credit provider can have the debt review terminated after 60 business days have lapsed without an application being filed at a court or tribunal.[102] The moratorium will also end if the debt counsellor rejects the application for debt review or if, upon such rejection, the consumer fails to apply to court directly within 20 days after receiving notice that the debt counsellor rejected the application;[103] if the court determines that the consumer is not over-indebted, rejects the debt counsellor's proposal or rejects the consumer's direct application to court;[104] or if the consumer fulfils all the obligations under the debt rearrangement order.[105] Significantly, and in addition, the moratorium will end if the consumer defaults on any obligation under the rearranged payment plan.[106] The implication of the latter rule is that the debt rearrangement order offers a once-off alternative to normal foreclosure and therefore if it fails to help the consumer to avoid further defaults, normal foreclosure is permitted to go ahead.[107] In other words, debt rearrangement is the consumer's second chance: but there will be no third or further chances to save his or her home from the creditor's foreclosure remedy[108] (unless there is another reason for the court to deny the creditor's application for an execution order).

If a credit agreement is declared reckless, the relief that the consumer receives could, under appropriate circumstances, go further than a mere reorganisation of the debt repayment plan. Without going into detail, in addition to a normal debt rearrangement and depending on the kind of reckless credit involved, the force and effect of the agreement can be suspended for a certain period (during which time no payments need to be made and no further debt accumulates) and/or the consumer's obligations can (either in part or in full) be set aside — hence a discharge.[109] Although the latter kind of discharge is not granted regularly, it has been done, and could thus effectively save the debtor's home from foreclosure.[110]

It should be noted that the debt-review process has not been free of criticism, and some doubts have also been expressed as to whether it currently goes far enough to provide adequate relief for over-indebted

[101] Section 88(3).

[102] Section 86(10). However, s 86(11) empowers the court to order that the debt review should resume on conditions deemed just under the circumstances.

[103] Section 86(3)*(b)*(i) read with s 88(1)*(a)*, s 86(9) and reg 26(1) of the National Credit Regulations in GN R489 in *GG* 28864 of 31 May 2006.

[104] Section 86(3)*(b)*(i) read with s 88(1)*(b)*.

[105] Section 86(3)*(b)*(i) read with s 88(1)*(c)*.

[106] Section 86(3)*(b)*(ii). The repayment plan will not revive if this default is remedied; see *FirstRand Bank Ltd formerly known as First National Bank of Southern African Ltd v Fester* [2011] ZAWCHC 363 para 4.

[107] See especially *Ferris v FirstRand Bank Ltd* 2014 (3) SA 39 (CC).

[108] See also *Jili v FirstRand Bank Ltd t/a Wesbank* 2015 (3) SA 586 (SCA) para 30.

[109] Section 83 of the NCA; for more detail, see Brits op cit note 75.

[110] See especially *ABSA Bank Ltd v De Beer* 2016 (3) SA 432 (GP).

consumers.[111] For purposes of the argument I make in this contribution, it is not necessary to extrapolate on any of these criticisms or to address them. I take for granted that there are practical hiccups with the debt-review process and its outcomes, and that there is room for improvement. The lack of any kind of discharge, except in cases of reckless lending, could probably also be reconsidered (especially if this does not detract from what the creditor would have received in a normal sequestration procedure). Notwithstanding this, my aim here is not to advocate for specific reforms to the current debt-review regime, but merely to show that debt reorganisation as presently envisioned by the NCA is an example of a remedy that can be explained in terms of Dyal-Chand's 'sharing' theory. In fact, viewing debt rearrangement in this light could arguably help to improve its use and efficacy, and might provide a foundation upon which to consider possible reforms.

(d) The constitutional boundaries of debt reorganisation

Another element that should be added to this matrix is the legal implications of a debt modification for the creditor's contractual and proprietary rights. Indeed, there has been a debate in the US context regarding whether the modification of the rights of specifically secured creditors could be unconstitutional for amounting to a 'taking' without compensation of the creditor's property as contemplated in the Fifth Amendment to the US Constitution.[112] Without expressing any views on the US position, in the South African context one could similarly ask what the implications are, if any, of a compulsory debt modification (whether a discharge or mere rearrangement) for the creditor's rights under s 25 (the property clause) of the South African Constitution. To keep the length of this contribution within bounds, I express my views on this matter only briefly and on the basis of a few assumptions that cannot be justified here in full.[113]

Section 25(1) of the Constitution provides that '[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property'.[114] For s 25(1) to apply, someone must be *deprived* of *property* under the authority of a legal rule. Furthermore,

[111] See for example M Roestoff '*Ferris v Firstrand Bank Ltd* 2014 3 SA 39 (CC): Enforcement of a credit agreement after breach of a debt rearrangement order and the ineffectiveness of debt review in terms of the National Credit Act' (2016) 49 *De Jure* 134 and the other authors referred therein; Lienne Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* (unpublished LLD thesis, University of Pretoria, 2012) 163–5.

[112] See for example Charles J Tabb 'The bankruptcy clause, the fifth amendment, and the limited rights of secured creditors in bankruptcy' 2015 *Univ of Illinois LR* 765; J P Forrester 'Bankruptcy takings' (1999) 51 *Florida LR* 851; James Steven Rogers 'The impairment of secured creditors' rights in reorganization: A study of the relationship between the Fifth Amendment and the Bankruptcy Clause' (1983) 96 *Harvard LR* 973.

[113] See also Brits *Mortgage Foreclosure* op cit note 4 para 6.4.

[114] On the property clause in general, see A J van der Walt *Constitutional Property Law* 3 ed (2011).

the right in s 25(1) is only limited if the law in question permits an *arbitrary* deprivation of property. For present purposes, the question therefore is whether the NCA's provisions on debt rearrangement authorise a *deprivation* of the creditor's *property* and, if so, whether this deprivation is *arbitrary*.

In a recent publication I analysed this question in detail with specific reference to the remedies granted to a debtor when the creditor was found guilty of reckless lending, such as the suspending of the agreement for a period, the setting aside of all or some of the debtor's obligations and/or the restructuring of the debt.[115] Although the focus of that inquiry was narrower than the present one, the general thrust of those conclusions can apply to other instances of debt modification too. In what follows I briefly summarise my general understanding of how the property clause applies to creditors' rights and the modification thereof.

In addition to the fact that limited property rights (like a security right of mortgage) are commonly accepted to qualify as *property* for constitutional purposes,[116] there is strong authority that the property concept also includes a personal claim for the payment of a sum of money.[117] In other words, one can fairly easily assume that a mortgage creditor's rights (the contractual claim for repayment and the security right itself) qualify as property deserving of protection under the property clause. Supposing then that the creditor holds property by virtue of the mortgage transaction, the next question is whether a compulsory debt rearrangement order *deprives* the creditor of its property. The standard definition of a deprivation of property was formulated by the Constitutional Court as 'any interference with the use, enjoyment or exploitation of private property'.[118] Although there is some debate as to how extensive the interference must be to qualify as a deprivation,[119] one can at least accept that it must be 'significant enough to have a legally relevant impact' on the right holder's use and enjoyment of the property.[120]

[115] Brits op cit note 75.

[116] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 51 ('property' includes rights in property); see also Brits op cit note 75 at 16–17 and the other sources listed there at notes 85–8.

[117] See especially *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) (recognising an enrichment claim as 'property'); *Chevron SA (Pty) Ltd v Wilson t/a Wilson's Transport* 2015 (10) BCLR 1158 (CC) para 16 (recognising moneys paid to a creditor as 'property'); see also *Cherangani Trade and Invest 107 (Pty) Ltd v Mason NO* 2011 (11) BCLR 1123 (CC) para 8; *Cool Ideas 1186 CC v Hubbard* 2014 (4) SA 474 (CC) para 38 as well as Brits op cit note 75 at 17–18 and the other sources cited there at notes 89–90.

[118] *First National Bank* supra note 116 para 57.

[119] See for example the more restrictive definition in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v Member of the Executive Council for Local Government and Housing, Gauteng* 2005 (1) SA 530 (CC) para 32.

[120] *Opperman* supra note 117 para 66; see also *South African Diamond Producers Organisation v Minister of Minerals and Energy NO* 2017(6) SA 331 (CC) paras 42–8.

For present purposes it is assumed that a debt modification (of any kind) probably qualifies as a legally significant interference with the exploitation of the creditor's rights — although the degree of interference will vary from case to case and will depend on the particular remedy involved. However, it is important to consider that there is nothing objectionable about a mere deprivation of property, since the regulation of the use of property in the public interest is natural in democratic societies. Instead, the deprivation is only constitutionally problematic if it is *arbitrary* as contemplated in s 25(1). Without providing a comprehensive explanation of the test to determine arbitrariness, the basic definition is that a deprivation is arbitrary if the law in question 'does not provide sufficient reason for the particular deprivation in question or is procedurally unfair'.[121]

The procedural fairness element of the test will probably not be problematic in the context of a debt rearrangement order, since the NCA requires that it should be approved by a magistrate after holding a hearing at which the creditor's interests will be represented. This conclusion is bolstered by the fact that the court will have a discretion regarding the appropriate order.[122] The 'sufficient reason' element represents the substantive part of the inquiry where, in sum, the purpose of the deprivation must be compared to the effect thereof on the right holder. The aim is to evaluate whether — all things considered — the deprivation is constitutionally justifiable. Depending on the circumstances and various factors (which are not listed here), the strictness of this evaluation will vary on a sliding scale, with a mere rationality test on the one end, and a stricter proportionality test on the other.[123]

Without exploring this dimension in any greater detail, my purpose for adding this perspective to the present discussion is to establish a constitutional basis for balancing the need for debt modification with the legitimate rights of credit providers. I do not argue that the property clause should stand in the way of debt modification and reorganisation initiatives. Instead, I contend that the arbitrariness test in the property clause can serve as a tool to help design the most appropriate remedy for each instance, because it can give guidance with respect to how far a rearrangement order is permitted to go before it becomes illegitimate — when its effect becomes irrational or out of proportion with its purpose. Therefore, in the spirit of 'sharing', as I explain below, not only do both parties have formal rights and use interests in the property, but both also have constitutionally protected rights with regard to the mortgaged property.

Another point that should be considered is that a debt modification will very often amount to little more than a recalibration that merely reflects the true commercial value of the mortgage transaction for the creditor. In other

[121] *First National Bank* supra note 116 para 100.

[122] The presence of a judicial discretion is regarded as a key component of procedural fairness; see for example *Opperman* supra note 117 paras 69, 76; *Chevron* supra note 117 paras 22–4.

[123] See *First National Bank* supra note 116 para 100(a)–(g).

words, if the debt modification involves nothing more than a pricing down of the creditor's asset to its true market value, the associated deprivation of property (if one can even call it that under such circumstances) can hardly be regarded as arbitrary. In fact, the kind of modifications contemplated here will rarely cause greater losses for a creditor than would a normal foreclosure or sequestration. Put another way, the purpose of the property clause is not to insulate persons from losses resulting from the normal business risks associated with making investments in a particular market.

On the other hand, a debt modification might become arbitrary if the modification goes further than a realistic pricing down related to the market value of the transactions or what the creditor would have received in an insolvency sequestration procedure. (However, the market value of the transaction should also not be overstated, since this is not the central measure when it comes to determining the level of arbitrariness; it is just one factor that should help with the analysis.) Moreover, if the consumer's over-indebtedness resulted from the creditor's blameworthy lending practices, the relief granted via a debt modification can probably go further than in cases where no reckless lending took place, but even there the relief should generally not go further than what is necessary to rectify the negative consequences of the creditor's behaviour.[124]

Hence, a debt modification should ideally remove the debtor from a position of 'over-indebtedness' — either immediately or at least incrementally over a period of time — but it should in general not go further than this by for instance unjustifiably enriching the debtor at the creditor's expense.

IV DEBT REORGANISATION AS 'SHARING'

In this part I provide more specifics about how I conceptualise the South African debt rearrangement remedy in terms that correspond to Dyal-Chand's interest–outcome model for 'sharing' in property law.

Over the course of a mortgage transaction the mortgagor and mortgagee both hold property rights in the asset. According to trite property-law doctrine, the mortgagor holds ownership, while the mortgagee holds a real security right — both being rights in rem. If the mortgagee's right to foreclose is activated (when the debtor defaults), the mortgagor's ability to rely on ownership as against the mortgagee is basically removed, since ownership is inherently limited by the mortgagee's security right. In other words, if — based solely on the parties' respective title to the property relative to each other — a court had to decide whether to authorise the foreclosure and sale of the property, the mortgagee must necessarily win. The reason for this is that it has the stronger title to the property. The Supreme Court of Appeal has usefully described the effect of a mortgage by explaining that the mortgagor

[124] Brits op cit note 75 at 22 and 24.

'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.'[125]

In this view, the mere fact that the mortgagor is the owner is not enough to overcome the mortgagee's reliance on its security right. When a debtor fails to repay the debt according to the terms of the loan agreement, and if the creditor elects to call up its security, the traditional title-based remedy demands that the property must be attached and sold. The court can only deny the creditor its remedy if there is some flaw in its title. In other words, the available options will be that the creditor either wins or loses depending on whether or not the title represented by its security right is valid and the correct procedure is followed.[126] Focusing on the parties' respective private-law rights to the property generally does not provide any other options. This perspective is in line with the traditional pre-*Jaftha* approach to mortgage enforcement that was described above.

However, if, instead of this rights-based approach, a more interest/use-based approach was to be adopted, the choice of outcomes might be more diverse than the win/lose dichotomy presented otherwise. Instead of focusing only on the respective property rights of the parties, one would then also investigate their true interests in, or uses of, the property. Pulling back the veil of their formal rights (ownership versus mortgage), how is the property really used, and what are the parties' respective intentions for it?

As explained above, the developments regarding housing rights in South Africa have provided a more concrete way to define the mortgagor's use of and interest in the property, without the need solely to fall back on his or her formal (and inherently limited) title to the property. In addition to the equity in the property (the market value minus the amount owed to the mortgagee), the mortgagor's main interest rests in the fact that the property is his or her home. In South Africa we have the conceptual benefit that home occupation is not just a social or emotional commodity, but is constitutionally protected in its own right — and not as a mere accessory to ownership or some other formal right.[127] Significantly, the Constitutional Court has confirmed that the mortgaging of a residential property, although limiting the debtor's

[125] *Saunderson* op cit note 59 para 2. See also *Lief NO v Dettmann* 1964 (2) SA 252 (A) at 259; *Rothschild v Lowndes* (1908) TSC 493 at 498; *Stewart's Trustees & Marnitz v Uniondale Municipality* (1889) 7 SC 110 at 112.

[126] Another defence against the creditor's claim might be to show an 'abuse of right' or 'abuse of process', but in the pre-*Jaftha* era these concepts did not play a significant role in assisting mortgage debtors. Post-*Jaftha* the notion of an abuse of the debt-execution process has become more pronounced, but it is usually linked to the effect of the process on the debtor's housing rights, especially where the arrears are relatively small; see for example *Gundwana* supra note 7 paras 44 and 48; *Fraser* supra note 68 para 22; *Folscher* supra note 68 para 40.

[127] See especially *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) paras 19–23.

ownership, does not amount to a waiving of the debtor's protections under the housing clause.[128] This means that, unlike the formal title (ownership) to the land (which is inherently limited by the mortgage), the debtor *can* raise his housing rights as a defence against the mortgagee's foreclosure action.

This naturally complicates the court's task, since it puts into question the legitimacy of the win/lose dichotomy. The reason for this is that, according to the broader perspective of the parties' interests in and uses of the property, both of them have valid and enforceable rights to the property. Thus, a simple win/lose choice is not so easy to make. As explained above also, the court must undertake a proportionality test to determine whether it would be justified to limit the debtor's right of access to adequate housing in favour of enforcing the creditor's foreclosure right. For instance, the property should only be sold if it is the last resort. The problem is that this inquiry still takes place in a win/lose dichotomy, except that the decision has been made more complex. Moreover, even in situations where it seems that the house should not be sold, one cannot simply deny the creditor's legitimate claims either. Therefore, the next step is to search for an alternative middle ground in terms of which the parties can 'share' the property in accordance with their respective interests in or uses of it. As explained above, *Jaftha* requires an approach like this in order to give proper effect to the housing clause in debt-enforcement litigation.

After understanding the debtor's interest in the property — which is economical (the equity in the asset, if there is any) and social/constitutional (housing, but also dignity, and any other relevant interests) — one must similarly look behind the mortgagee's formal title to discern its true interest in or use of the property. Generally, a mortgage creditor has no interest in owning, occupying or otherwise physically using the property. Ultimately the mortgagee's only interest rests in retrieving its investment and having the property serve as collateral to mitigate the risks associated with loan repayment. Having the property attached and sold serves no intrinsic purpose for the mortgagee other than facilitating the economic aim of receiving repayment of the loan. Because its primary use of the property is not necessarily dependent on the immediate sale of the property, this might therefore open up the opportunity, in some instances at least, to design an alternative remedy that enforces the creditor's true interests without in the process removing the debtor's use of the property. Indeed, in certain circumstances, a forced sale of the property could amount to an overkill in that it goes far beyond what is necessary to satisfy the creditor's interests. In this sense, a court-ordered debt reorganisation, if designed creatively, could be a more balanced remedy in terms of which the parties 'share' the property and according to which constitutionally unacceptable disproportionality is

[128] *Gundwana* supra note 7 para 44.

therefore avoided. In other words, one might achieve an outcome that is more in line with the parties' true interests in and uses of the property.[129]

A remedy like this would naturally involve compromises on the part of both parties. Under the NCA's debt-review scheme, the creditor's compromise is found in the delayed retrieval of its investment — not receiving payment in accordance with the payment plan to which the parties initially agreed and for which they planned. However, as mentioned above, the Act does not envision any discharge or reduction in the interest rate, so at the end of the day the creditor should in principle retrieve everything owed to it, albeit over a longer period of time. And since interest will continue to accumulate, the longer period should not — in theory at least — impact on the creditor's profit margins. In any event, to the degree that debt review might negatively impact the creditor's bottom line, it is likely that foreclosure or sequestration would have resulted in an even lower return than receiving payment according to a reorganised payment plan. As mentioned above also, it is likely that the modification of the payment terms merely reflects the correct market value of the transaction.

On the other side of the coin, the debtor's compromise is found in the fact that a longer repayment period will end up costing him or her more due to the continued accrual of interest. In exchange, however, the debtor does not lose his or her home but is given a period of reprieve in which he or she should ideally evaluate his or her overall financial prospects. For instance, the debtor should consider selling the property on the private market or devise plans to increase his or her income and thus increase the mortgage payments. In other words, a reorganisation of the mortgage debt will not always be a long-term solution, but for the debtor it creates some breathing space and affords opportunities to deal with over-indebtedness problems in a way that is less extreme than foreclosure, while also accommodating the creditor's interests.

V CONCLUSION

In the South African context, the presence of a debt reorganisation remedy is constitutionally mandated by the limits that the housing clause places on the creditor's foreclosure remedy. This is demonstrated most clearly by the Constitutional Court's insistence in *Jaftha* that alternative remedies should be sought before a home is attached and sold — and that one should not be limited by a win/lose type of thinking when it comes to finding a solution. However, the ambit of a debt rearrangement order is also constitutionally constrained in that the property clause prohibits arbitrary interferences with

[129] Another way to look at it is to seek a remedy in the tension between two important social values, namely the value of having a home (which is protected in terms of — for example — the constitutional housing clause and certain other statutory measures) and the value of complying with contractual duties (which is facilitated through the effective enforcement of debt through the court processes): see for example *Fraser* supra note 68 para 17.

creditors' property and contractual rights. In other words, in addition to their 'normal' ownership and security rights, both the debtor and creditor have constitutionally protected interests in the mortgaged asset. While the debtor's housing interests are protected under the housing clause (s 26 of the Constitution), the creditor's economic interests are protected as 'property' under the property clause (s 25).

It should be stressed that it is not my observation that South African mortgage law has moved (or should move) from a pro-creditor to a pro-debtor approach. It is fairly clear that the mortgage enforcement system was largely pro-creditor pre-2004, but I do not believe that the developments thereafter have had the effect (or should have the effect) of swinging the pendulum towards the other extreme. The commercial realities of real estate financing and the banking industry remain at the forefront, but my point is that these interests are (or should be) neither superior nor subordinate to the housing and other social interests of debtors. In fact, I argue that there can be room for both sets of interests and that a formal debt rearrangement remedy presents such an opportunity — hence an opportunity for 'sharing'.

A traditional foreclosure remedy that results in the loss of a home will very often be the constitutionally appropriate remedy, and economically the only feasible way to enforce the creditor's claims. The respective rights/title of the mortgagor and mortgagee are also not irrelevant; they are just not the full story. Very often the private-law rights of the mortgagee must simply be enforced as is — where no 'sharing' is possible and thus where the rights-based approach and the interest–outcome approach generally lead to the same conclusion. In my view, debt review provides a valuable (but probably not the only) practical tool through which to make the above determination. If no debt rearrangement plan is feasible in light of both parties' interests, then a foreclosure sale of the property is most likely justifiable. However, there may be instances (perhaps more than we think) where a debt rearrangement order could lead to an outcome that upholds the mortgagee's economic interests in the transaction, while also retaining the debtor's interests in, and uses of, the asset.