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Statutory regulation of forced sale of the home in South Africa

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ABSTRACT

The home of a debtor has never enjoyed specific statutory protection against forced sale in the individual debt enforcement and insolvency procedures in South Africa. In *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* (2005 (2) SA 140 (CC)) and *Gundwana v Steko Development CC and Others* (2011 (3) SA 608 (CC)), the Constitutional Court recognised that in the individual debt enforcement process execution against a debtor's home, even where it has been mortgaged in favour of a creditor, may constitute an unjustifiable infringement of the right to have access to adequate housing, provided by section 26 of the Constitution. The effect of these decisions is that, in every case in which a creditor seeks to execute against a person's home, a court must consider "all the relevant circumstances" to determine whether execution is justifiable, in terms of section 36 of the Constitution.

The absence of a properly constructed framework, incorporating clear substantive and procedural requirements, within which these recently established principles must be applied, has led to divergent approaches in the courts and a lack of clarity regarding circumstances in which execution against a debtor's home will be permitted. Further, courts have not considered the impact of section 26 and other rights on the position where a debtor's home is realised by the trustee of an insolvent estate in terms of the Insolvency Act 24 of 1936. This has given rise to a number of unanswered questions as well as to a lack of predictability that potentially hold adverse consequences for bond finance, commerce, and the economy generally. The need to balance the competing interests emphasises the necessity for a coherent contextual framework within which forced sale of a debtor's home may occur.

This thesis examines issues surrounding forced sale of a debtor's home in South Africa. It compares the position in other legal systems and suggests mechanisms and an appropriate method, or process, for inclusion in statutory provisions to regulate the forced sale of a debtor's home in both the individual debt enforcement and insolvency procedures in South Africa.

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CHAPTER 1
INTRODUCTION

"Home is where one starts from."
- From *East Coker* by TS Eliot

1.1 Background

The statement "a man's home is his castle" is derived from the *dictum* of Coke CJ in *Semayne's Case*[1] that "the house of everyone is to him as his castle and his fortress". In recent years, empirical studies and theoretical analyses have advanced recognition of the significance of home as a social, economic, psychological, cultural, and emotional phenomenon.[2] In law, conflict frequently arises between the interests of a debtor and his family members and those of his creditors, especially mortgagees, in the debtor's home. Often, the home is the only valuable asset worth considering, from the perspective of a creditor who will target it specifically. The need to balance the affected parties' interests brings to the fore the necessity for a coherent contextual framework within which forced sale of the home may occur.[3]

The home of a debtor has never enjoyed specific statutory protection in the form of exemption from forced sale, in the individual debt enforcement and insolvency procedures in South Africa.[4] However, in 1994, the new constitutional dispensation[5]

[1] *Semayne's Case* (1604) 5 Co Rep 91a 91b, 77 ER 194 195, referred to by Fox *Conceptualising Home* 4 n 6.
[2] According to Fox, these studies, conducted in various social science disciplines, include, *inter alia*, social psychology, sociology, environmental psychology, housing studies and gender studies. Studies have involved specialists such as psychologists, anthropologists, economists, historians, architects and planning researchers, as well as cultural, socio-economic, and socio-political theorists. See Fox *Conceptualising Home* 5.
[3] Fox *Conceptualising Home* vii-viii, 3ff. See, also, Fox 2002 *J L & Soc* 580.
[4] Although various statutory provisions regulating the individual debt enforcement and insolvency procedures place certain assets beyond the reach of creditors, these do not include the debtor's home.

which introduced a Bill of Rights[6] brought about significant change to the South African jurisprudence and legal system.[7] More recently, recognition by the courts of the impact of the right to have access to adequate housing, provided for in section 26 of the Constitution, which forms part of the Bill of Rights, has had a profound effect on developments concerning execution against a debtor's home in the individual debt enforcement process. The combined effect of the Constitutional Court's decisions in *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others*[8] and *Gundwana v Steko Development CC and Others*,[9] is that it is acknowledged that execution against a debtor's home may constitute an unjustifiable infringement of the right to have access to adequate housing. Further, this may occur even where the home has been mortgaged in favour of the creditor. Therefore, in every case in which execution is sought against a person's home, judicial oversight is required to determine whether, in terms of section 36 of the Constitution, execution is justifiable in the circumstances. A court is required to undertake an evaluation, in which it must consider "all the relevant circumstances", to determine whether execution against a person's home should be permitted.

Given that before the decision in *Jaftha v Schoeman*, a creditor's, especially a mortgagee's, right to execution against the debtor's property had been regarded largely as unassailable, these were groundbreaking changes effected by the Constitutional Court in the course of carrying out constitutional imperatives. However, in their wake, there remains a lack of clarity surrounding implementation of the principles, without any properly constructed framework of substantive requirements and procedural rules within

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See, for example, s 67 of the Magistrates' Courts Act 32 of 1944, s 39 of the Supreme Court Act 59 of 1959, s 23 and s 82(6) of the Insolvency Act 24 of 1936, and other statutes, such as the Pension Funds Act 24 of 1956, the General Pensions Act 29 of 1979, the Long-Term Insurance Act 52 of 1998 and the Land Reform (Labour Tenants) Act 3 of 1996.

[5]The Constitution of the Republic of South Africa 200 of 1993, referred to as "the interim Constitution", came into operation on 27 April 1994. It was later replaced by the Constitution of the Republic of South Africa 108 of 1996, hereafter referred to as "the Constitution", which came into operation on 4 February 1997.

[6]Contained in Chapter 2 of the Constitution.

[7]Woolman and Swanepoel "Constitutional History" 2-48; Rautenbach and Malherbe *Constitutional law* 316; Devenish "Constitutional Law" *LAWSA* 5(3) 15.

[8]*Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC), hereafter referred to as "*Jaftha v Schoeman*".

[9]*Gundwana v Steko Development and Others* 2011 (3) SA 608 (CC), hereafter referred to as "*Gundwana v Steko*".

which they ought to be applied.[10] The result is that the criteria for the determination of whether, and the precise circumstances in which, execution should be permitted, are unclear. Further, courts have not considered whether realisation of an insolvent debtor's home by the trustee of an insolvent estate in terms of the Insolvency Act 24 of 1936 constitutes a potential infringement of section 26 and other rights.[11] This has given rise to a lack of predictability as well as a number of unanswered questions. Elucidation of the position is thus required.

The right to have access to adequate housing is one of the justiciable socio-economic rights included in the Bill of Rights to facilitate the transformation of South African society. The right must therefore be viewed within this broader socio-economic context.[12] Section 26(1) provides that "[e]veryone has the right to have access to adequate housing." Section 26(2) obliges the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." In *Government of the Republic of South Africa and Others v Grootboom and Others*,[13] the Constitutional Court stated that section 26(1) and (2) are related and must be read together.[14] The effect is that section 26(2) imposes a qualified positive obligation on the state to devise a comprehensive and workable programme to meet its responsibilities in relation to the provision of housing.[15] The Housing Act 107 of 1997[16] was enacted in furtherance of this obligation. Housing policies are reflected in the National Housing Code, published in terms of the Housing Act,[17] as well as in a number of other official documents and in provincial and local (municipal) housing codes.[18]The Housing Act, the National Housing Code and other documents have been amended on

[10]See Van Heerden and Boraine 2006 *De Jure* 319.
[11]Hereafter referred to as "the Insolvency Act". See Van Heerden, Boraine and Steyn "Perspectives" 228 230, 261; Boraine "The Law of Insolvency and the Bill of Rights" par 4A8 (g); Evans *Critical Analysis* 412-427; Evans "Does an insolvent debtor have a right to adequate housing?".
[12]See Liebenberg *Socio-Economic Rights* Adjudication. See, also, 3.1, below.
[13]*Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC), 2000 11 BCLR 1169 (CC), hereafter referred to as "*Grootboom*".
[14]*Grootboom* par 34. See also McLean "Housing" 55-9.
[15]*Grootboom* pars 21 and 38. Liebenberg "The Interpretation of Socio-Economic Rights" 33-17 states that s 26(2) thus both defines and limits the positive duties on the state.
[16]Hereafter referred to as the "Housing Act".
[17]The National Housing Code was first published in 2000 and was revised in 2009 to reflect amended housing policies.
[18]See 4.2, below.

a number of occasions to reflect changes in housing policy.

The Constitutional Court also recognised in *Grootboom* that at the very least section 26(1) places a negative duty "upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing".[19] This aspect formed the basis of the unjustifiable infringement of the right of each debtor to have access to adequate housing which was identified in *Jaftha v Schoeman*. The court held that in the circumstances execution against the debtors' homes would deprive them of their existing access to adequate housing. This was because, in their financial circumstances, they would never again be in a position to obtain adequate housing, given the rule in the National Housing Code that allowed only a first-time homeowner to be eligible for a state subsidy to acquire a house.

In *Grootboom*, the Constitutional Court acknowledged the negative aspect of the obligation contained in section 26(1) as being further spelt out in section 26(3) which provides that "[n]o one may be evicted from their home … without an order of court made after considering all the relevant circumstances" and that "[n]o legislation may permit arbitrary evictions."[20] Several legislative enactments give effect to section 26(3).[21] Of particular importance to this study is the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998[22] which regulates the eviction of unlawful occupiers from land. Section 4 of this Act provides for a specific procedure to be followed before an unlawful occupier may be evicted. An eviction order must be issued by a court which may grant such an order only if, after having considered all the relevant circumstances, it determines that it is just and equitable to do so. It has been

[19] *Grootboom* par 34. Liebenberg "The Interpretation of Socio-Economic Rights" 33-17-33-18 explains that the phrase "preventing and impairing" is broader than the standard international formulation of the duty to "respect" socio-economic rights.
[20] *Grootboom* par 34. See Liebenberg *Socio-Economic Rights* 270; Liebenberg "The Interpretation of Socio-Economic Rights" 33-20.
[21] These include: the Restitution of Land Rights Act 22 of 1994, the Land Reform (Labour Tenants) Act 3 of 1996; the Interim Protection of Formal Land Rights Act 31 of 1996; the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, commonly referred to as "PIE"; the Extension of Security of Tenure Act 62 of 1997, commonly referred to as "ESTA"; and the Rental Housing Act 50 of 1999.
[22] Hereafter referred to as "PIE".

held that PIE applies where occupation was once lawful but has subsequently become unlawful.[23] PIE is therefore applicable where it is sought to evict an erstwhile owner, including a mortgagor, of a home which has been sold in execution at the instance of a creditor or which has been realised by the trustee of his insolvent estate.[24]

Ordinarily, PIE concerns the rights of a landowner *vis-à-vis* the rights of occupiers. However, in the context of eviction proceedings brought against a debtor after the forced sale of his home, the position is different. Here it is the right of a creditor to execution in order to obtain fulfilment of the debtor's obligations, or the right of a purchaser of property to obtain vacant possession of property of which he has become the owner, *vis-à-vis* the debtor's right to have access to adequate housing which is relevant. In *Gundwana v Steko* and subsequent judgments, connections were made and analogies drawn between the forced sale of a debtor's home and the eviction of a person from his home.[25] Although the relationship between execution against a debtor's home and eviction from one's home, and the extent to which "relevant circumstances" are mirrored in each context, may not be entirely clear, considerations applicable in relation to section 26(3) and PIE are apparently pertinent to a study of the treatment of a debtor's home in this "post-Bill of Rights" era.

Thus far, the Constitutional Court has chosen to confine the basis of its reasoning, in matters concerning execution against a debtor's home, to the latter's right to have access to adequate housing. This has meant that reported judgments lack meaningful analysis of the position in terms of the wide range of constitutional rights of all parties concerned where the forced sale of a debtor's home occurs. To the extent that analogies may be drawn between the forced sale of a debtor's home and the eviction of

[23]See *Ndlovu v Ngcobo*; *Bekker and Another v Jika* 2003 (1) SA 113 (SCA), [2002] 4 All SA 384 (SCA), referred to at 3.3.1.4 (b), below.
[24]For discussion of a proposed, but subsequently rejected, statutory amendment to exclude the application of PIE in relation to applications for the eviction of erstwhile lessees, mortgagors and previous owners, see 3.3.1.3 (b), below.
[25]As is suggested, it is submitted, in *Grootboom* par 34 and *Gundwana v Steko* pars 23, 41, 44 and 46. See also *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 (4) SA 363 (GSJ) par 9; *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP) par 34 and *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC) par 13.

a person from his home, the right to life,[26] the right to access to courts[27] and the right to equality,[28] which have featured in eviction cases, are also relevant. Other constitutional rights potentially affected by the forced sale of a debtor's home include the right to dignity,[29] which also underlies persons' contractual rights,[30] children's rights[31] and the right to property.[32] In relation to the right to property, before *Jaftha v Schoeman* the forced sale of debtors' homes, whether mortgaged or not, occurred as a matter of course, according to the applicable rules in both the individual and collective debt enforcement processes, without any consideration for debtors' property rights. In *Standard Bank of South Africa Ltd v Saunderson and Others*,[33] decided after *Jaftha v Schoeman*, the Supreme Court of Appeal viewed a mortgage bond as "an indispensable tool for spreading home ownership"[34] and regarded a mortgagee's right as being fused into the title of the mortgaged property.[35] As explained above, the provisions of PIE apply where a debtor's home has been sold, at the instance of either a creditor or a trustee of the debtor's insolvent estate, but where the debtor has not vacated the property and his eviction is sought. In such a situation, the debtor's property rights would not feature because in the usual course of events he would already have lost ownership by this stage. However, the property rights of the applicant mortgagee, based in its real security rights, or the rights of ownership of the purchaser of the home, would be relevant considerations.

A debtor might endeavour to protect his rights of ownership by avoiding the forced sale of his home. His options would be limited to negotiating with the creditor, or creditors, or the mortgagee of his home, as the case may be, for a variation in the contractual terms pertaining to fulfilment of the obligation. Alternatively, he might seek to rely on available

[26] S 11 of the Constitution.
[27] S 34 of the Constitution.
[28] S 9 of the Constitution.
[29] S 10 of the Constitution, discussed at 3.3.2, below.
[30] See 3.3.2, below.
[31] S 28(1)(*c*)of the Constitution, discussed at 3.3.3, below.
[32] S 25 of the Constitution, discussed at 3.3.4, below.
[33] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA), hereafter referred to as "*Standard Bank v Saunderson*".
[34] *Standard Bank v Saunderson* par 1.
[35] *Standard Bank v Saunderson* par 2.

statutory consumer debt relief measures. Administration in terms of section 74 of the Magistrates' Courts Act 32 of 1944[36] is unlikely to pose a realistic solution given the fact that it is limited to debt not exceeding an amount of R50 000. However, the debt review process provided for by the National Credit Act 34 of 2005,[37] with the possibility of court-authorised debt restructuring, potentially provides an avenue for over-indebted homeowners to avoid execution against their homes. The stated purpose of the NCA is, *inter alia*, to promote and advance the social and economic welfare of South Africans. It is intended to protect consumers by, *inter alia*, "providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements" and "a consistent and harmonised system of debt restructuring, enforcement and judgment which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements".[38] However, the interpretation and practical implementation of the provisions of the NCA have been fraught with difficulties and controversy which have reduced the effectiveness of its debt relief mechanisms as a solution. It should also be borne in mind that they were not devised specifically as a means to avert the forced sale of a debtor's home.

The global economic crises followed close on the heels of the coming into operation of the NCA. Emergency measures along the lines of those recently implemented in other countries in response to the mortgage and home foreclosure crises[39] have not been implemented in South Africa. However, while it may be acknowledged that South Africa has not experienced a home foreclosure crisis of the same magnitude as has occurred in some foreign jurisdictions, the recessions have had a significant impact. Thus, solutions found abroad may nevertheless provide useful pointers for optimal treatment of an overburdened debtor's home in the South African context.

The forced sale of a debtor's home most often involves a contractual relationship between the creditor and the debtor. From a creditor's perspective, application of what

[36]Hereafter referred to as the "Magistrates' Courts Act".
[37]Hereafter referred to, interchangeably, as "the National Credit Act" and "the NCA", as deemed appropriate.
[38]See s 3 of the NCA.
[39]See Chapter 7, below.

is regarded as "the first premise of contract law"[40] – *pacta sunt servanda* – is fundamental to the conduct of business as is the ability to rely on and realise security rights acquired in a debtor's mortgaged home. Likewise, as indicated in *Standard Bank v Saunderson*, mentioned above, a homeowner's interest in being able to access credit ought not to be jeopardised. Therefore, it is in the interests of all concerned to have clarity in relation to the circumstances in which execution may occur against a debtor's home when lenders are deciding whether to finance either the purchase of immovable property, or business ventures, against security provided in the form of a mortgage passed over the potential debtor's home. As regards a mortgagee's real security rights, a clearer indication is required of how the property rights of a homeowner and a mortgagee ought to be evaluated and balanced in this context.

Thus, issues surrounding individual and broader property, commercial and economic interests enter the arena. To have greater clarity would inevitably instil confidence in the legal system and would go a long way to ensuring that commerce, generally, and our country's economic interests are not undermined. On the other hand, highly emotive issues surrounding housing and the concept of home complicate matters. For the debtor, his family members, and other dependants, the loss of their home may have considerable consequences. It is "a sensitive matter" to frame legislation permitting interference with contractual principles expressed in the maxim *pacta sunt servanda*.[41] However, in the absence of clearly established substantive and procedural criteria for execution against a person's home, debtors in default, often uneducated, illiterate and, as laypersons, will most likely be ignorant as to how best to proceed. In addition, the prohibitive cost of litigation, particularly in the high court, will effectively exclude or at least deter many debtors from pursuing matters.[42] It is submitted that the *ad hoc* treatment of the issues, in the process of which defendants are expected to take the initiative and to litigate, tends to undermine ordinary persons' access to justice. Another disadvantage is that the case-by-case development of the law tends to become an inordinately protracted and, sometimes, unsatisfactory process.

[40]Hu and Westbrook 2007 *Colum L R* 1321 1389.
[41]See Rajak and Henning 1999 *SALJ* 262 273.
[42]See considerations expressed in the judgment in *FirstRand Bank v Maleke* par 6.

Viewing the casuistic development of this area of the law, thus far, reveals that it resulted in discrepancies between the applicable statutory provisions in the magistrates' courts and in the high courts, respectively, which in turn created jurisdictional issues. This was because creditors frequently chose to approach the high court where, immediately after the decision in *Jaftha v Schoeman*, judicial oversight was not yet required, to obtain default judgment and orders declaring debtors' mortgaged homes specially executable. Controversy also surrounded whether, and if so, in what circumstances, a mortgaged home would be protected from execution. This was because in *Jaftha v Schoeman*, the Constitutional Court had stated that, where the home had been mortgaged in favour of the creditor, "execution should ordinarily be permitted where there has not been an abuse of court procedure."[43] Divergent approaches emerged in the various branches of the high court after which the Supreme Court of Appeal, in *Standard Bank v Saunderson*, settled a number of controversial issues.

However, it was still unclear when execution against a mortgaged home might amount to an unjustifiable infringement of the debtor's section 26 rights. Notably, during this period, in *ABSA Bank Ltd v Ntsane and Another*[44] and *FirstRand Bank Limited v Maleke*; *FirstRand Bank Limited v Motingoe and Another*; *Peoples Mortgage Ltd v Mofokeng and Another*; *FirstRand Bank Limited v Mudlaudzi*,[45] the courts refused to permit the sale in execution by a mortgagee of the debtor's home. In *ABSA v Ntsane*, the court held that executing against a debtor's home to obtain satisfaction of a mortgage debt where the arrears amounted to a trifling R18,46 constituted an abuse of the court process. In *FirstRand Bank v Maleke*, the court regarded it as being more appropriate for the recently introduced debt relief measures provided by the NCA to be explored as an alternative before execution was permitted against the defendants' homes.

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[43] *Jaftha v Schoeman* par 58.
[44] *ABSA Bank Ltd v Ntsane and Another* 2007 (3) SA 554 (T), hereafter referred to as "*ABSA v Ntsane*".
[45] *FirstRand Bank Limited v Maleke*; *FirstRand Bank Limited v Motingoe and Another*; *Peoples Mortgage Ltd v Mofokeng and Another*; *FirstRand Bank Limited v Mudlaudzi* 2010 (1) SA 143 (GSJ), hereafter referred to as "*FirstRand Bank v Maleke*".

More than six years after *Jaftha v Schoeman*, the Constitutional Court, in *Gundwana v Steko*, corrected aspects of *Standard Bank v Saunderson* and confirmed that, as already required by the amended rule 46(1) of the Uniform Rules of Court,[46] judicial oversight is necessary in every case in which execution is sought against a person's home. The court stated that this includes where the home has been mortgaged in favour of the creditor. What is more, it held that it is for a court to determine whether each matter is "of the *Jaftha*-kind".[47] This decision has had significant practical implications for the courts. The high court and the Supreme Court of Appeal have interpreted and applied the decision, in *Gundwana v Steko*, in *Nedbank Ltd v Fraser and Four Other Cases*,[48] *FirstRand Bank Ltd v Folscher and Another, and Similar Matters*,[49] *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases*,[50] and *Mkhize v Umvoti Municipality*.[51] These judgments reveal continuing divergent approaches in the various courts. In the circumstances, a lack of clarity remains, particularly with regard to the application and practical implementation of the requirements as set out by the Constitutional Court in its judgment. For example, the concept of "an abuse of the court process" appears to have been extended beyond that which was probably originally intended by the Constitutional Court in *Jaftha v Schoeman*. This leads to a number of unanswered questions. One may acknowledge the wisdom of the Constitutional Court's desire, expressed in *Jaftha v Schoeman*[52] and endorsed in judgments such as *FirstRand Bank v Folscher*[53] and *Standard Bank v Bekker*,[54] to maintain flexibility in the considerations to be taken into account by a court

[46]Made by the Rules Board for Courts of Law under s 6 of the Rules Board for Courts of Law Act 107 of 1985, with approval of the Minister for Justice and Constitutional Development, hereafter referred to as the "High Court Rules".
[47]*Gundwana v Steko* par 43. Cf *Standard Bank v Bekker* par 28.
[48]*Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 (4) SA 363 (GSJ), hereafter referred to as "*Nedbank v Fraser*".
[49]*FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 (4) SA 314 (GNP), hereafter referred to as "*FirstRand Bank v Folscher*".
[50]*Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC), hereafter referred to as "*Standard Bank v Bekker*".
[51]*Mkhize v Umvoti Municipality* 2012 (1) SA 1 (SCA). (This judgment was delivered on 30 September 2011.)
[52]*Jaftha v Schoeman* par 53.
[53]*FirstRand Bank v Folscher* par 17.
[54]*Standard Bank v Bekker* par 10.

in deciding whether execution would be justifiable. However, there is an overriding need for clarity and certainty. More precisely defined criteria are needed for judicial officers, practitioners, financial institutions, advice centre staff and lay persons, including creditors, and the debtors and their families, to be able to anticipate the circumstances in which execution against a home, including a mortgaged one, will be permitted.

The right to have access to adequate housing has not arisen, thus far, in any insolvency case in which an application has been brought for the sequestration of the estate of the debtor. It is anticipated that it may be only a matter of time before this occurs.[55] It is also anticipated that the same sort of evaluation which is required in the individual debt enforcement process ought to be applied in the insolvency, or collective debt enforcement, process. It is submitted that there is a need for comprehensive enunciation of appropriate principles, policies, and processes to be applied whenever the forced sale of a debtor's home is sought both in the ordinary execution and in the insolvency procedures.

A cursory glance at other legal systems shows that there are two broad approaches to treatment of a debtor's home.[56] Some countries, such as the United States of America, apply a statutory homestead exemption.[57] Others, such as England and Wales, have various legislative provisions which apply in both individual debt collection and bankruptcy processes, and in relation to a mortgaged home, to ensure that the interests of the debtor and his dependants are considered. Recent developments and reform initiatives in countries such as Scotland, Ireland, and member states of the European Community also indicate greater emphasis being placed on regard for a consumer debtor's home.[58] These and other comparative aspects will be dealt with in more detail in Chapter 7.

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[55]This anticipation is shared by a number of authors including: Evans *Critical Analysis* 412-427; Boraine "The Law of Insolvency and the Bill of Rights" par 4A8 (g); Evans "Does an insolvent debtor have a right to adequate housing?"; Els 2011 *De Rebus* (October) 21; Van Heerden, Boraine and Steyn "Perspectives" 260, 265.
[56]See Chapter 7, below. See, also, INSOL International *Consumer Debt Report II* November 2011 4-6.
[57]See 7.2, below.
[58]See 7.6, 7.7 and 7.8, below, as well as references to treatment of a debtor's home and housing needs in INSOL International *Consumer Debt Report II* November 2011 5, 11, 17.

The relevant statutory provisions in jurisdictions abroad generally reflect a variety of purposes which have been identified as including, *inter alia*, to:[59]

- provide greater legal certainty and predictability;
- comply with constitutional imperatives;
- provide adequate housing, security of tenure, or shelter for the debtor, his children, family members and other dependants;
- avoid a drain on the state's resources;
- preserve the dignity of the debtor, his children, family members and other dependants;
- protect the debtor's family members from the consequences of impoverishment;
- make "good citizens" of the debtor, his children, family members and other dependants;
- preserve the debtor's family's "wealth";
- protect the spouse, or surviving spouse, of the debtor;
- protect the debtor's children and other dependants;
- promote the concept of "family"; and
- promote gender equality.

It is posited that valuable information may be gleaned from mechanisms available in comparative legal systems with a view to considering the introduction of legislative provisions, along similar lines, but which are appropriate for South Africa.

Redirecting one's focus closer to home, it should be borne in mind that section 7(2) of the Constitution obliges the state to "respect, protect, promote and fulfil the rights in the Bill of Rights". These include both the positive and negative aspects of the right to have access to adequate housing, protected by section 26 of the Constitution. Section 26(2)

[59]See Resnick 1978 *Rutgers L Rev* 615 621; Fox *Conceptualising Home*; Goodman 1993 *J Am Hist* 470; Morantz 2006 *Leg Hist Rev* 1; Boraine, Kruger and Evans "Policy Considerations" 637 663ff.

obliges the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right. In the circumstances, it is proposed that the enactment in South Africa of appropriate legislative provisions to protect the debtor and his dependants against the forced sale of their home, or at least the consequences of it, would not only be in keeping with international developments, but would also accord with constitutional imperatives. It would also uphold sound humanitarian, social, and economic values and, it is anticipated, expand access to justice. Most importantly, it is hoped, it would provide greater legal certainty and predictability.

1.2 Research statement

Legal certainty requires the enactment of appropriate legislative provisions to regulate the forced sale of a person's home in both the individual debt enforcement process and the insolvency process in South Africa. Legislation should contain criteria to be met for forced sale to be permitted in order to facilitate the balancing of the interests of, on the one hand, the debtor and his family and/or dependants and, on the other, of the creditor, and, in the broader context, of commerce, generally.

1.3 Research objectives and methodology

The objectives and methodology of this study are as follows.

- To consider the contextual and legal framework within which forced sale of a debtor's home occurs in the individual debt enforcement and insolvency processes in South Africa.
- To analyse the relevant reported judgments with a view to clarifying the parameters within which, according to established precedent, the home has been protected in the execution process as well as to identify the principles and policies that form the basis of these decisions.
- To analyse and compare the position in other jurisdictions that provide for statutory regulation of forced sale of the home with a view to drawing guidance

regarding the possible inclusion of appropriately modified provisions and mechanisms into our legal system.

- To suggest factors and considerations and an appropriate method or procedure for adoption in the formulation of appropriate legislative provisions containing substantive and procedural requirements regulating forced sale of a debtor's home in both the individual debt enforcement and insolvency processes.

1.4 Delineations and limitations

This work is subject to the following delineations, limitations, and qualifications.

- This thesis considers the situation where the debtor is the owner of his home.
- In this thesis, it is assumed that it is desirable for concurrence, as far as possible, in the classes of assets which are excluded from sale in execution in the individual debt enforcement process and excluded from an insolvent estate.[60]
- This work is intended neither to be a study of, nor to canvass, economic theory or finance, nor the financial implications of bankers' lending practices.

1.5 Terminology

For the sake of convenience and uniformity, unless specifically indicated otherwise, in this thesis "he" connotes "he or she" and "his" connotes "his or her". Further, unless specifically indicated otherwise, an insolvent will be referred to as "he" and the insolvent's spouse or co-habiting partner will be referred to as "she".

In this thesis, by the "individual debt enforcement process" is meant the ordinary civil process by which a creditor institutes action against a debtor. The "collective debt enforcement process", or the "collective debt collection process" – a term universally employed by authors and commentators,[61] connotes the insolvency process. In a sense, the terms "collective debt enforcement" and "collective debt collection" may each

[60]See Evans 2010 *SA Merc LJ* 465 477 who submits that harmonisation in this respect is essential.
[61]See, for example, Bertelsmann *et al Mars* 2; Fletcher *Law of Insolvency* 9; Ferriell and Janger *Understanding Bankruptcy* Chapter 1.

be regarded as something of a misnomer, in South Africa, in light of the decision in *Investec Bank Ltd and Another v Mutemeri and Another*.[62] In that case, it was held that sequestration, in terms of the Insolvency Act, does not amount to "enforcement" of a credit agreement in legal proceedings, for the purposes of section 88(3) of the NCA.[63] Be that as it may, in this thesis, these terms will nevertheless be employed in discussion of the insolvency process which results in the liquidation of a debtor's assets.

In some jurisdictions, insolvency is referred to as bankruptcy. As Fletcher explains, traditionally, in England, the term "insolvency" referred to the factual condition of being insolvent, whereas the term "bankruptcy" referred to the legal condition or status of a debtor who had been declared insolvent through the required, formal process. However, Fletcher also states that the distinction between the technical meanings of these two terms has become obscured by popular usage.[64] In this thesis, unless the context specifically indicates otherwise, "insolvency" and "bankruptcy" are treated as equivalent terms.[65]

In South African law, mortgage connotes the hypothecation of immovable property by registration of a mortgage bond in compliance with the Deeds Registries Act 47 of 1937 as amended.

In relation to the NCA, "debt rearrangement" and "debt restructuring" are used interchangeably.[66]

[62] *Investec Bank Ltd and Another v Mutemeri and Another* 2010 (1) SA 265 (GSJ), hereafter referred to as "*Investec v Mutemeri*".
[63] See 4.5.4 and 6.10.2, below.
[64] See Fletcher *Law of Insolvency* 6-7.
[65] However, the different meanings and senses of these terms must be appreciated. See, for example, the meaning of bankruptcy as explained by Rajak "Culture of Bankruptcy" 3-5 and the nuanced meanings of "insolvency" and "bankruptcy", respectively, which emerge from the passage quoted by Rajak, at 13.
[66] Cf Vessio 2009 *TSAR* 274 284 n 67.

1.6 Reference techniques

In this thesis, the style employed is similar to that applied in the *Potchefstroom Electronic Law Journal*, supplemented by *The Oxford Standard for Citation of Legal Authorities* (*OSCOLA*). Full details of sources of reference are not included in the text of the footnotes but may be found in the bibliography.

Given the increased tendency for secondary sources, including academic and practitioners' commentary, media reports, as well as codes, policies and practice manuals, to be accessible electronically via the internet, it was decided not to differentiate in the bibliography between secondary sources referred to in hard copy and those accessed via internet websites. Only sources specifically mentioned in the footnotes have been included in the bibliography.

Given the case-driven nature of the development of this area of the law, in certain chapters there are numerous references, in the footnotes, to many different cases and paragraph numbers in judgments, with cross-references to judicial comment in relation to other judgments. In order to avoid confusion, the decision was made to specify the case name and relevant paragraph numbers in each footnote. Therefore, terms such as "*ibid*" and "*idem*" are not employed in the footnotes. This has resulted in repetition of case names, and other references, in successive footnotes. However, it is hoped that, overall, this will be more convenient for the reader.

In Juta's *South African Law Reports*, Lexis Nexis' *All South African Law Reports* and the "saflii" electronic database of decided cases there has been a lack of consistency in the citation of the names of FirstRand Bank Ltd and the Standard Bank of South Africa Ltd. In this thesis, as a rule, references reflect the spelling of the party's name as it appears in the relevant law report.

The Renaming of High Courts Act 30 of 2008 came into operation on 1 March 2009.[67] As a result, the high courts were renamed. In this thesis, each high court division will be referred to by the name which it bore at the time of the occurrences under discussion. Specific case references reflect the name of the court as it appeared in the relevant law report at the time of reporting.

The South African Law Reform Commission used to be called the South African Law Commission. In this thesis, it will consistently be referred to by its current name – the South African Law Reform Commission – or, where appropriate, "the Commission".

In March 2003, the Insolvency and Business Recovery Bill was approved by Cabinet, but it was never tabled in Parliament and, therefore, is not a public document. In 2010, a modified version of it, adapted to conform to subsequent developments and changes in the law, was compiled. As it is not a public document, this more recent, modified version of the Insolvency and Business Recovery Bill will be referred to, in this thesis, as "the unofficial working draft of a proposed Insolvency and Business Recovery Bill".[68]

1.7 Overview of chapters

This thesis is divided into eight chapters, including this one which provides introductory background to the thesis topic. Chapter 2 consists of a historical overview of aspects of Roman and Roman-Dutch law relating to individual and collective debt enforcement procedures and principles relating to mortgage and foreclosure, in the event of breach, to the extent that they impacted on a debtor's home. Some historical aspects of the English law, which also formed roots of South African law, are referred to in Chapter 7 which also covers the current position in England and Wales.

[67] See *GG* 31948 of 23 February 2009.
[68] A copy of the latest version of this document is on file with the author and is available, upon request, from Mr MB Cronje, of the Department of Justice and Constitutional Development, who was the researcher responsible for the South African Law Reform Commission's review into the law of insolvency, completed in 2000.

Chapter 3 focuses on the Constitution and, more specifically, the Bill of Rights. It deals with constitutional implications for the forced sale of a debtor's home. Its aim is to provide the necessary background to constitutional aspects, for the analysis, in Chapter 5, of the main cases concerning the sale in execution of a person's home, as well as for the consideration, in Chapter 6, of constitutional implications for the sale of an insolvent person's home by the trustee of the insolvent estate. In Chapter 3 the application of the Bill of Rights, the limitation of rights, and the interpretation of the Bill of Rights and other legislation are considered and discussed. The focus is on the right to have access to adequate housing, as protected by section 26 of the Constitution, within its broader context as a socio-economic right. This chapter also considers relevant provisions of PIE and the implications, for execution against a debtor's home, of aspects of certain judgments in eviction cases. Chapter 3 also contains brief discussion of constitutional aspects of private law contractual and property rights as well as other rights which are relevant to the forced sale of a debtor's home.

Chapter 4 outlines, with minimal commentary, aspects of law and policy which are relevant to the sale in execution of a debtor's home in the individual debt enforcement process. The main aim is to obviate the need for detailed explanation, within the analysis of the reported cases which will be presented in the following chapter, of applicable common law principles and statutory provisions. These will include basic substantive and procedural requirements for a creditor to obtain judgment and for the execution of a debtor's assets, taking into account exempt assets as well as national housing policy and its implementation. Some aspects of the law discussed also have a bearing on cases which will be discussed in Chapter 6.

Numerous amendments, both to the relevant statutory law and to applicable policy, have occurred during the course of this specific doctoral study. These include the coming into operation of the National Credit Act, the revision of the National Housing Code, the amendment of rules 45 and 46 of the High Court Rules, and the amendment of the Magistrates' Courts Act and the Magistrates' Courts Rules. Now there is also an

unofficial working draft of a proposed Insolvency and Business Recovery Bill.[69] These changes have taken place over a number of years, contemporaneously with *ad hoc* developments which have unfolded, including the creation of new precedent upon the delivery of each judgment, spanning from *Jaftha v Schoeman* to, most recently, *Standard Bank v Bekker*, *Mkhize v Umvoti Municipality* (SCA) and *Blue Moonlight Properties* (CC). Naturally, a dynamic and, it is submitted, unavoidable interconnectedness is discernible between the amendments in applicable law and policy and the developments in which courts, through their judgments, have provided protection for a debtor's home. This has constituted a challenge as far as concerns presentation of the material in an optimally logical, sequential order. After careful consideration, the decision is first to present, in Chapter 4, aspects of law and policy including recent amendments. Thereafter, Chapter 5 will deal with the relevant judgments. While this may create a sense of having to travel back and forth, in relation to chronological developments, it is hoped that the combined effect of Chapters 3, 4 and 5 will be to explain the current position as coherently as is practicable.

Chapter 5 provides an account and analysis of the main, relevant, reported judgments, from *Jaftha v Schoeman* onwards, to *Gundwana v Steko* and its interpretation and application in *Nedbank v Fraser*, *FirstRand Bank v Folscher*, *Standard Bank v Bekker*and *Mkhize v Umvoti Municipality* (SCA). It identifies issues that contribute to the current uncertainty in relation to the circumstances in which execution against a person's home constitutes an unjustifiable infringement of the rights of the debtor and his dependants. It discusses commentators' published views on the subject and makes suggestions for substantive and procedural reform.

Chapter 6 deals with the position in insolvency law in terms of which the home of the insolvent, often the most valuable asset in his estate, must be realised together with all the other assets in the insolvent estate for the benefit of the creditors. It touches on recent cases concerning the interface between the National Credit Act and the Insolvency Act and it considers the potential implications of recent developments,

[69] See 1.6, above.

canvassed in Chapter 5, in the individual debt enforcement process for insolvency law and process. More specifically, Chapter 6 considers the need, from a constitutional perspective, for clear policies to be formulated in relation to treatment of an insolvent debtor's home and for judicial oversight to be specifically focused upon the impact of the realisation of the insolvent's home on his and his dependants' section 26, section 28, and other rights. It also considers the desirability of the introduction of some form of statutory provision geared towards averting, or postponing, realisation, where appropriate, or even exempting it, or to some extent the proceeds of its sale, from the insolvent estate.

Chapter 7 consists of comparative analysis with a view to identifying aspects of the law applicable in foreign jurisdictions that could be the basis for recommendations for appropriate reform of the law, and amendments to approach and policy, in South Africa. This chapter covers aspects of the position in the United States of America, Canada and New Zealand each of which has a long tradition of protection of the debtor's home against creditors. This chapter will deal with the position in England and Wales, as well as in Scotland and Ireland. The current position in Europe will be touched on very briefly.

Chapter 8 contains conclusions and recommendations, poses suggestions for reform, and proposes legislative intervention to regulate the forced sale of a person's home in both the individual debt enforcement and insolvency processes in South Africa.

I have endeavoured to state the law as at 31 December 2011. Cases in which judgments were delivered on or before 31 December 2011 and which appeared in the official 2012 law reports before completion of this manuscript are referred to using their 2012 citations.

CHAPTER 2

HISTORICAL OVERVIEW

O quid solutis est beatius curis,
cum mens onus reponit ac peregrine
labore fessi venimus larem ad nostrum
desideratoque acquiscimus lecto.
– Catullus

"What happiness to shed anxieties, when the mind puts off its burden and worn with the labours of the world we come back to hearth and home and sink to rest on the pillow of our dreams!"

2.1 Introduction

The South African legal system is described as a "mixed" system. This is because its roots are found in Roman and Roman-Dutch law, it was influenced by English law, especially in the area of commercial law, including insolvency law, during the nineteenth and early twentieth centuries, and some aspects of its origins lie in indigenous law.[1] In each of the Roman, the Roman-Dutch, and the English legal systems, initially, substantive and procedural rules relating to debt enforcement permitted execution only against a debtor's person. Thereafter, the law developed to provide for execution against a debtor's property. Collective debt enforcement, or insolvency, rules and procedures evolved as did principles pertaining to mortgage and a creditor's real security rights. Certain types of assets came to be regarded as exempt from execution in the individual and collective debt enforcement processes but there was no formal exemption of the home of a debtor. However, it is submitted that scrutiny of the relevant legal principles and procedures, as they were applied in their respective historical and socio-economic context, reveals a discernible, albeit indirect and subtle, effect of providing protective measures in relation to debtors' homes.

[1]See Du Bois *et al Wille's principles* 33ff; Zimmerman "Good faith and equity" 217.

This chapter provides a brief historical overview of the Roman and Roman-Dutch legal principles and procedures which were applicable to debt enforcement and execution against a debtor's immovable property, including where such property was mortgaged in favour of the creditor. It also highlights certain aspects of Roman law and societal values and structures which may be regarded as factors which effectively caused a debtor and his family to remain in their home or at least to continue to have access to one. English law influences on the historical development of South African law operated at a time before a debtor's home received any protection against creditors' claims in English law. A brief overview of historical developments in England will be included in comparative analysis, in Chapter 7, which deals, *inter alia*, with the current position in England and Wales.

2.2 Roman law

2.2.1 General background

Roman history may be divided into three main periods: the Monarchy (753 to 510 BC); the Republican period (510 to 27 BC); and the Empire (from 27 BC onwards).[2] There were three successive kinds, or stages in the development, of legal redress, known as the *legis actiones*, the *formula* procedure, and the *cognitio* procedure, which coincided roughly with these historical periods. Significant for Roman law were the years from 367 BC onwards, with praetorian influences in the application and supplementation of the civil law,[3] and when Justinian, as the Emperor of the East from 527 to 565 AD, carried out a comprehensive compilation of the laws and brought about a number of important reforms.

[2]The Empire is generally divided into the Principate (27 BC –284 AD) and the Dominate (from 284 AD onwards). For an historical sketch, see Bordowski *Textbook* 1-23. See also Hunter *Roman Law* 1-121; Van Zyl *Roman Private Law* 1-9; Van Warmelo *Roman Civil Law* 1-29.
[3]See Thomas *Textbook* 15.

2.2.2 Individual debt enforcement

In the primitive society of ancient Rome, debt enforcement occurred in the form of "self-help" against the person of the debtor.[4] Written laws, the earliest of which were contained in Table III of the Twelve Tables,[5] as well as legal structures and procedural mechanisms regulated this.[6]

In the *legis actio* procedure if a judgment debt had not been paid within 30 days the creditor could arrest and bring the debtor before the praetor.[7] If the debt remained unpaid,[8] the praetor "addicted" the debtor to the creditor who could hold him in chains in a private prison[9] for 60 days during which time they might reach a compromise.[10] At this stage the debtor was still free, as opposed to being a slave, he was still the owner of his property and capable of contracting.[11] On the last three market days of these 60 days, the creditor was obliged again to bring the debtor before the praetor into the "meeting place" and the amount for which he had been judged liable was declared publicly. This was done in the hope that someone might come forward to pay the debt and release the debtor.[12]

If the debt remained unpaid, the creditor was entitled to sell the judgment debtor as a

[4]Van Warmelo *Roman Civil Law* 271.
[5]Promulgated in 451 BC; Table III dealt with execution of judgments.
[6]Kaser *Roman Private Law* 330 refers to the written laws as "state-restricted and supervised self-redress." Examples of procedural mechanisms are the *legis actiones*, the *formula* procedure and the *cognitio* procedure, mentioned at 2.2.1, above. See Hunter *Roman Law* 122-142; 967ff.
[7]This was called *manus iniectio*, the laying of hands on a person; see Hunter *Roman Law* 1030-1031. See also Stander 1996 *TSAR* 371; Calitz *Reformatory Approach* 19; Calitz 2010 *Fundamina* 16(2)1 5ff.
[8]A debtor could arrange for a substitute, called a *vindex*, to answer for the debt. However, if the *vindex* lost the case, he was liable for double damages. See Table III 3; Sohm *Institutes* 235; Buckland *Text-Book* 619 n 7; Thomas *Textbook* 79; Lee *Elements* 427. Crook *Law and Life* 92 states that this legal procedure "weighted the scales of litigation heavily in favour of the rich against the poor". As to who might opt to come to the debtor's rescue by paying the debt on his behalf or by acting as *vindex*, see 2.2.6, below.
[9]Table III 3-4; Lee *Elements* 427-428, with reference to Gellius *Noctes Atticae* 20.1.46; Kaser *Roman Private Law* 338. Cf Mousourakis *Historical and Institutional Context* 137-138; Jolowicz and Nicholas *Roman Law* 188.
[10]Table III 5; Burdick *Principles* 633, 671; Buckland *Text-Book* 619.
[11]See Buckland *Text-Book* 619; Jolowicz and Nicholas *Historical Introduction* 188, 190. Cf Wenger *Institutes* 227; Kaser *Roman Private Law* 338; Sohm *Institutes* 235. The latter sources refer to such a debtor as being a "debt-slave" or "*ipso iure* in the position of a slave".
[12]Table III 5. See Buckland *Text-Book* 619; Thomas *Textbook* 79; Gellius *Noctes Atticae* 20.1.48.

foreign slave.[13] It is uncertain whether, at this stage, the debtor's property "went with his person to the creditor"[14] although, according to Sohm:[15]

> When the person of the debtor (whom execution placed in the position of a slave in regard to his creditor) passed into the power of the creditor, the same fate befell his whole estate and probably also his whole family, i.e., the aggregate of those who were subject to his *potestas* [*sic*]. Thus every personal execution involved necessarily –- though only indirectly –- an execution against the debtor's property, because it went, in all cases, against the debtor's entire person and estate, quite regardless of the actual amount due.

Where there was more than one creditor, they were entitled to "cut shares".[16] Some commentators regard this as meaning cutting the debtor's body into pieces[17] while others believe it meant that creditors shared the proceeds of the debtor's sale into foreign slavery.[18] The primary purpose of this harsh procedure was to bring pressure to bear on the debtor to pay.[19] A debtor who had no assets, who was without access to credit and who did not have anyone to pay the debt on his behalf, would, in most cases, save his "life and freedom" by entering into a transaction of *nexum* in terms of which he would submit to working off his obligation to the creditor.[20]

In the formulary process, if a judgment debt was not paid within 30 days the creditor could take the debtor again before the praetor and, if the debtor challenged the claim

[13]Table III 5; see Buckland *Text-Book* 620; Wenger *Institutes* 225.
[14]Jolowicz and Nicholas *Historical Introduction* 190.
[15]Sohm *Institutes* 287.
[16]Table III 6.
[17]Thomas *Textbook* 79. Cf Bordowski *Textbook* 65; Kaser *Roman Private Law* 338.
[18]Wenger *Institutes* 224-225; Buckland *Text-Book* 620, with reference to Gellius *Noctes Atticae* 20.1.48; Burdick *Principles* 633-634, 671; Johnston *Roman Law* 108-109; Thomas *Textbook* 79; Wessels *History* 661. Buckland *Roman Law of Slavery* 402 states, with reference to Gellius *Noctes Atticae* 20.1.47, that, while a judgment debtor might ultimately be sold into slavery, his position in early law is to some extent obscure and the provisions were, very early on, obsolete.
[19]Van Warmelo *Roman Civil Law* 274; Wenger *Institutes* 230. Cf Wessels *History* 661 who states that there is "[s]ome doubt whether the debtor was sold as a slave ... [and h]e may have been held as a pledge compellable to redeem the debt by the services of himself and his family."
[20]Wenger *Institutes* 222, 226 n 12; Kaser *Roman Private Law* 338; Jolowicz and Nicholas *Historical Introduction* 164-166, 189-190. Although reference is often made to a debtor who surrendered himself to his creditor in *nexum* as a "debt-slave", he did not lose his status as a free person: see Thomas *Textbook* 217. In relation to *nexum*, see Calitz *Reformatory Approach* 19; Calitz 2010 *Fundamina* 16(2) 5; Dalhuisen *International Insolvency and Bankruptcy* par 1.02[1] 1-4-1-5. Also, on slavery and debt servitude, see Rajak "Culture of Bankruptcy" 8-11.

but lost, he would be liable for double the original amount of the debt.[21] The *lex Poetelia*,[22] introduced to improve the judgment debtor's position, prohibited his sale into slavery and his being put to death.[23] However, the creditor could still, with the praetor's permission, take the debtor into confinement[24] to work off the debt[25] in which case the debtor retained rights of property and disposition, as would a person who had pledged himself in a transaction of *nexum*.[26] Wenger explains the position thus:[27]

> Then it would be comprehensible, if a person, in order to save his little home for himself and his family, incurred a *manus iniectio* in order to wipe out the debt with the work of his hands…. Indeed this *manus iniectio* now meant temporary quasi-slavery … and in truth even beyond the sixty days, especially when the danger of death no longer threatened. Since personal execution also … befell just the poor man who had no property, we understand its continued existence until far beyond the formulary procedure.

In 320 AD, Constantine abolished imprisonment for debt unless the debtor "contumaciously refused to pay."[28] Nevertheless, persons often sold themselves into, or stayed in, slavery as an easier alternative.[29] Others hired out themselves or their children as a way of working off a debt, often in transactions which were apparently

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[21]See Hunter *Roman Law* 1031ff; Thomas *Textbook* 109; Buckland *Text-Book* 642; Burdick *Principles* 671; Garnsey *Social* Status 204 n 1. The authors refer to Gaius IV 9. Garnsey *Social Status* 138 points out how it was the poorer section of the population who suffered considerable hardship, being "forced through debt to sell their meagre possessions, take out credit at unfavourable rates, and ultimately fall victim to the savage debt laws and forfeit their freedom".

[22]Also referred to as *lex Poetilia*. It was promulgated in 325 or 326 BC or, according to Sohm *Institutes* 287, in 313 BC.

[23]Controversy surrounds its exact provisions. See Hunter *Roman Law* 1035; Burdick *Principles* 634; Jolowicz and Nicholas *Historical Introduction* 164, 190; Sohm *Institutes* 287; Wenger *Institutes* 225, 230-231; Buckland *Text-Book* 620; Van Warmelo *Roman Civil Law* 274; Thomas *Textbook* 79. Bertelsmann *et al Mars* 6 refer to Kunkel *Roman Legal and Constitutional History* 31 and the contrary view expressed in Kaser *Das römische Privatrecht* I 154 n 36.

[24]During the later Republic, slavery had been replaced by imprisonment in a public prison for debtors who were unable to pay their debts: see Hunter *Roman Law* 1035-1036, with reference to C 7.71.1 and D 42.1.34; Buckland *Text-Book* 622.

[25]Thomas *Textbook* 109; Lee *Elements* 454; Wenger *Institutes* 230-231. Buckland *Text-Book* 643 states that "[t]he confinement put pressure on the debtor: perhaps it was used mainly for solvent debtors." Kaser *Roman Private Law* 338 submits that the *lex Poetelia* "regulated in detail rather than introduced" the debtor being able to work off his debt as a debt-slave of the pursuer. See also Johnston *Roman Law in Context* 109; Crook *Law and Life* 173; Schiller *Roman Law Mechanisms* 209.

[26]Wenger *Institutes* 230.

[27]Wenger *Institutes* 231. See also Jolowicz and Nicholas *Historical Introduction* 190.

[28]See Bertelsmann *et al Mars* 6; Hunter *Roman Law* 1036, with reference to C 10.19.2. However, Mousourakis *Historical and Institutional Context* 373 states, with reference to *C TH* 9.11.1; C 9.5.2 (Justinian), that in practice powerful landowners continued to confine their debtors in private prisons.

[29]Crook *Law and Life* 59.

service contracts in terms of which the servant was bound for life or for a number of years.[30] In Justinian's time, a defaulting debtor could be put to work for four months.[31]

Execution against a debtor's property was a praetorian innovation in the formulary process.[32] The praetor could grant to a creditor *missio in bona* which was an order giving a claimant possession of the entire property of a debtor who was in hiding or who had left the country to evade arrest, imprisonment or slavery.[33] Thereafter, the creditor could sell the debtor's property and apply the proceeds to satisfy his claims.[34]

In terms of the *cognitio* procedure execution could occur against the person[35] or the property of the debtor, the latter being the norm.[36] A later development allowed a court officer to proceed with the execution, where judgment was for payment of a sum of money, by seizing part of the judgment debtor's property to be kept as a pledge.[37] If the debtor did not pay within two months after judgment, the property could be sold by auction.[38] If the sale yielded insufficient proceeds to satisfy the claim more property could be seized for the same purpose.[39] Slaves, oxen and agricultural implements were exempt from seizure and sale[40] and movable property was to be exhausted before land could be seized.[41] This became the norm, during the later Empire, where the debtor was not suspected of being insolvent. This state of affairs has been regarded as an

[30]Grubbs *Law and Family* 1995 270; Crook *Law and Life* 61.
[31]Kaser *Roman Private Law* 366.
[32]Wenger *Institutes* 233; Kaser *Roman Private Law* 339, 342.
[33]Mousourakis *Historical and Institutional Context* 219; Garnsey *Social Status* 193; Hunter *Roman Law* 1037; Buckland *Text-Book* 631, 644; Thomas *Textbook* 110.
[34]Kaser *Roman Private Law* 355; Crook *Law and Life* 172.
[35]This was still, as in the formulary process, initiated by the *actio iudicati*. Buckland *Text-Book* 672 and Thomas *Textbook* 122 state that a judgment debtor could be confined in a public prison. Lee *Elements* 458 states that private imprisonment continued in spite of attempts to suppress it.
[36]Evans *Critical Analysis* 30.
[37]The *pignus ex judicati causa captum*. See Nicholas *Roman Law* xiv; Lee *Elements* 458; Wenger *Institutes* 313-314; Buckland *Text-Book* 672; Mousourakis *Historical and Institutional Context* 373.
[38]Thomas *Textbook* 121 refers to D 42.1.31, and mentions that, in Justinian's time, this had been extended to four months; C 7.54.2. See also Bordowski *Textbook* 74-75.
[39]Buckland *Text-Book* 672; Thomas *Textbook* 122.
[40]Hunter *Roman Law* 1043 and Burdick *Principles* 672 both refer to C 8.17,7.
[41]Wenger *Institutes* 314; Hunter *Roman Law* 1043 and Burdick *Principles* 672 both refer to Digest 42.1.15.8. See also Mousourakis *Historical and Institutional Context* 373.

indication of the balancing of the interests of the creditor and the judgment debtor.[42]

2.2.3 Collective debt enforcement

As mentioned above, where there was more than one creditor, they could "cut shares" or at least share in the proceeds of the debtor's sale into foreign slavery.[43] A praetorian innovation, in the late second century BC,[44] permitted creditors, alternatively or in addition to personal execution, to levy execution directly against a debtor's property.[45] Through this process, the debtor was rendered *infamis* and was deemed bankrupt. His property was sold *en masse* to the highest bidder, that is, the person who offered the creditors the highest dividend on their claims.[46] The purchaser succeeded to the entire estate and the proceeds were divided amongst creditors according to a fixed order of preference.[47] This was in effect the Roman equivalent of bankruptcy proceedings.[48]

This process was rarely resorted to against members of the upper class with the result that it probably affected only debtors of lower social standing.[49] Where the proceeds of the sale did not satisfy the creditors' claims in full they could bring proceedings to execute against any assets which the debtor acquired subsequently.[50] However, this was subject to the *beneficium competentiae* which afforded the debtor a period of

[42]See Hunter *Roman Law* 1043; Buckland *Text-Book* 608; Thomas *Textbook* 122; Burdick *Principles* 672, with reference to Digest 46.1.6.2; 42.1.31; Sohm *Institutes* 289; Wenger *Institutes* 239-240, 314 where he states that it "threaten[ed] … the existence of the debtor no more than … [was] necessary in the interest of the creditor". Crook *Law and Life* 178 refers to it as "the intelligent solution".
[43]See 2.2.2, above.
[44]The *actio Rutiliana*. See Bertelsmann *et al Mars* 6 with reference to authorities cited by Roestoff *'n Kritiese Evaluasie* 16ff; Roestoff 2004 *Fundamina* 113 118ff; Calitz 2010 *Fundamina* 16(2) 7-8.
[45]This entailed the issue of three decrees: *missio in possessionem*; *proscriptio bonorum*; and *venditio bonorum* (also referred to as *emptio bonorum*; see Gaius *Institutes* III 78-79). See Thomas *Textbook* 109 who refers to Gaius IV 35; Hunter *Roman Law* 1037; Buckland *Text-Book* 643ff; Kaser *Roman Private Law* 356-357; Sohm *Institutes* 287ff. A *missio in possessionem* was an authorisation by the praetor to take possession either of a particular thing or the whole of a person's property; see Jolowicz and Nicholas *Historical Introduction* 228. Wenger *Institutes* 236 refers to this as *missio in bona* which was an order giving a claimant possession of the whole of a person's property: see Mousourakis *Historical and Institutional Context* 219. Apparently, there was some overlap between these two concepts.
[46]Wenger *Institutes* 237; Buckland *Text-Book* 644; Johnston *Roman Law in Context* 109.
[47]Smith *Law of Insolvency* 5 cites Wessels *History* 662; Bertelsmann *et al Mars* 6-7.
[48]Wenger *Institutes* 233; Sohm *Institutes* 288; Johnston *Roman Law in Context* 109 refers to Kaser *Römische Privatrecht* 405.
[49]Crook *Law and Life* 174.
[50]Buckland *Text-Book* 403, 644; Wenger *Institutes* 237; Crook *Law and Life* 174.

recovery of one year after the sale during which time he was rendered safe from execution against his person and "articles of necessity", including necessary food, clothing, and movables necessary for agriculture and trade, were exempt from execution.[51] This has been regarded as signifying a shift in policy, to some extent, towards a more humanitarian conception or recognition of a debtor's rights.[52]

A *senatusconsultum*[53] provided that where debtors were *clarae personae*, particularly those of senatorial rank, a curator[54] could be appointed who, subject to the praetor's sanction, sold the debtor's assets, not *en masse*, but in lots. This was known as *distractio bonorum*.[55] This process did not render the debtor *infamis* nor dispossess him of all of his assets. Only assets sufficient to satisfy the creditors' claims were sold and the debtor retained the rest of his estate.[56] With the passing of time, and certainly by the *cognitio* period, *distractio bonorum* became the general mode for realisation of a debtor's assets.[57]

A significant development, presumably in the interests of severely over-indebted nobles, was the introduction of *cessio bonorum*[58] which allowed a debtor, probably where insolvency was not due to his fault,[59] voluntarily to surrender his property. Transfer of his property to his creditors would exempt a debtor from *infamia*[60] and personal seizure for any debts which remained unpaid.[61] After *cessio bonorum*, *venditio bonorum* took

[51]Buckland *Text-Book* 693-694; Kaser *Roman Private Law* 357.
[52]See Wenger *Institutes* 238 n 39.
[53]The date of which is unknown: see Buckland *Text-Book* 645. Garnsey *Social Status* 186 states that this occurred in the early Empire or Principate.
[54]Instead of a *magister*.
[55]Buckland *Text-Book* 645; Johnston *Roman Law in Context* 110 refers to Kaser *Römische Privatrecht* 404-405. Kaser *Roman Private Law* 355, 357; Wenger *Institutes* 238-239; Crook *Law and Life* 177-178; Roestoff *'n Kritiese Evaluasie* 29; Roestoff 2004 *Fundamina* 127; Calitz 2010 *Fundamina* 16(2) 9.
[56]Buckland *Text-Book* 645; Thomas *Textbook* 110; Wenger *Institutes* 239; Bertelsmann *et al Mars* 7.
[57]Buckland *Text-Book* 672-673; Thomas *Textbook* 122; Bertelsmann *et al Mars* 7.
[58]With the passing of the *lex Julia*, possibly in 17 BC, but it is uncertain whether this occurred in the time of Julius Caesar or of Augustus; see Hunter *Roman Law* 1039; Burdick *Principles* 671; Sohm *Institutes* 288. See also Garnsey *Social Status* 186-187 and Frederiksen 1966 *J Rom Studs* 128-141.
[59]Buckland *Text-Book* 645; Johnston *Roman Law in Context* 110; Crook *Law and Life* 174; Kaser *Roman Private Law* 357.
[60]C 2.11.11. See Sohm *Institutes* 289.
[61]Thus excluding the creditor's choice between executing against the debtor's person, at civil law, or against the debtor's property under praetorian law. See Sohm *Institutes* 288; Wenger *Institutes* 235; Buckland *Text-Book* 645 refers to G 3.78 and C 7.71.1.

place and the debtor could rely on the *beneficium competentiae* for all time and not merely for a year.[62]

In the *cognitio* procedure execution against all of the property of the debtor, that is, bankruptcy proceedings, occurred only where the debtor was insolvent.[63] On application by the creditors, the judge appointed a *curator bonorum* to manage the bankrupt property.[64] Creditors had to join the proceedings within two to four years.[65] In all instances, *distractio bonorum* took place.[66] The claim of a creditor who was a pledgee was first paid out of the proceeds of the thing pledged to him. Any surplus would then go to the other creditors, with certain claims receiving preference, after which other creditors would receive their respective percentages of the proceeds.[67]

In the time of Justinian, a majority vote by creditors could result in a moratorium being granted to the debtor.[68] It was also possible for the debtor to approach the Emperor for a moratorium "in the face of an impending execution."[69]

2.2.4 Debt relief measures available in Roman law

Apart from *cessio bonorum*, and the benefits which it offered, the Roman law of contract presented some alternatives for a debtor unable to meet his obligations timeously.

[62]There is some dispute about this. See Smith *Law of Insolvency* 5 with reference to Johnson, Coleman-Norton & Bourne *Ancient Roman Statutes* 201 n 151 and the Digest or Pandects (Book XL II Title 3 4). See Buckland *Text-Book* 645, 693-694; Sohm *Institutes* 289; Thomas *Textbook* 110; Lee *Elements* 455; Bertelsmann *et al Mars* 7. Cf Wessels *History* 663; Burdick *Principles* 671-672; Wenger *Institutes* 235, 237-238, 316.
[63]Wenger *Institutes* 314; Kaser *Roman Private Law* 366.
[64]Wenger *Institutes* 315.
[65]Two years if they lived in the same province and four years if they lived in a different province; see Wenger *Institutes* 315. Otherwise, creditors could not share in the proceeds of the seized property and they would be left with only a claim against the debtor.
[66]Wenger *Institutes* 315; Kaser *Roman Private Law* 366. See Roestoff *'n Kritiese Evaluasie* 29 who agrees with the submission made by Swart *Rol van 'n Concursus Creditorum* that *distractio bonorum* was the origin of the South African insolvency regime.
[67]Wenger *Institutes* 315-316.
[68]Wenger *Institutes* 316, n 23, refers to *Cod Iust* VII 71.8 (531-532 AD).
[69]Wessels *History* 663. Wenger *Institutes* 316-317 n 23[a] states, with reference to *Cod Iust*, I 19.4, that the law at the time of Justinian was that this would only occur if sufficient security was furnished by the debtor. He also mentions that Egyptian provincial law likewise allowed a moratorium for a period of five years. See also Roestoff *'n Kritiese Evaluasie* 31.

These included: *solutio per aes et libram* and *acceptilatio*, by which a creditor formally released the debtor from liability; *pactum de non petendo*, an agreement not to sue or take action; and *transactio*, or compromise, which brought an obligation to an end. In Justinian's time, *datio in solutionem* entitled a debtor, who could not meet his obligation to the creditor, and who owned immovable property for which he could not find a buyer, instead of payment to transfer the immovable property to the creditor, even without the latter's consent.[70] Parties could also resort to *remissio*,[71] a partial release, and *dilatio*,[72] by which a moratorium was created if the majority of the creditors were in favour of it.

2.2.5 Real security

2.2.5.1 Forms of real security

Roman law recognised three forms of real security:[73] *fiducia* and, under praetorian law, *pignus* and *hypotheca*.[74] *Fiducia* entailed the transfer of ownership[75] of the debtor's property to the creditor who agreed to re-transfer the property to the debtor as soon as the debt was paid.[76] Parties usually also agreed, in a *pactum de vendendo*, on the circumstances in which the creditor could sell the property.[77] Where the seller sold the property either before the debt was due or contrary to their agreement, the sale was nevertheless valid and the purchaser received good title. This meant that the debtor

[70] *Novellae* 4.3 and 120.6.2. See Roestoff *'n Kritiese Evaluasie* 35-37.
[71] D 2 14 7 17; D 2 14 7 18; D 2 14 7 19; D 2 14 8; D 2 14 10; D 17 1 58 1 and D 42 9 23.
[72] See Roestoff *'n Kritiese Evaluasie* 31.
[73] Real security entails the giving of a real right to a creditor as security for the performance of a debt, the effect being that the creditor has, in addition to the right to claim satisfaction of the debt from the debtor personally, a right to obtain satisfaction of his claim by selling the thing given as security. See Buckland *Text-Book* 473; Sohm *Institutes* 351-352.
[74] Hunter *Roman Law* 436ff refers to *pignus* as pledge and *hypotheca* as mortgage. Burdick *Principles* 382 explains that, in Roman law, both *pignus* and *hypotheca* were used for movables and immovables. These three forms co-existed until the time of Constantine. See also Buckland *Text-Book* 478; Thomas *Textbook* 330-333; Van Zyl *Roman Private Law* 197-198, particularly n 293.
[75] Either by *mancipatio* or *in iure cessio*.
[76] The agreement to re-transfer was known as *pactum fiduciae*. See Sohm *Institutes* 352; Thomas *Textbook* 329; Jolowicz and Nicholas *Historical Introduction* 301ff; Kaser *Roman Private Law* 127ff; Van Warmelo *Roman Civil Law* 113-114.
[77] This was required to release the creditor from his fiduciary obligation, arising from the *pactum fiduciae*, to re-transfer the property to the debtor, so that he could obtain satisfaction of his claim by selling the thing; see Sohm *Institutes* 352; Buckland *Text-Book* 474.

could not recover the property from the purchaser although he had a claim against the creditor for breach of the fiduciary obligation.[78]

Pignus[79] developed out of the praetorian protection of possession.[80] The debtor retained ownership but gave possession of the thing to the creditor who had to restore it to the debtor once the debt was paid.[81] The creditor did not have the right to dispose of the pledged property and, if he did sell it, the debtor as owner could recover it from anyone who had obtained possession of it. From the creditor's perspective, this was unsatisfactory, especially where the debtor was in default, and so the parties usually agreed, in a *pactum de vendendo*, that the creditor could sell the property if the debt was not paid by a certain date.[82]

Hypotheca, also referred to as "mortgage", occurred when the property remained with the debtor but, if the debtor failed to pay the debt, the creditor had a real right to obtain possession of the hypothecated property and, in terms of a *pactum de vendendo*, the right to sell the property in order to satisfy his claim. The debtor as owner could recover his property if a third party obtained possession of it. He could also enter into successive transactions of *hypotheca* with various creditors.[83] Thus *hypotheca* catered for both the debtor's and the creditor's interests and was "more in keeping with the capitalistic character of the time".[84]

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[78]Sohm *Institutes* 353; Buckland *Text-Book* 474. In the case of land provided as security, the creditor often left it in the hands of the debtor as a *precarium*; see Thomas *Textbook* 143, 329.
[79]Referred to as pledge; see Hunter *Roman Law* 436.
[80]A *pignus praetorium* granted a creditor "*missio in possessionem*" of the debtor's property by which the creditor gained control of a thing as security for his claim. A *pignus judiciale* arose in the seizure of a debtor's property in the course of a judicial execution; see Sohm *Institutes* 287, 353-356. See also Buckland *Text-Book* 475; Thomas *Textbook* 330; Jolowicz and Nicholas *Historical Introduction* 302; Van Warmelo *Roman Civil Law* 115-116. In relation to the order in which developments occurred, cf Kaser *Roman Private Law* 129.
[81]Transfer of possession occurred by *traditio*. The debtor could not use the thing unless by specific agreement with the creditor, that is, by *precario*. See Buckland *Text-Book* 476.
[82]Sohm *Institutes* 353-354; Thomas *Textbook* 331; Hunter *Roman Law* 437; Jolowicz and Nicholas *Historical Introduction* 302.
[83]Sohm *Institutes* 354, 356; Hunter *Roman Law* 436ff; Buckland *Text-Book* 475; Thomas *Textbook* 332-333; Van Zyl *Roman Private Law* 198; Kaser *Roman Private Law* 129; Jolowicz and Nicholas *Historical Introduction* 303; Van Warmelo *Roman Civil Law* 116-119.
[84]Sohm *Institutes* 354-355.

2.2.5.2 The creditor's rights

Essentially the effect of the creation of real security was that the creditor acquired the right:

- to obtain, if he was not already in, possession of the pledged or hypothecated property;
- to sell the property once the secured debt had become due and, in spite of notice or judgment against him, the debt had not been paid; and
- of foreclosure in which case the property was forfeited to the creditor.[85]

In later classical law, in the absence of a *pactum de vendendo*, the creditor's right to sell the property when the debt became due was implied unless it was expressly excluded.[86] In such a case, three successive notices to the debtor were required.[87] If the proceeds of the sale exceeded the amount of the debt, the surplus had to be paid to the debtor.[88] Although the creditor could not sell the property to himself,[89] the debtor could sell it to him.[90]

Justinian modified the position so that, even where the agreement expressly provided that the creditor could not sell the property, he could do so as long as he gave three successive notices to the debtor.[91] Another significant modification by Justinian was that, where parties agreed that the creditor could sell the property on the debtor's failure to pay the debt by a certain date, no sale could take place until two years after formal notice of his intention to the debtor.[92] If the creditor was not in possession of the

[85] Sohm *Institutes* 356; Hunter *Roman Law* 436. Hunter *Roman Law* 437 describes *fiducia* as "essentially a self-acting foreclosure".
[86] Hunter *Roman Law* 437; Thomas *Textbook* 331; Kaser *Roman Private Law* 132; Buckland *Text-Book* 476-477.
[87] See Buckland *Text-Book* 477 n 1 and Thomas *Textbook* 331, with reference to G 2.64 and Paulus *Sententiae* 2.5.1 and C.8.27.14. See also Kaser *Roman Private Law* 132. Buckland *Text-Book* 477 states that the creditor did not have to obtain possession before the sale.
[88] Sohm *Institutes* 356; Hunter *Roman Law* 439.
[89] See, also, Kaser *Roman Private Law* 132-133.
[90] Buckland *Text-Book* 477; Kaser *Roman Private Law* 132-133; Hunter *Roman Law* 438.
[91] Cf Buckland *Text-Book* 477, referring to refers to D 13.7.4, who states that it might have been some later authority who brought about this modification.
[92] If the creditor was in possession of the pledged property; see Hunter *Roman Law* 437. See also Gane

property, he had first to obtain a judicial decree authorising it.[93]

Parties could also agree in a *lex commissoria*, or "forfeiture clause", that if the debt was not paid by a certain date the creditor would become the owner of the property.[94] This was known as foreclosure. However, this was disadvantageous to the debtor in circumstances where the value of the property exceeded the amount of the debt. In 230 AD, a new kind of foreclosure, called *impetratio dominii*,[95] was introduced whereby the creditor could apply to the court to have ownership granted to him. The property was valued and, upon notice to the debtor[96] and after the lapse of one year, the creditor became bonitary owner[97] of the pledged property. If the property was worth less than the amount of the debt, the debtor was discharged from liability but, if it was worth more, the creditor had to pay the difference to the debtor.[98] However, the debtor could pay the debt and the interest due and "redeem the pledge"[99] at any time before the creditor's *usucapio* became complete,[100] that is, within two years of uninterrupted possession, in respect of land and houses, and one year, in respect of movables.[101] After Constantine abolished the *lex commissoria*, in 320 AD,[102] *impetratio dominii* became the only means of foreclosure available to the creditor.[103]

Justinian permitted foreclosure only where no purchaser, for an adequate price, could

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(tr) *Selective Voet* Vol 3 Book XX title 5 s1: 615.

[93] C 8.34.3.1. See Buckland *Text-Book* 477; Thomas *Textbook* 331; Hunter *Roman Law* 437, with reference also to D 13.7.4 and D 13.7.5; Burdick *Principles* 381-382, with reference to Codex 8.28.5, 8.14.10, Inst 4.7.1, Digest 13.7.4, 47.2.73.

[94] Buckland *Text-Book* 477; Sohm *Institutes* 353-354 n 2; Thomas *Textbook* 331; Hunter *Roman Law* 438.

[95] Buckland 477; Thomas *Textbook* 331; Kaser *Roman Private Law* 133, referring to Alex. C 8.33.1; Van Warmelo *Roman Civil Law* 116; Hunter *Roman Law* 438.

[96] Hunter *Roman Law* 438 states that the public had to be notified of the *hypotheca* and there had to be a delay of a year.

[97] Buckland *Text-Book* 477 calls bonitary ownership "praetorian ownership". In relation to bonitary ownership, see Sohm *Institutes* 81ff, 311; Buckland 191ff; Hunter *Roman Law* 263ff.

[98] Buckland *Text-Book* 477; Sohm *Institutes* 356.

[99] Thomas *Textbook* 331. Cf Bordowski *Textbook* 290 who does not mention the required initial lapse of a year before approaching the court.

[100] In relation to *usucapio*, the acquisition of ownership by uninterrupted possession, see Sohm *Institutes* 318ff; Buckland *Text-Book* 241ff.

[101] Thomas *Textbook* 159; Hunter *Roman Law* 265. These periods were laid down in the Twelve Tables: see G 2.42.

[102] Hunter *Roman Law* 438 refers to C 8.34.1; Kaser *Roman Private Law* 132-133; Sohm *Institutes* 356; Van Warmelo *Roman Civil Law* 115.

[103] Buckland *Text-Book* 477; Thomas *Textbook* 331. Both refer to C 8.34.3. See, also Sohm *Institutes* 356.

be found.[104] If the debtor and creditor lived in the same province, the creditor was obliged to give formal notice to the debtor once two years had elapsed since the debt became due. If they lived in different provinces, the creditor had to apply to the provincial judge who would serve a notice on the debtor, setting a date for payment to occur.[105] Once that date passed without the debt having been paid, the creditor could obtain ownership on petition to the emperor.[106] A debtor who, within a subsequent period of two years, paid in full, including interest and costs, could nevertheless redeem the property. Failing this, the ownership of the creditor became irrevocable.[107] Further, if the property was sold the creditor had to transfer to the debtor any amount of the proceeds which exceeded that which the debtor had owed.[108] If the proceeds were less than the amount due the creditor could still claim the balance from the debtor.[109]

Thus significant measures were put in place which, through delaying foreclosure and requiring a judicial decree where the creditor was not in possession of the hypothecated property, effectively protected a defaulting debtor against loss of his immovable property and even enabled him to redeem it within a period of two years after foreclosure had occurred.

2.2.6 Significance of the family home in the Roman social and historical context

Understanding the significance of family and the family home, in the Roman social and historical context, provides additional insights into the implications, for homeowners, of the debt enforcement laws. *Familia*, controlled by the *paterfamilias*,[110] was at "the centre

[104] Hunter *Roman Law* 438; Buckland *Text-Book* 477; Sohm *Institutes* 356; Kaser *Roman Private Law* 133.
[105] Hunter *Roman Law* 438 refers to C 8.34.3.2. If the debtor could not be found, the court would order the debt to be paid by a certain date.
[106] Hunter *Roman Law* 438 refers to C 8.34.1.
[107] Buckland *Text-Book* 477; Thomas *Textbook* 331-332; Hunter *Roman Law* 438 refers to C 8.34.3.3.
[108] Thomas *Textbook* 332, with reference to C 8.33.3.
[109] Buckland *Text-Book* 477, with reference to C 8.33.3.
[110] Heichelheim, Yeo and Ward *Roman People* 35. *Familia* included every member of the household who was subject to the power of the *paterfamilias*: the children who were subject to his *potestas*, the wife who was in the position of a child, if they were married *in manus*, adopted members, slaves over whom he had *dominium* and former slaves who had been freed. See also Dupont *Daily Life in Ancient Rome* 103.

of the Roman community".[111] A number of *familiae*[112] formed a *gens*.[113] The word "*familia*" initially meant "dwelling-place or house"; later it came to mean "the house-community" and, "in a legal sense, the house-property."[114] The family home held great religious significance: it housed the spirits of deceased family members and the obligatory hereditary altar and ancestral tomb.[115] Dupont states that "family and house really were indissoluble" with the house consisting of a family and a single patriarchal head "joined together in veneration of the *lar familiaris*."[116] Generally, during all periods and in every social class, members of the *familia* all lived under the same roof[117] until the death of the *paterfamilias*.[118] All family property, movable and immovable, fell into the estate of the *paterfamilias*.[119] Roman marriages[120] were mostly strategically arranged in order to forge important ties and alliances between families. Slaves were important assets[121] who, if they were freed, continued to constitute invaluable support for their former master in a patron-client relationship.[122]

Clientage[123] was an important institution for economic, political, and social reasons and

[111]Van Zyl *Roman Private Law* 9; Thomas *Textbook* 410ff.
[112]"… with a common progenitor (even if he was a legendary figure)" as stated by Tellegen-Couperus *Roman Law* 6.
[113]A clan.
[114]Heichelheim, Yeo and Ward *Roman People* 35.
[115]Dupont *Daily Life in Ancient Rome* 103.
[116]Dupont *Daily Life in Ancient Rome* 103. The household gods which played a fundamental role in the family's religious life included the *lares* and the *penates* (spirits who inhabited the pantry), Janus (the "spirit of the door", with whom family life began), and Vesta (the "spirit of the hearth" who was "the centre of family life and worship"); see Heichelheim, Yeo and Ward *Roman People* 42.
[117]Although, sometimes, members of the younger generations might take up lodgings elsewhere or even build or purchase other houses in which to reside. See Dupont *Daily Life in Ancient Rome* 103, 105; Heichelheim, Yeo and Ward *Roman People* 36; Thomas *Textbook* 414; Moore *Roman Commonwealth* 93.
[118]Upon this event, "the family would split into as many new families as there were men of the subsequent generation", according to Dupont *Daily Life in Ancient Rome* 103.
[119]Neither wives married *in manus* nor children could own property, subject to the legal principles regarding *peculium*: Thomas *Textbook* 416-417.
[120]Including marriages without *manus*: wives married without *manus* to the men in the family also lived in the house but were regarded as merely "'passing through' in order to provide their husband with children" and remained subject to the power of their oldest agnatic relative and part of the latter's *familia*; see Dupont *Daily Life in Ancient Rome* 105.
[121]See Dupont *Daily Life in Ancient Rome* 58, 105.
[122]Forsythe *Early Rome* 221; Mousourakis *Historical and Institutional Context* 272; Thomas *Textbook* 404.
[123]The relationship between patron and client.

was fortified by the religious significance of the concept of *fides*.[124] In early Roman times, persons became clients[125] of the *gens*, as a whole, in a symbiotic relationship: the *gens* granted them land, political and financial support, protection in the courts and permission to share in its religion; clients pledged, *inter alia*, loyalty, military service and field work. Later, as the *gens* became less important, clients submitted to the patronage, and became the dependants, of rich and influential families who also established alliances, based largely on the concept of *amicitia*, meaning "friendship", amongst themselves. Crook explains it thus:[126]

> The wheels of Roman society were oiled – even driven, perhaps – by two notions: mutual services of status-equals (I help you in your affairs; I then have a moral claim on your help in mine) and patronage of higher status to lower…. It was the patron who came to the legal rescue of his client, paid his money down for litigation, paid his debt to prevent him being haled off, stood as his representative; you might hesitate to 'lay the hand' on a humble plebeian with his patron standing by.

The significance of clientage may also be understood in the context of the two social and political classes of Roman citizens, the patricians and the plebeians.[127] The patricians were mostly wealthy aristocrats and noblemen[128] while the plebeians were mostly poor urban and rural persons.[129] Initially, wealthy persons had sumptuous homes in town and villas on country estates,[130] while subsistence farmers and pastoralists, with modest needs, lived comfortably in straw and mud huts on small plots.[131] However, with the expansion of the Roman Empire, continual war took its toll on the economy. In time,

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[124]Heichelheim, Yeo and Ward *Roman People* 38. Referred to as the "foundation of justice", *fides* embraced "being true to one's word, the paying of one's debts, the keeping of sworn oaths, and the performance of obligations assumed by agreement"; see Heichelheim, Yeo and Ward *Roman People* 46.
[125]Heichelheim, Yeo and Ward *Roman People* 38-39. In early times, clients included foreigners, either from conquered territories or who wished to live in Roman territory and become Roman citizens, freed slaves and Romans who were unable to make a living or protect themselves and their property.
[126]Crook *Law and Life* 93.
[127]The conflict continued from about 500 BC until 287 BC, with the passing of the *lex Hortensia*. See Heichelheim, Yeo and Ward *Roman People* 39; Forsythe *Early Rome* 157; Tellegen-Couperus *Roman Law* 7.
[128]Who monopolised the senate, held high positions and, as pontiffs, were the custodians and interpreters of the sacred laws in the early Republic: Heichelheim, Yeo and Ward *Roman People* 55.
[129]Although some became wealthy and powerful.
[130]Moore *Roman Commonwealth* 86, 87, 93; Dupont *Daily Life in Ancient Rome* 41ff.
[131]Heichelheim, Yeo and Ward *Roman People* 131-132; Dupont *Daily Life in Ancient Rome* 32ff; Moore *Roman Commonwealth* 93.

many of the wealthy, with their lavish lifestyles, became severely over-indebted[132] and poor farmers who had been forced to join the army often returned from war to find that their farms had been looted by the enemy or badly managed or even stolen by dishonest neighbours.[133] Those who borrowed money to pay taxes or to buy seed or implements suffered under the harsh debt enforcement laws, emerging as "the landless poor".[134] As a result, many returned to the army, sold or hired themselves out as gladiators or sold or hired out their children or moved to the city.[135]

The influx of the poor to the cities caused high-rise tenement blocks, called *insulae*, designed for letting, to be hastily constructed. Living conditions were overcrowded, unsanitary, and hazardous due to poor construction. Rentals, food prices and the rate of unemployment were high.[136] These tenants lived an unsettled existence, using the *insulae* as temporary accommodation without a household shrine and gods.[137] At the same time, overseas conquests created new markets which resulted in agricultural operations becoming large-scale and capital-intensive, with some of the wealthy generating even more wealth for themselves.[138] Poverty-stricken Roman citizens and foreigners became the clients of wealthy Roman patrons: urban clients were at their patrons' "beck and call" and were expected to give them political support in return for food, money, or clothes; rural clients, mostly peasants, were exploited in "humiliating servitude".[139]

Widespread discontent amongst the urban poor in the latter part of the second-century BC caused political upheaval and conflict with access to land being a main issue.[140] As

[132]Heichelheim, Yeo and Ward *Roman People* 54; Dupont 41 refers to it as "opulent poverty".
[133]Heichelheim, Yeo and Ward *Roman People* 56.
[134]Dupont *Daily Life in Ancient Rome* 44-45; Heichelheim, Yeo and Ward *Roman People* 56.
[135]Crook *Law and Life* 61; Heichelheim, Yeo and Ward *Roman People* 65.
[136]Moore *Roman Commonwealth* 144-145, 150; Heichelheim, Yeo and Ward *Roman People* 134.
[137]Moore *Roman Commonwealth* 150.
[138]Heichelheim, Yeo and Ward *Roman People* 132-133.
[139]Mousourakis *Historical and Institutional Context* 271.
[140]See Heichelheim, Yeo and Ward *Roman People* 134-135 (for an account of the contributing factors), 155.

Dupont explains:[141]

> … [for a peasant,] loss of his land spelled the loss of his house, his family, his household gods, the tombs of his ancestors, and his dignity…
>
> … Tiberius Gracchus … spoke on their behalf as follows:
>
> > 'The wild beasts that roam over Italy have, every one of them, a cave or lair to shelter in; but the men who fight and die for Italy enjoy only the light and air that is common to all above their heads; having neither house nor any kind of home they must wander about with their wives and children… for not a man of them has a hereditary altar; not one of all these many Romans has an ancestral tomb… Though they are styled masters of the world, they have not a single clod of earth to call their own'.

This speech portrays the stark realities of poverty and homelessness and the socio-economic necessities of access to land, security of tenure and access to adequate housing and their direct connection with upholding human dignity. It is submitted that it is also strikingly reminiscent in a number of respects of issues which are relevant in the current South African socio-economic context.

2.3 Roman-Dutch law

2.3.1 General background

After the Frankish Empire dissolved in 900 AD, for many centuries, no general legislation was passed. The Counts of Holland issued local *handvesten* (privileges) in their towns which were, in many respects, at variance with one another. As a result, Roman law, regarded as "a system logical, coherent and complete",[142] was received in some of the provinces of the Dutch Netherlands. Ordinances passed by municipalities also formed part of the law. Charles V promulgated what have been referred to as "useful measures",[143] such as the *Placaat* of 10 May 1529, relating to the transfer and hypothecation of immovable property, and the Perpetual Edict of 4 October 1540.

[141] Dupont *Daily Life in Ancient Rome* 45, quoting Plutarch *Tiberius and Gaius Gracchus* 9. Tiberius Gracchus was a key politician in the campaign for access to land.
[142] Lee *Introduction* 3.
[143] Lee *Introduction* 6.

Another significant ordinance was the Ordinance on Civil Procedure of 1580.[144] By the end of the sixteenth century, the applicable law consisted of: ordinances; *handvesten*; the Roman-Dutch law, that is, "the ancient customs engrafted on the Roman law"; and the Roman law, as reflected in the *Corpus Juris* (as well as, in some cases, in the Canon law).[145] This law was introduced to the colonies including the Cape of Good Hope.[146]

2.3.2 Individual debt enforcement

According to Germanic custom, a debtor could be sold into slavery and, during the feudal regime, a debtor could be compelled to work for his creditor.[147] Old Dutch *handvesten* permitted a debtor who was unable to pay his creditor to be handed over to him until the debt was paid.[148] Apparently, before the introduction of *cessio bonorum*,[149] the law of Holland provided only for execution against the person.[150] The early "self-help" procedure received judicial sanction in situations where the defendant refused to appear in court, the rationale being that an obstinate defendant should be deprived of the protection of the law. However, partly because of the sanctity of personal freedom, the defendant was required to be called three times to appear before a judge, with considerable intervals in between, before he was regarded as being in default. Wessels states this "tenderness towards the defendant always formed a marked feature in the procedure of the Dutch courts … [and] prevailed in the Cape Colony before our modern

[144]See Erasmus "Interaction" 141 143. See, also, 2.4, below.
[145]Wessels *History* 206-207.
[146]Lee *Introduction* 7ff. See, also, 2.4, below.
[147]Wessels *History* 664 comments that later legal provisions for civil imprisonment were vestiges of this practice.
[148]See, for example, the *Handvest* of Alkmaar of 1254, mentioned by Wessels *History* 663, with reference to the *Rechtsgeleerde Observatiën* Volume 2 obs 100. See also Calitz 2010 *Fundamina* 16(2) 9ff.
[149]This was probably in the fifteenth century: see Wessels 663-664; Van der Keessel 3.51.2. Calitz *Reformatory Approach* 24 refers also to Wessels *History* 218. See also Calitz 2010 *Fundamina* 16(2) 10ff.
[150]Wessels *History* 664; Evans *Critical Analysis* 42. An additional debt enforcement procedure, based on the Roman law concept of *missio in possessionem*, referred to at 2.2.3, above, was apparently not often resorted to: see Voet 42.4, 42.5.1; Roestoff *'n Kritiese Evaluasie* 51-52; Roestoff 2005 *Fundamina* 78 81ff; Bertelsmann *et al Mars* 8. Gane's translation Volume 6 quotes Voet 42.4.6 thus: "Nay again these placings in possession are but seldom employed by the customs of today". The reason given was that either judgment was obtained against the absconding debtor in his absence, as being "contumacious", or the plaintiff proceeded by attaching and selling the property of the defendant, a process which had developed by that time.

rules of court were promulgated."[151]

Later developments allowed execution against the debtor's property. Because litigation was complex, necessitating representation by attorneys and advocates,[152] and because it was expensive, a plaintiff had first to claim satisfaction from the defendant in a friendly manner[153] before he could institute action by serving summons.[154] In the high court, the parties were required first to appear before a commissioner in an attempt to reach a compromise before a summons could be issued. The process server, when serving the summons, had also to explain to him the "exigency" of it. If the defendant wished to defend the matter, the process server would appoint a convenient day, between 14 days and one month later, for him to appear.[155]

If the defendant did not appear on the return day, the plaintiff would "pray default". In an ordinary action, four defaults were required. After each default, the defendant was afforded the benefit of a subsequent writ or summons until, after the fourth default, the court would grant judgment against him.[156] In a defended matter, once the substantive and procedural requirements[157] had been complied with and a valid judgment had been granted[158] it had to be declared executable. In the lower courts, the judgment has to be placed in the hands of the messenger. In the high court, a writ of execution of the judgment had to be taken out at the registrar's office giving authority to the process server to execute it.[159] The process server or messenger had to deliver to the execution debtor a document, known as the *sommatie*, calling upon him to satisfy the judgment

[151]Wessels *History* 175.
[152]Van der Linden *Institutes* 3.2.4.
[153]Either orally or in writing, or by notarial demand.
[154]Van der Linden *Institutes* 3.2.1. On service of summons, see Van der Linden *Institutes* 3.2.6.
[155]Van der Linden *Institutes* 3.2.9. On the return day, the plaintiff's attorney had to file a declaration setting out the claim; see Van der Linden *Institutes* 3.2.12.
[156]Van der Linden *Institutes* 3.2.13. If the defendant appeared on the second or third summons, he could apply to purge the defaults, but if he appeared only on the fourth summons, he was required to obtain a writ of relief.
[157]For a matter to be rendered "ripe for judgment", see Van der Linden *Institutes* 3.2.10ff, 3.3,3.8.
[158]It had to have been pronounced or delivered publicly; see Van der Linden *Institutes* 3.9.4.
[159]Van der Linden *Institutes* 3.9.5.

debt, together with costs, within 24 hours[160] failing which a *renovatie*,[161] or *alias* writ, was issued. Thereafter, if the judgment was still not satisfied the execution proceeded in different ways depending on the type of action.[162]

In real actions in which, in terms of the judgment, a person was obliged to vacate specific immovable property, the process server or messenger immediately removed the execution debtor from, and placed the execution creditor in, possession.[163] In personal actions in which, in terms of the judgment, a person was obliged to pay a sum of money, the process server or messenger, on serving the *renovatie*, would demand that property should be pointed out to him by the judgment debtor. It was the duty of the former to take movable property sufficient to satisfy the judgment debt.[164] On the other hand, if despite diligent enquiry the process server or messenger did not find sufficient movable property to satisfy the judgment debt, he had to levy execution upon the immovable property. However, he was not entitled to levy execution upon immovable property of great value for small debts unless it could not be divided.[165]

In the lower courts, after the immovable property was attached its sale had to be publicly announced on four Sundays and market days, in the towns, and on four Sundays and court days, in the country, with placards having to be posted in the nearest town. Once the sale had been held and the purchase price had been paid a deed of transfer was granted to the purchaser by the lower court.[166]

In the high court, execution against immovable property entailed a more complex process.[167] Once the immovable property was attached in the presence of the *schepenen*, notice was given both to the execution debtor and to the lower court. The

[160]Van der Linden *Institutes* 3.9.6. In the high court, the *sommatie* set out what was required of the judgment debtor and a copy of the judgment and the writ of execution were also delivered to him.
[161]This was a repetition of the *sommatie*.
[162]Van der Linden *Institutes* 3.9.7.
[163]Van der Linden *Institutes* 3.9.8.
[164]Van der Linden *Institutes* 3.9.9-3.9.10.
[165]Van der Linden *Institutes* 3.9.11, with reference to *Reglem Art* 22.
[166]Van der Linden *Institutes* 3.9.11.
[167]Van der Linden *Institutes* 3.9.12.

process server publicised the sale by issuing proclamations on four Sundays and market days and, on the appointed day, he provisionally sold the property to the highest bidder. Thereafter, he had to summons all interested persons to the high court and to annex returns of service to the judgment and the writ of execution. On the appointed day, the execution creditor had to file his claim at the Rolls of the High Court for it to issue a decree of transfer which would confirm the sale after which nobody could oppose it.[168] A certificate, or deed of proclamation, was drawn up in the registrar's office calling on all persons to appear at the high court on a certain day if they wished to make a higher bid for the immovable property than that already received. The process server published the deed of proclamation by posting placards announcing the final sale. On the advertised day, the property was *de novo* publicly put up for sale at the Rolls of the High Court by the assistant registrar, or secretary in charge of the Rolls, and knocked down to the highest bidder. Thereafter, a ceremony took place in which the oldest commissioner of the Rolls held in his hand the deed of transfer with the court's seal attached to it. When there were no further bids for the property, he removed the court's seal thus signifying that the property had been adjudicated to the purchaser.[169] The proceeds of the sale of the immovable property had to be paid to the secretary of the lower court or to the registrar of the high court, as the case might be, and payment to the creditor was regulated from there.[170]

If the judgment debtor did not have property or had property insufficient to satisfy the judgment debt, the judgment creditor was permitted to proceed against his person.[171] A debtor could evade imprisonment by relying on the *beneficium competentiae* which entitled him to retain an amount adequate for his maintenance according to his craft and standing.[172]

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[168]There was a set procedure to be followed if anyone wished to oppose it, although it appears that this rarely occurred; see Van der Linden *Institutes* 3.9.7.
[169]Van der Linden *Institutes* 3.9.7.
[170]Van der Linden *Institutes* 3.9.8.
[171]Van der Linden *Institutes* 3.9.14.
[172]See Voet 42.1.46 with reference to Digest XLII 1.19.1; L 17.173 and XXV 3.5.7; Gane (tr) *Selective Voet* Vol 6 346-347. Interestingly, a nobleman was entitled to more than a common person and an old man was entitled to more than a youth because it was easier for the latter to obtain a livelihood. For discussion of the *beneficium competentiae* in Roman law, see 2.2.3, above. Voet 42.1.46 also mentions, as a way of evading imprisonment, *cessio bonorum,* for discussion of which see 2.2.3, above.

2.3.3 Collective debt enforcement

Originally, in the Netherlands there was no uniform insolvency system. Customs rooted in Roman law principles developed to deal with insolvent estates.[173] In many places, common law rules applied[174] while in some areas special ordinances were issued to deal with insolvent and other estates.[175]

Cessio bonorum was introduced into Holland in the fifteenth or sixteenth century.[176] It was not available as of right to a debtor[177] but was a privilege extended by the court, in its discretion, to a debtor whose insolvency arose because of misfortune.[178] Full disclosure of the position of the debtor's estate was required in what has been described as a complicated and expensive procedure, in a petition to court, with notice to creditors.[179] Once a report was received from the *burgomaster*[180] and governing authority of the place where the debtor was domiciled, the court would grant a rule *nisi* calling on persons to show cause why the provisional writ of *cessio bonorum*, known as *brieven van cessie*, should not be made final. The issue of the provisional writ prevented the arrest of the debtor and its confirmation effected a stay of execution against his assets which were placed in the custody of a curator.[181] The debtor was entitled to retain certain assets including his clothes, bedding, tools and other

[173]Wessels *History* 661; Roestoff *'n Kritiese Evaluasie* 48; Evans *Critical Analysis* 41; Dalhuisen *International Insolvency and Bankruptcy* 1-35.
[174]Van der Linden *Institutes* 3.10.
[175]Bertelsmann *et al Mars* 9.
[176]See Wessels *History* 663ff; Roestoff 2005 *Fundamina* 78; Calitz *Reformatory Approach* 24-25; Stander 1996 *TSAR* 374. Exactly when *cessio bonorum* was introduced is unclear: according to Bertelsmann *et al Mars* 8, Schörer n 532 states that, according to Van Leeuwen, *cessio bonorum* was not in use before 1288; Van der Keessel *Select Theses* 883 indicates that it was in use towards the end of the fifteenth century.
[177]As it had been under the Roman legal system; see 2.2.3, above.
[178]Wessels *History* 665.
[179]Grotius *Introduction to Dutch Jurisprudence* 3.41.2; Van der Linden *Institutes* 3.7.2; Wessels *History* 664.
[180]*Burgomaster* is the English translation of *burgemeester*, in the old Dutch, and *burgermeester*, in contemporary Afrikaans. See Wessels *History* 75, 163, 209 and 664 for an explanation of the term *burgomaster* and the official duties of the incumbent of such position.
[181]Van der Keessel *Select Theses* 884; Wessels *History* 664-665; Stander 1996 *TSAR* 371; Evans *Critical Analysis* 42; Calitz *Reformatory Approach* 25.

necessities of life such as items which might enable him to earn a living.[182] *Cessio bonorum* did not lead to a discharge from pre-sequestration debts[183] and creditors could claim after-acquired property in that, in terms of the *brieven van cessie*, if the debtor by good fortune were to acquire new assets he was obliged to pay his creditors in full.[184]

When the court granted *cessio bonorum*, the estate initially was administered by commissioners under the supervision of local magistrates.[185] By the eighteenth century, chambers, known as the *Desolate Boedelkamers*, administered insolvent estates of all debtors who had surrendered their estates by *cessio bonorum* and of all bankrupt persons, known as *bankroetiers* or *bankbreekers*, who had fled the country to evade their creditors or who had acted fraudulently.[186] Apart from *cessio bonorum* and the treatment of *bankroetiers*, there was no other formal insolvency process available and each creditor was obliged to use the individual debt enforcement procedures to try to execute against the debtor's assets. If the assets were insufficient to cover the debt, execution against the person of the debtor, by arresting him, was permitted.[187]

A form of the Roman law *missio in possessionem*[188] also applied in Holland[189] in terms of which a curator was appointed to distribute the proceeds of the debtor's assets proportionately amongst the creditors once the assets had been sold by public auction.[190] It was also possible, in regions where no specific ordinances applied, for sequestration of a debtor's estate to occur at the instance of creditors who showed that debts were legally due to them and that the debtor was undoubtedly insolvent. The process consisted in one or more persons being appointed as sequestrators or curators whose duty it was to go to the house of the debtor, to seal up the coffers, to place the

[182]Voet 42.3.7; Wessels 665-666.
[183]Van der Keessel *Select Theses* 889.
[184]Wessels *History* 666; Evans *Critical Analysis* 43. See related comments by Van Heerden and Boraine 2006 *De Jure* 331, 352, discussed at 5.3.3, below.
[185]The *scout* and *schepenen*; see Bertelsmann *et al Mars* 8.
[186]Wessels *History* 667.
[187]Voet 42.1.45; Roestoff *'n Kritiese Evaluasie* 52.
[188]Mentioned at 2.2.3, above.
[189]Voet 42.5.1; Bertelsmann *et al Mars* 8; Gane (tr) *Selective Voet* Vol 6 388ff; Evans *Critical Analysis* 42.
[190]Voet 42.5.2. Cf Roestoff *'n Kritiese Evaluasie* 51 with reference to De Villiers *Ou-Hollandse insolvensiereg* 5-6, 70 who stated that this never became an insolvency process in Roman-Dutch law.

books and papers in safe custody and to appoint a person to look after the estate. If the debtor and his family had left their home, it was shut up by order of court.[191] The sequestrators or curators had to draw up an inventory of the estate, realise perishable assets, call in all debts owing to the debtor, and pay in to the court's secretary any money received.

A debtor whose estate had been placed under administration in this manner usually tried to reach a compromise with his creditors so that his estate would be returned to him. In terms of the common law, all of the creditors had to agree to the compromise in the absence of which only the sovereign could confirm the composition.[192] If no composition was reached, creditors had to be given notice, by newspaper advertisement, to lodge their claims with the secretary of the court. The property in the estate had to be sold and realised as soon as possible although immovable property had to be sold "at such times of the year as …[were] suited for this purpose".[193] After the final liquidation had taken place, the sequestrator or curator had to draw up an account of his administration. The creditors had to be summonsed to court, the account had to be audited and passed in the presence of the court before which the creditors had to justify their claims. Thereafter, the proceeds were divided amongst them.[194]

In many places, the position was regulated by local ordinances. The most significant, as a source of South African insolvency law,[195] was the Amsterdam Ordinance of 1777.[196] It provided for any debtor who was obliged to stop payment of his debts, or for his creditors, to approach the commissioners of the *Desolate Boedelkamers* for an order to take control of the debtor's estate. Two commissioners were appointed to administer the estate. They had first to try to make an arrangement with the creditors. If this did not

[191] See Van der Linden *Institutes* 3.10.2-3.10.3; Calitz *Reformatory Approach* 26; Calitz 2010 *Fundamina* 16(2) 11ff; Bertelsmann *et al Mars* 8.
[192] Van der Linden *Institutes* 3.10.4.
[193] Van der Linden *Institutes* 3.10.5.
[194] Van der Linden *Institutes* 3.10.6.
[195] *Fairlie v Raubenheimer* 1935 AD 135 146. See also Wessels *History* 667-668; Stander 1996 *TSAR* 376; Bertelsmann *et al Mars* 9; Roestoff *'n Kritiese Evaluasie* 53ff; Roestoff 2005 *Fundamina* 82ff; Calitz *Reformatory Approach* 26-27; Calitz 2010 *Fundamina* 16(2) 11-12.
[196] *Nederlandsche Jaarboeken* 1777 291. See 2.4, below.

occur, they had to call a meeting of creditors, two or three of whom would be appointed as provisional sequestrators of the estate. The debtor would receive an amount out of the estate sufficient to maintain his household and he could keep in his possession tools of trade and assets necessary to earn a living.[197]

Sequestration prevented executions against the estate except for those which had already commenced.[198] The debtor had a month to try to reach a composition with his creditors through a prescribed process administered by the commissioners.[199] Once a composition was approved in writing, the estate was released from sequestration.[200] If a composition was reached but the debtor did not adhere to its terms, the estate was declared insolvent and he was prevented thereafter from entering into a composition with creditors even if all of them agreed to the terms. If a composition was not achieved within one month of the sequestration of the estate, the chamber declared it insolvent.[201] Once a debtor had been declared insolvent, any composition had to be reached with all, and not merely a majority, of the creditors who had proved claims.[202]

The commissioners appointed two of the sequestrators as curators[203] to oversee the sale of the assets of the insolvent estate. The insolvent, his wife and children were permitted to retain their everyday clothing and the insolvent's wife, if married to him by antenuptial contract, or his next of kin, could acquire the necessary household furniture at a reduced price.[204] An insolvent who was an artisan and who had conducted himself in good faith could, with the consent of the curators and the commissioners, retain his tools of trade and other tools with low value.[205] Once the estate assets had been liquidated, the proceeds were distributed amongst the creditors with preferent creditors

[197] Wessels *History* 668ff.
[198] Article12, referred to by Roestoff *'n Kritiese Evaluasie* 54.
[199] Articles 13, 14 and 15. Although the formation of a composition was encouraged, creditors could oppose it and, if successful, the estate had to be declared insolvent. See Article 16; Roestoff *'n Kritiese Evaluasie* 54; Wessels *History* 668.
[200] Articles 17 and 18; Wessels *History* 668; Evans *Critical Analysis* 46.
[201] Article 25; Evans *Critical Analysis* 46.
[202] Article 25; Roestoff *'n Kritiese Evaluasie* 55.
[203] Wessels *History* 668 refers to them as "trustees".
[204] Roestoff *'n Kritiese Evaluasie* 56.
[205] Article 29; Roestoff *'n Kritiese Evaluasie* 56.

being paid out first.[206] The Amsterdam Ordinance provided for a rehabilitation process in terms of which the commissioners returned to the insolvent a specific percentage of the assets and granted him a discharge from all pre-sequestration debt. The rehabilitated debtor regained his contractual capacity.[207] This was the predecessor of the South African insolvency law concept of rehabilitation.[208]

2.3.4 Real security

Mortgage,[209] as defined by Grotius, is a "right over another's property which serves to secure an obligation".[210] The ancient form of German pledge was not an accessory agreement but more a kind of "alternative payment" whereby the debtor delivered to the creditor, as provisional payment, something different from the object promised and which he could "redeem" once he performed his obligation. The debtor could choose not to perform what he had promised but to allow the object to remain with the creditor as fulfilment of their agreement. Further, if the creditor sold the object to a third party the debtor could not reclaim it. These aspects indicate that the creditor was regarded as the owner of the thing "pledged" and that, in a sense, credit was in fact not granted.[211]

In time, the Roman law principles relating to *pignus* and *hypotheca* were adopted so that by the time of Grotius the law of Holland, in relation to pledge, was similar to the Roman law of Justinian's time.[212] Initially, when immovable property was pledged, the creditor became *dominus* with full usufruct of the land on the basis that he had promised to transfer the land back to the debtor once the debt was paid. If the debt was not paid within the stipulated time, the mortgagee remained the owner. However, in the

[206] Article 47; Roestoff *'n Kritiese Evaluasie* 56.
[207] Articles 40-42; Wessels *History* 669; Roestoff *'n Kritiese Evaluasie* 57; Evans *Critical Analysis* 47.
[208] Wessels *History* 672-673.
[209] Note that Gane (tr) *Selective Voet* Vol 3 Book XX Title 1: 470 states that, although the term "mortgage" is used in relation to immovables, strictly speaking it was not used in the Dutch law, the proper term to be used being "hypothec". However, for the sake of convenience, Gane made reference to "mortgage", in this context.
[210] Lee *Introduction* 183, with reference to Grotius 2.48.1.
[211] This was based on the *vadium* contract; see Wessels *History* 569-571, 592-593 who describes it as a type of contract of exchange.
[212] Specific aspects, based on German custom, remained; see Wessels *History* 593.

thirteenth century the law was modified so that, if the mortgagor did not fulfil his obligation, the mortgagee could no longer treat the property as his own but he had to sell it by judicial sale. The debtor could recover the mortgaged property right up until the point when it was actually sold in execution by judicial decree.[213] The law of Holland, at the time of Grotius, did not recognise a *parate executie* stipulation which permitted the creditor to sell the mortgaged property without an order of court if the debtor did not pay timeously.[214]

By the fourteenth century, the general practice was for the mortgagor to retain possession of his property.[215] Thus, a deed of hypothecation became necessary and sufficient publicity for a mortgagee to be able to ascertain if property had already been mortgaged. To this end various *placaaten* were issued which effectively provided that a special mortgage of immovable property, including a *kustingbrief*,[216] was valid only if it was executed before the court and the required duty was paid.[217] The holder of a validly executed special mortgage had a preferent claim on the proceeds arising from the sale of the mortgaged property. Where more than one special mortgage had been executed upon the same property, they would rank according to the order in which each was executed.[218]

To obtain the court judgment which was required before a creditor could sell the mortgaged property, he had to have drawn up a confession of judgment by the

[213]Wessels *History* 594-596.
[214]Wessels *History* 596; Lee *Introduction* 200-201, with reference to Voet 20.5.6, states that a *parate executie* agreement would not be enforced if the debtor afterwards objected, or if the private sale would be prejudicial to the other hypothecary creditors. Van der Keessel *Select Theses* 439 states that a pledgee could sell the thing delivered to him if that was originally agreed upon. It may be noted that the translator, Lorenz, has qualified this statement by pointing out, with reference to Digest 8.7.4, that it would be more accurate to translate the text as "where there has been no stipulation to the contrary." There is controversy as to whether the later law of Holland permitted *parate executie*.
[215]Wessels *History* 594.
[216]A *kustingbrief* was a special mortgage of immovable property for the balance of its purchase price, the bond being passed at the time of transfer of the property; see Van der Linden *Institutes* 1.12.3.
[217]These included a *Placaat* of Charles V of 10 May 1529 and the *Politique Ordonantie* of 1580; see Wessels *History* 217-218, 595. The *Placaat der 40ste Penning* of 22 December 1598 made duty of 2.5 per cent payable; see Lee *Introduction* 185; Van der Keessel *Select Theses* 433.
[218]A special mortgage enjoyed a claim preferent to that in respect of a prior general mortgage: Van der Keessel *Select Theses* 436; Lee *Introduction* 198; Van der Linden *Institutes* 1.12.4.

debtor,[219] or he had to issue a summons against the debtor requiring him to pay the debt or to appear to hear the mortgaged property being declared bound and executable. Once the judgment was obtained, the special mortgage was executed in compliance with certain requirements.[220] Where mortgaged property was sold without the consent of the true owner, the latter could legally claim it from any person who was in possession of it without making restitution for the price paid by the latter. An exception to this rule was where goods were sold *bona fide* in the public market. In such a case, the price had to be restored.[221]

Mortgage was extinguished by decree of court or by judicial sale or sale in insolvency of the mortgaged property.[222] It could also be extinguished by prescription.[223]

2.3.5 Debt relief measures available in Roman-Dutch law

2.3.5.1 Composition

The *Placaat* of Charles V of 1544 provided for a debtor to enter into a composition with his creditors as long they all agreed to it.[224] Thereafter, the position varied according to whether the particular city or province had issued a specific ordinance which provided for a composition in which a certain majority could bind the minority.[225] It appears that

[219]Known as *willige condemnatie*. This was required in a case where the bond had been made subject to confession being signed.
[220]Lee *Introduction* 200 refers to 2 Maasdorp 307. Van der Linden *Institutes* 1.12.5 states that the formalities were those required in the case of an *onwillig Decreet* which was "a sale of immovable property that took place by way of execution upon the order of the court; or, in a more general sense, a sale of the debtor's property, commenced by the *Deurwaarder* upon a judgment, and afterwards consummated at the High Court."
[221] See Van der Keessel *Select Theses* 183 n 3, with reference to Van Leeuwen *Censura Forensis* part I book iv ch 7 § 17, 184. This rule applied in Holland, but not in Zeeland.
[222]Voet 20.5.10, with reference to Mattheus II *De Auctionibus Libri Duo, quorum prior Venditiones, posterior Locationes, quae sub hasta fiunt, exequatur: adjecto passim voluntarium auctionum jure* 1.14.11.
[223]Van der Keessel *Select Theses* 208.
[224]Van der Keessel *Select Theses* 829 states that this reflected the Roman law principles applicable in relation to *remissio*, mentioned at 2.2.4, above.
[225]In 1649, Zeeland adopted such an ordinance as did Amsterdam in 1659, Leyden in 1665 and Haarlem in 1708. See Van der Linden *Institutes* 3.10.4; Roestoff *'n Kritiese Evaluasie* 59. Amsterdam adopted a later ordinance in 1777, discussed at 2.3.3, above. In terms of some of these ordinances, three quarters of the creditors, entitled to two thirds of the debt, could bind the minority. Gradually a practice developed

the debtor received a partial discharge of his debt if *remissio* was granted to him and the creditors could not claim the balance out of after-acquired assets.[226]

2.3.5.2 Moratoria

General moratoria were extended as emergency measures in the Netherlands as a result of disasters, wars and revolution[227] and, in addition to *cessio bonorum*, there were four benefits, originally based on the Roman law *dilatio*, available to debtors:[228] *brieven van inductie*,[229] *brieven van respijt*,[230] *seureté du corps*[231] and *surchéance van betaalinge*.[232]

In terms of legislation issued in 1581, *brieven van inductie*[233] could be issued by the High Court of Holland upon application by the debtor if the majority of creditors, who could bind the minority, agreed to a postponement of payment and the debtor provided security for payment upon the expiry of such period.[234] This provided the debtor with a financial "recovery period" during which no creditor could sue him or execute against his property or his person. In terms of *placaaten* issued in 1531 and 1544, the *Hooge Overheid*, with the authority of the court concerned, and, after 1581, the *Hooge Raad*

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that allowed the insolvent a discharge from all of his debts if one half of his creditors, to whom he owed one half of his debts, agreed to it. In the latter respect, see Van der Keessel *Select Theses* 829; Wessels *History* 666; Evans *Critical Analysis* 43.

[226] Voet 2.14.28; Roestoff *'n Kritiese Evaluasie* 60 refers to Dalhuisen *Compositions* 29.

[227] For example, the *Placaat van de Staten van Holland en Wes Friesland* of 26 December 1672 forbade creditors from claiming "*hypotheeken en kustingen*" during the year 1673 if the security provided had lost its value on account of the "*algemeene calamiteit*" (being the war against France and England and its consequences). It provided that the *recht van hypotheek* nevertheless remained intact and that interest was payable. See Roestoff *'n Kritiese Evaluasie* 60 n 282; Henning 1991 *THRHR* 523; Henning 1992 *THRHR* 1.

[228] Van der Keessel *Select Theses* 889-895.

[229] Also known as *rescripta inductionis*. See Van der Linden *Institutes* 3.7.4.

[230] Also known as *rescripta moratoria*. *Respijt* was also referred to as *atterminatie*; see Van der Linden *Institutes* 3.7.3.

[231] Or benefit of safe conduct; see Van der Keessel *Select Theses* 894. This allowed a postponement of the obligation, and thus freedom from arrest, for a period of about three to four months, for a debtor, who was in hiding, to try to reach a compromise with creditors. The majority of creditors had to be in favour of it.

[232] Van der Keessel *Select Theses* 895.

[233] They were known as *brieven van inductie* on account of the creditors, who all had to be cited, having been induced to allow this indulgence; see Van der Keessel *Select Theses* 892.

[234] Van der Keessel *Select Theses* 890, 892.

could issue *brieven van respijt.* Contention exists as to whether agreement by creditors was required.[235] This relief was available only if the damage or loss which led to the debtor's inability to fulfil his obligations was not due to his fault and only once the debtor had provided security.[236] The effect of the grant of *brieven van respijt* was that the debtor's duty to pay his debts was postponed for a period of up to five years during which time no creditor could sue him or execute against his property or his person.

Surchéance van betaalinge was an indulgence granted by the state, without the requirement of agreement by creditors or the provision of security, which afforded a debtor the right to suspend payment of debts for the period of one year and which suspended all actions, arrest, attachments and executions against him.[237] *Surchéance van betaalinge* was first granted by the States of Holland during war against England from 1779 to 1784. It provided for a suspension of obligations in exceptional instances as well as where the debtor was, due to circumstances beyond his control, unable to fulfil all of his obligations. It was viewed as a means of avoiding sequestration and civil imprisonment and was preferred above *brieven van inductie* and *brieven van respijt*. The practice survived in modern Dutch law. It was applied in South Africa until it was abolished by the Cape Ordinance 6 of 1843. This ordinance, discussed below,[238] was based on English law and it is regarded as the basis of current South African insolvency law.[239]

2.3.5.3 Debt relief measures based on contract

The developed Roman-Dutch law of contract, having advanced beyond the formal categorisation of contracts in the Roman legal system, was based on the principle of sanctity of contract as expressed in the maxim *pacta sunt servanda*.[240] Contract was

[235]The contrary views are set out by Van der Keessel *Select Theses* 891 who argues that the consent of the majority of the creditors was indeed required.
[236]Van der Keessel *Select Theses* 890.
[237]Van der Keessel *Select Theses* 895 regards this benefit as "one not a little opposed to equity and the principles of law."
[238]See 2.4, below.
[239]See *Newcombe v O'Brien* 20 EDC 292 296.
[240]See Visser 1981 *SALJ* 641 649ff, 654; Hutchison "Nature and Basis" 12. See, also 1.1, above.

essentially based on *consensus ad idem*.[241] Therefore, parties could terminate their obligation by mutual agreement in the form of either release (*acceptilatio*),[242] novation (*novatio*) or compromise (*transactio*). A partial release was also possible. A *pactum de non petendo*, an agreement not to enforce a right, or not to sue, was a type of release.[243] Novation occurred when parties with the requisite intention[244] agreed to replace the required performance with some other form of performance so that a new contractual obligation came into existence.[245] *Transactio* was an agreement between two or more parties which resolved a dispute between them. *Datio in solutionem*, by which a debtor who could not pay his debt and who owned immovable property could instead give such property to the creditor, even against the will of the latter, was no longer in use.

2.4 Reception of Roman-Dutch law and English law in South Africa

In 1652, the Dutch East India Company established a halfway refreshment station, including a vegetable garden and a hospital, for ships travelling between the Netherlands and the East Indies. The commander of the settlement was Jan van Riebeeck who established a rudimentary judicial system, at first administered by himself and his staff, applying the laws of the Province of Holland. These events led to the Cape Colony being established and the introduction of Roman-Dutch law into South Africa.[246] In 1656, a *Justitie ende Chrijghsraet* was created to deal with legal matters. Except for the introduction of civil courts, called the courts of *landdrosten* and *heemraden*, for more remote areas outside Cape Town and the substitution of the *Justitie ende Chrijghsraet* with the *Raad van Justitie*, this basic structure of the administration of justice remained until the end of the first period of Dutch occupation of the Cape in 1795.[247] Although the

[241]Wessels *History* 571-577; Hutchison "Nature and Basis" 12.
[242]Van der Keessel *Select Theses* 828 states that this was "a present and absolute remission of debt". See also Lee *Introduction* 271.
[243]Van der Keessel *Select Theses* 828; Lee *Introduction* 271.
[244]See van der Keessel *Select Theses* 835.
[245]Lee *Introduction* 272.
[246]See Fagan "Roman-Dutch Law" 35ff; Calitz *Reformatory Approach* 37; Du Bois *Wille's principles* 64ff; De Vos *Regsgeskiedenis* 3ff, 18, 226ff.
[247]See Fagan "Roman-Dutch Law" 38; Erasmus "Interaction" 144-145 suggests that "the general organization of the administration of justice remained remarkably consistent" until 1827.

local government at the Cape issued *placaaten* these have all been repealed and Roman-Dutch law is generally regarded as the common law of South Africa.[248] No rules of procedure were promulgated specifically for the Cape and it appears that the *Raad van Justitie* applied the Ordinance on Civil Procedure of 1580.[249]

In 1795, the Cape became controlled by Britain. From 1803 to 1806, it was controlled again by Holland, or the Batavian Republic, as the Netherlands was then called.[250] In 1803, the Batavian Republic appointed Jacobus Abraham de Mist as Commissioner-General of the Cape. He brought about significant changes including the creation of a *Desolate Boedelkamer*, for the administration of insolvent estates. This was to ease the burden on the *Sequester*, who was a member of the *Raad van Justitie* and therefore part of the judiciary, and who, at that stage, had been responsible for the administration of all insolvent estates and the execution of civil sentences. The procedures for the *Desolate Boedelkamer* were issued in an ordinance, known as the *Provisionele Instruksie*, which has been acknowledged as "the first real and substantial insolvency law" in the Cape.[251] This ordinance was based largely on the Amsterdam Ordinance of 1777[252] although two differences were that creditors did not play a role in the administration of the insolvent estate and creditors could not apply for the sequestration of a debtor's estate. However, c*essio bonorum* and *missio in possessionem* were available to debtors in the Cape. This was certainly the position after 1803. In terms of the *Provisionele Instruksie*, curators, chosen by the creditors but acting under the supervision of the *Desolate Boedelkamer*, administered the insolvent estates.[253] It may be noted that, around 1805, in civil matters *landdrosten* "were required to use every

[248]See Fagan "Roman-Dutch Law" 39, 41ff, with reference, *inter alia*, to Hahlo and Kahn *South African Legal System* 578. For a useful, succinct explanation of the reception of Roman-Dutch law in South Africa, see Glover *Duress in the Law of Contract* 38 n 3. See, also, generally, De Vos *Regsgeskiedenis*.
[249]See Erasmus "Interaction" 143 n 15, 145. See 2.3.1, above.
[250]From 1795 to 1806, following its conquest by the French, the Netherlands was known as the Batavian Republic.
[251]Calitz *Reformatory Approach* 38-39, with reference to De Villiers *Die Ou-Hollandse insolvensiereg* 105-107.
[252]Referred to at 2.3.3, above. Smith *Law of Insolvency* 6 states, with reference to *Fairlie v Raubenheimer* 1935 AD 135 146, that this ordinance was the foundation of our insolvency law.
[253] Calitz *Reformatory Approach* 37-39.

endeavour to bring parties to amicable terms before proceeding to give judgment".[254] Also, three defaults by a defendant were required before default judgment could be granted. This rule did not exist in later South African law.[255]

In 1806, Britain re-occupied the Cape which became a British colony from 1815 until 1910 when the Union of South Africa was formed.[256] In 1806, when the British took control for the second time, they left de Mist's *Provisionele Instruksie* intact until 1818 when the *Desolate Boedelkamer* was abolished and replaced by a *Sequestrator*. In 1819, an Ordinance[257] was promulgated in terms of which the office of the *Sequestrator* would be responsible for the judicial administration of estates which were insolvent but not being administered or under curatorship. The *Sequestrator* would also be responsible for the execution of all civil sentences except those specially entrusted to the boards of *landdrost* and *heemraden*.[258]

The British were dissatisfied with the administration of justice at the Cape and, after a commission enquired into the matter, in 1827, a Charter of Justice was issued which reshaped the judicial system along English lines.[259] It provided, *inter alia*, for the replacement of the *Raad van Justitie* with an independent Supreme Court consisting of a Chief Justice and two puisne judges. This occurred in 1828. Full-time judges were imported from Britain. There was no Court of Chancery or Chancery jurisdiction and thus no separate courts of law and equity as there were in England.[260] The courts of *landdrost* and *heemraden* were replaced by resident magistrates as in the English system.[261] A second Charter of Justice, issued in 1832, came into effect in 1834. It provided for the retention of Roman-Dutch law as the law of the Cape Colony.[262] The Supreme Court was given extensive powers to make rules for the practice and pleading

[254]See Wessels *History* 360.
[255]See Wessels *History* 361.
[256]See Fagan "Roman-Dutch Law" 46; De Vos *Regsgeskiedenis* 242ff.
[257]See Proclamation 2 of September 1819; referred to by Calitz *Reformatory Approach* 39.
[258]See Calitz *Reformatory Approach* 39-40.
[259]See Erasmus "Interaction" 146; Calitz *Reformatory Approach* 40; De Vos *Regsgeskiedenis* 244ff.
[260]See Erasmus "Interaction" 146; Zimmerman "Good faith and equity" 218-219.
[261]Fagan "Roman-Dutch Law" 51.
[262] See Erasmus "Interaction" 146; Girvin "Mixed Legal System" 95 96; Fagan "Roman-Dutch Law" 51.

in civil matters which "had to be framed 'so far as the circumstances of the … Colony may permit, … with reference to the corresponding rules and forms in use in … [the] Courts of record at Westminster'."[263] This was significant for the development of South African civil procedure as a unique process in a mixed legal system.[264] Further, Ordinance 72 of 1830 stipulated that the English rules of civil procedure were to apply in the courts.[265] Erasmus points out that the English influences were introduced into the South African civil process before "the fundamental reform of the administration of civil justice in England during the nineteenth century." However, it is important to note that, despite the English law basis for the structures, several Roman-Dutch remedies and concepts were retained.[266]

The Charter of Justice also established the post of Master of the Supreme Court. The office of the *Sequestrator* was abolished. Ordinance 46 of 1828 provided that the Master of the Supreme Court would henceforth administer insolvent estates. The Cape Ordinance 64 of 1829, the first South African Insolvency Act, was essentially based on English law although some Roman-Dutch principles were also evident in the legislation.[267] This was repealed by a consolidating Ordinance 6 of 1843 which established a bankruptcy procedure for the whole of South Africa. In this process *cessio bonorum* and *surchéance van betaalinge* were abolished.[268] Thereafter, a number of ordinances, issued in Natal, the Orange Free State, and the Transvaal, largely adopted the provisions of the Cape Ordinance.[269] In 1916, the parliament of the Union of South Africa repealed all of the statutes which were applicable in the four provinces and enacted the Insolvency Act 32 of 1916. This was replaced by the present Insolvency Act 24 of 1936 which has been amended on a number of occasions.

[263]See s 46 of the Charter of Justice, referred to by Erasmus "Interaction" 146-147; Fagan "Roman-Dutch Law" 51; De Vos *Regsgeskiedenis* 247-248.
[264]See Zimmerman "Good faith and equity" 217; De Vos *Regsgeskiedenis* 248-249; Erasmus 1991 *SALJ* 265.
[265]Eckard *Principles of Civil Procedure* 1ff.
[266]See Erasmus "Interaction" 148-149; Wessels *History* 386ff.
[267] See Smith *Law of Insolvency* 6; Wessels *History* 669-670; Stander 1996 *TSAR* 376.
[268]See 2.3.5.2, above. See, also, Calitz *Reformatory Approach* 42; Bertelsmann *et al Mars* 9-11.
[269] See Smith *Law of Insolvency* 6-7.

The South African Law Reform Commission for many years considered the reform of South African insolvency legislation. In 2000, it published a report on its review of the law of insolvency which contained a Draft Insolvency Bill and an explanatory memorandum.[270] The Draft Insolvency Bill was never enacted. The most recent insolvency law reform initiative in South Africa has led to the compilation of an unofficial working draft of a proposed Insolvency and Business Recovery Bill.[271] None of the proposals thus far has concerned reform of the treatment of a debtor's home in the insolvency process.

Certain procedural aspects of the Roman-Dutch law, identified above, which effectively provided a measure of protection for a debtor's home, are not necessarily evident in the South African position prior to introduction of the Bill of Rights. Consideration of the way in which Roman-Dutch and English legal principles, procedures and concepts were received into South African law and the timing of their various influences may lead one to understand the reasons for this.

2.5 Conclusion

The harsh Roman debt enforcement laws originally provided for imprisonment, slavery, and possibly even death as consequences for debtors in default of their obligations. Later developments allowed for execution by a creditor against a debtor's property and, although with time certain assets were made exempt from execution by creditors, these never formally included the home of the debtor. Evidently, execution against the debtor's person was still possible.[272]

Debt relief measures available to Roman debtors included *cessio bonorum*, the surrender of assets which brought with it the *beneficium competentiae* which effectively

[270]See the *Report on the Review of the Law of Insolvency* Project 63 February 2000 *Explanatory Memorandum* (Vol 1), hereafter referred to as "the Explanatory Memorandum", and *Draft Insolvency Bill* (Vol 2), hereafter referred to as "the Draft Insolvency Bill" http://www.justice.gov.za/salrc/reports/r_prj63_insolv_2000apr.pdf [date of use 15 March 2012].
[271]See 1.6, above.
[272]See 2.2.2 and 2.2.3, above.

provided immunity from action by creditors for unpaid debts.[273] In the time of Justinian, a majority vote by creditors could bring about the granting of a moratorium to a debtor and it was possible for a debtor to approach the emperor for a moratorium.[274] Further, forming part of the law of contract, *dilatio* provided a means by which the majority of creditors could grant a moratorium to a debtor.[275]

A Roman person's home held religious as well as socio-economic significance.[276] It is apparent that, in terms of Roman law, a debtor could avoid the harsh personal and proprietary consequences of the debt enforcement laws and save his home by "working off the debt", often surrendering himself in *nexum*, or contractual bondage, to the creditor.[277] Sometimes, such an arrangement formed the basis of a patron-client relationship between the creditor and the debtor. It was also common for patron-client relationships to develop between third parties and debtors when the former came to the aid of the latter by paying their debts on their behalf thus forming an obligation, in a broader sense, between them. The concept of *amicitia*, between persons of equal status, might also have formed the basis of a third party paying the debt or intervening on the debtor's behalf. These relationships not only arose out of, but also contributed to, the complex but cohesive and, in a large measure, supportive fabric of Roman society.[278]

With the development of the legal concept of mortgage, Justinian put protective mechanisms in place to allow for the delay of foreclosure by a creditor for at least two years after judgment had been granted and, in appropriate cases, for foreclosure to occur only by judicial decree and, later, only by imperial decree. Further, a debtor could redeem the property within the two year-period succeeding the creditor having become owner of it, by paying the outstanding debt and other charges.[279] This, it is submitted, must have impacted on a debtor's ability to retain or to redeem his home.

[273] See 2.2.3, above.
[274] See 2.2.3, above.
[275] See 2.2.4, above.
[276] See 2.2.6, above.
[277] See 2.2.2, above.
[278] See 2.2.6, above.
[279] See 2.2.5, above.

Under developed Roman-Dutch law, procedural rules protected a debtor as far as possible from execution against his immovable property. A process server was required specifically to explain the exigency of a summons to the defendant. Wessels regarded as "tenderness towards the defendant" the rule that where a debtor did not appear in court, four defaults and successive summonses were required to be issued, with substantial intervals between them, before default judgment could be granted.[280]

In the lower courts, a sale in execution of immovable property had to be publicised on four successive Sundays. A creditor was not entitled to levy execution upon immovable property of great value for small debts unless it was indivisible.[281] The complex high court process for execution against immovable property entailed, *inter alia*, ensuring that the highest price was obtained for it. In the collective debt enforcement process, a rule applied that, when a debtor's estate was placed under administration, immovable property had to be sold "at such times of the year as …[were] suited for this purpose". This was presumably to obtain as favourable a price as possible in the interests of the debtor and the creditors. It is submitted that the effect of these rules would have been to provide at least some protection for a debtor whose home was sold in execution. Even if he did not manage to avoid its sale in execution, rules which promoted the highest possible price being obtained might well also have provided an excess which the debtor could have applied towards other accommodation.[282]

In the insolvency process, the debtor's home was not protected from sale. However, the first duty of the commissioner was to try to make an arrangement with creditors. Further, after the provisional writ was issued, a composition was encouraged.[283] Debt relief measures available in Roman-Dutch law included entering into a composition with creditors. Whether concurrence amongst all of the creditors was required, or whether the majority could bind the other creditors, depended on whether local ordinances

[280] See 2.3.2, above.
[281] See 2.3.2, above.
[282] See 2.3.2, above.
[283] See 2.3.3, above.

regulated this. It appeared that *remissio* brought about a partial discharge of debt and creditors could not claim unpaid debts by executing against after-acquired assets.[284]

Roman-Dutch law was applied in the Cape from 1652 onwards. Specific aspects of the Roman-Dutch law may be regarded as effectively providing a measure of protection for a debtor's home. However, the judicial system was revised by the British, through the two Charters of Justice, in 1828 and 1834, to make it conform to English structures, mechanisms and procedures. The result is that, in the "mixed" South African legal system, the law in relation to mortgage is more in line with Roman-Dutch law, whereas procedural law, and the law of insolvency, is more in line with English law. This explains why the Roman-Dutch aspects, identified above, are not evident in the South African law prior to introduction of the Bill of Rights.

In sum, under the Roman-Dutch law, procedural rules promoted personal service of summonses, granted more indulgence to an absent defendant before default judgment could be obtained, required a more protracted procedure for execution against immovable property, and stipulated more exacting requirements to maximise the price obtained at a judicial sale. Further, in both the individual and the collective debt enforcement processes there are indications of favouring and encouraging extra-judicial compromises being reached between parties. This may be seen as reflecting an approach that execution against immovable property should occur only as a last resort. Such an approach has been espoused, in contemporary jurisprudence, by the Constitutional Court in balancing constitutional rights applicable to execution against a debtor's home. This will be considered in the following chapter.

[284] See 2.3.5.1, above.

CHAPTER 3

CONSTITUTIONAL IMPACT AND IMPLICATIONS

> Every homeless person is in need of housing and this means that every step taken in relation to a potentially homeless person must also be reasonable if it is to comply with section 26(2).
>
> - *Per* Yacoob J in *51 Olivia Road* (CC) par 17

3.1 Introduction

The Constitution, containing a Bill of Rights, brought about significant changes to our jurisprudence and legal system.[1] It was in *Jaftha v Schoeman* that the Constitutional Court signalled the existence of constitutional implications for the sale in execution of a debtor's home in the individual debt enforcement process. It held that the sale in execution of a debtor's home may unjustifiably infringe his right to have access to adequate housing, protected by section 26(1) of the Constitution. It held, in relation to the process in the magistrates' courts,[2] that only a court may order execution against a debtor's home and that judicial oversight is required to determine whether, in terms of section 36 of the Constitution, execution is justifiable in the circumstances. Prior to *Jaftha v Schoeman*, in both the magistrates' courts and the high court the applicable rules and procedures did not require judicial oversight at the execution stage. In certain circumstances the magistrate's court execution process permitted a warrant of execution to be issued by the clerk of the court and, in the high court, the registrar could issue a writ of attachment against the assets of the judgment debtor without any court supervision.[3] This was the position in relation to movable and immovable assets. Further, the right of a mortgagee to an order declaring specially executable property

[1]Woolman and Swanepoel "Constitutional History" 2-48; Rautenbach and Malherbe *Constitutional law* 316; Devenish "Constitutional Law" *LAWSA* 5(3) 15.
[2]*Jaftha v Schoeman* concerned s 66(1)(a) of the Magistrates' Courts Act.
[3]See 4.4.3.3 and 4.4.4.3, below.

which had been validly mortgaged, regardless of whether it was the home of the mortgagor, was viewed largely as unassailable.[4]

Subsequent cases concerning execution against mortgaged property, which will be dealt with in Chapter 5, raised further complex issues. These included the balancing in terms of section 36 of the Constitution, *inter alia*, property, or real security, and housing rights in a contractual context. Here, common law principles including sanctity of contract, as expressed by the maxim *pacta sunt servanda*, and broader economic and other societal interests must also be considered. In *Gundwana v Steko*, a matter dealing with execution in the high court process, the Constitutional Court clarified the position that judicial oversight is required in every matter in which it is sought to execute against a person's home. This includes the situation where the home has been mortgaged in favour of the creditor. Therefore, the position has changed since the "pre-Bill of Rights" era in which execution could be levied against the home of a judgment debtor without any judicial oversight. Now, execution against the home of a person should not be permitted without prior court intervention.[5]

However, no clear framework of substantive and procedural criteria exist within which the required judicial evaluation must occur. Highly emotive issues surrounding housing, and the concept of home, complicate matters. The right to have access to adequate housing is one of the justiciable socio-economic rights included in the Bill of Rights to facilitate the transformation of South African society. The right must therefore be viewed within this broader socio-economic context.[6] The forced sale of a debtor's home usually involves a contractual relationship between the creditor and the debtor[7] and, where the home has been mortgaged, the real security rights of the creditor. This means that

[4]See 4.3.1 and 4.3.3, below.
[5]These comments follow those made by Van Heerden and Boraine 2006 *De Jure* 330 after *Jaftha v Schoeman*.
[6]See Liebenberg *Socio-Economic Rights*. Recent socio-economic rights cases have concerned evictions from both state and private land, involving the right to have access to adequate housing, the right to have access to health care services (provided for in s 27(1)(a) of the Constitution), and the right to have access to water (provided for in s 27(1)(b) of the Constitution) and to toilets and sanitation.
[7]Although it should be noted that this is not always the case. An example of a delictual claim which led to the judgment upon which the sale in execution was based, see *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA), discussed at 4.4.3.7 and 5.5.3.2, below.

issues surrounding individual and broader commercial and economic interests enter the arena.

In addition to the right to have access to adequate housing, other constitutional rights potentially affected by the forced sale of a debtor's home include the right to dignity,[8] children's rights[9] and the right to property.[10] In *Gundwana v Steko* and subsequent judgments, connections have been made and analogies drawn between the forced sale of a debtor's home and the eviction of a person from his home.[11] To this extent, constitutional rights which have featured in eviction cases including the right to life,[12] the right to access to courts,[13] and the right to equality[14] may also be pertinent. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE),[15] which regulates the eviction of unlawful occupiers from land, is also significant because it has been held to apply where occupation was once lawful but has subsequently become unlawful. PIE is therefore applicable where it is sought to evict an erstwhile owner of a home who has not vacated it after its sale in execution at the instance of a creditor or its realisation by the trustee of his insolvent estate in terms of the Insolvency Act.[16] The relationship between execution against a debtor's home and eviction from one's home, and the extent to which "relevant circumstances" are mirrored, in each context, are not entirely clear. However, considerations applicable, in relation to section 26(3) of the Constitution and to PIE, are evidently pertinent to a study of the treatment of a debtor's home in this "post-Bill of Rights" era.

This chapter deals with the impact of the Bill of Rights on the forced sale of a debtor's home. Its aim is to provide the necessary background for the analysis, in Chapter 5, of

[8]S 10 of the Constitution.
[9]S 28(1)(*c*) of the Constitution.
[10]S 25 of the Constitution.
[11]As is suggested, it is submitted, in *Grootboom* par 34 and *Gundwana v Steko* pars 23, 41, 44, 46. See also *Nedbank v Fraser* par 9; *FirstRand Bank v Folscher* par 34 and *Standard Bank v Bekker* par 13.
[12]S 11 of the Constitution.
[13]S 34 of the Constitution.
[14]S 9 of the Constitution.
[15]This Act is also mentioned in 1.1, above. In this manuscript, it is referred to as "PIE".
[16]See *Ndlovu v Ngcobo*; *Bekker and Another v Jika* 2003 (1) SA 113 (SCA), [2002] 4 All SA 384 (SCA), referred to at 3.3.1.4 (b), below, and *ABSA Bank Ltd v Murray and Another* 2004 (2) SA 15 (C), referred to at 3.3.1.4 (a), 3.3.1.4 (b), 3.4, 6.3.2 and 6.6.3, below.

the main cases concerning the sale in execution of a person's home and the consideration, in Chapter 6, of constitutional implications for the realisation of an insolvent person's home by the trustee of the insolvent estate. This chapter is therefore intended to shed light on the subject of treatment of a debtor's home, specifically from a constitutional, or human rights, perspective. Chapter 4 will canvass various other aspects of law and policy which have a bearing on the topic. Thereafter, Chapter 5 will contain analysis of the relevant reported judgments in the individual debt enforcement process and Chapter 6 will deal with treatment of a debtor's home in the insolvency context.

In this chapter, the application of the Bill of Rights, the limitation of rights, and the interpretation of the Bill of Rights and other legislation are considered and discussed. The focus is placed on the right to have access to adequate housing as protected by section 26 of the Constitution within its broader context as a socio-economic right. This chapter also considers aspects of eviction cases as well as the relevant provisions of PIE. It also deals briefly with select aspects of private law contractual and property rights.

3.2 Application, interpretation and limitation of rights

3.2.1 Application

Section 7(1) provides that the Bill of Rights "is a cornerstone of democracy in South Africa … [which] enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom".[17] Section 7(2) provides that the state is obliged to "respect, protect, promote and fulfil the rights in the Bill of Rights."[18] Section 8(1) provides that "[t]he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." In terms of section 8(2), it also "binds a natural or a juristic person if, and to the extent that, it is applicable,

[17]See Cheadle, Davis and Haysom *South African Constitutional Law* 2.1 and 3.1.
[18]See Rautenbach and Malherbe *Constitutional law* 325; O'Regan 1999 *ESR Review* 2.

taking into account the nature of the right and the nature of any duty imposed by the right." Section 8(3) prescribes a mechanism[19] for application of the Bill of Rights to private persons in terms of which a court must first consider whether there is legislation which gives adequate effect to the right in question. If not, the court must consider whether an existing common-law rule gives effect to the right. If the common law is deficient, the court is obliged to develop it to give effect to the right and it may at the same time develop rules to limit the right but subject to the limitation clause contained in section 36(1).[20]

Section 39(2) provides that, when interpreting any *legislation* and when developing the common law, a court "must promote the spirit, purport and objects of the Bill of Rights." Thus, provision is made for the indirect application of the Bill of Rights to the law or, as otherwise expressed, a value-based interpretational approach.[21] Each right is regarded as having specific values which led to their being enshrined in the Constitution and these also "determine the right's sphere of protected activity."[22] This means that even where the Constitution does not have direct application "the values and principles encapsulated in section 39(2)" should clearly influence how the matter will be

[19]Liebenberg *Socio-Economic Rights* 331, 334-335 describes s 8(3)(a) and (b) as providing courts with "the tools to develop rules which seek to synthesise and achieve the best reconciliation possible between competing rights and values which may be at stake in a particular case." Cheadle, Davis and Haysom *South African Constitutional Law* 3.1.3 refer to this mechanism as "the South African Constitution's special genius."

[20]See discussion of s 36 at 3.2.3, below. On application, generally, see, also, Rautenbach "Introduction to the Bill of Rights" pars 1A30-1A37.

[21]According to which the content and scope of the rights enshrined in the Bill of Rights are determined in light of the five fundamental values which "animate the entire constitutional enterprise: openness, democracy, human dignity, freedom and equality"; see Rautenbach "Introduction to the Bill of Rights" par 1A19; Woolman and Botha "Limitations" 34-17-34-18. See also Currie and de Waal *Bill of Rights Handbook* 159, 161; Devenish *Commentary* 598ff, 621; Cheadle, Davis and Haysom *South African Constitutional Law* 33.1-33.3; Woolman 2007 *SALJ* 762; Liebenberg *Socio-Economic Rights* 325; Du Plessis "Interpretation" 32-1ff, 32-127; Rautenbach "Fundamental Rights" *LAWSA* 10(1) pars 284, 286. See, also, *Barkhuizen v Napier* 2007 (5) SA 323 (CC) as well as remarks by the court, and arguments put forward, in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), hereafter referred to as "*Everfresh v Shoprite Checkers*", pars 1, 13, 16, 22-25, 30-34, in the majority judgment, and pars 48, 61, 64. (This judgment was delivered on 17 November 2011.)

[22]Woolman and Botha "Limitations" 34-17. See also Liebenberg *Socio-Economic Rights* 324, where it is stated that s 39(2) "requires courts to go beyond an exclusive focus on particular substantive rights and to consider how the general ethos and purposes of the Bill of Rights can be actively promoted in the interpretation of legislation and the development of the common law or customary law." She also submits, at 335, that s 39(2) refutes development of the common law according to "a narrow, formalistic construction of the relevant rights in the Bill of Rights."

resolved.[23]

3.2.2 Interpretation

Section 39(1)(a) requires a court when interpreting the Bill of Rights "to promote the values that underlie an open and democratic society based on human dignity, equality and freedom."[24] The duty to *promote* emphasises that "transformative constitutionalism" and "a socially interconnected and embodied concept of humanity" are envisaged.[25] Significant, in this context, is the concept of *ubuntu* which is recognised as being one of the values that section 39(1) requires to be promoted.[26] In *S v Makwanyane*,[27] Mokgoro J associated *ubuntu* with concepts such as "humanity" and "menswaardigheid" ("human dignity")[28] and Langa J described *ubuntu* as capturing, conceptually:[29]

> ... a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

In *Port Elizabeth Municipality v Various Occupiers*, Sachs J stated:[30]

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[23]Devenish *Commentary* 621. Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 317 explains that s 8(3) "is routinely applied by invoking the provisions of s 39(2) of the Constitution."

[24]In terms of s 39(1)(a) and (b), a court must also consider international law and it may consider foreign law. In terms of s 39(3), "[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill." On interpretation of the Bill of Rights, see Rautenbach "Introduction to the Bill of Rights" par 1A9.

[25]Liebenberg *Socio-Economic Rights* 98-99.

[26]See Du Plessis "Interpretation" 32-130; Bennett 2011 *PELJ* 30; *Everfresh v Shoprite Checkers* pars 23 and 61. On *ubuntu*, see also English 1996 *SAJHR*, Mokgoro 1998 *PELJ*, Kroeze 2002 *Stell LR*, Cornell 2004 *SAPL* and Pieterse "Traditional African Jurisprudence".

[27]*S v Makwanyane* 1995 (2) SACR 1 (CC), 1995 (6) BCLR 665 (CC), 1995 (3) SA 391 (CC), hereafter referred to as "*S v Makwanyane*", pars 130-131, 223-227, 237, 307-313, 516.

[28]*S v Makwanyane* par 308. See, also, Rautenbach "Introduction to the Bill of Rights" par 1A11.

[29]*S v Makwanyane* par 224. Mahomed DP also refers to *ubuntu* in his judgment at 263.

[30]*Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), 2004 (12) BCLR 1268 (CC), hereafter referred to as "*Port Elizabeth Municipality*", par 37 (footnotes omitted), cited by Liebenberg *Socio-Economic Rights* 99. See also Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 286.

> The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

It is submitted that, at least on the level of the emphasis on communality and human interdependence, parallels are discernible between *ubuntu* and elements of the concepts of *amicitia* and patronage in Roman society.[31] Similarities have also been suggested between *ubuntu* and the role played by "institutions of Roman-Dutch law" such as unjustified enrichment, public policy, good faith, the *exceptio doli generalis* and the concept of *arbitrium boni viri*.[32]

3.2.3 Limitation of rights

Constitutional rights are not absolute.[33] Section 36 provides:

> (1) The rights in the Bill of Rights 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, taking into account all relevant factors, including –
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose.
> (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Thus, section 36 of the Constitution provides a matrix, or template, for courts assessing the constitutional validity of a law. It also provides the analytical framework within which legislation should be drafted, considered and debated by the legislature.[34] The factors

[31] See 2.2.6, above.
[32] Bennett 2011 *PELJ* 49-51 has also drawn parallels between, *inter alia*, *ubuntu* and equity, in English law, referred to at 7.5.3.1, below, and *ubuntu* and the *exceptio doli generalis*, in Roman-Dutch law. See, also, *Everfresh v Shoprite Checkers* par 64.
[33] See Rautenbach "Introduction to the Bill of Rights" pars 1A43-1A52; Woolman and Botha "Limitations" 34-1.
[34] Cheadle, Davis and Haysom *South African Constitutional Law* Chapter 30; Woolman and Botha "Limitations" 34-2; Rautenbach and Malherbe *Constitutional law* 348.

listed in section 36(1) are not the only matters to be considered and courts are not precluded from taking any other relevant factor into account. Further, the factors have not been formulated as criteria or tests. No weight has been attached to any factor and neither has any order of consideration been prescribed.[35]

For the limitation of a right to be valid, it must be limited by "law of general application".[36] This includes legislation, subordinate legislation, the common law (both private law and public law rules) and customary law.[37] Policies, practices and programmes do not generally constitute laws of general application.[38] To be of general application the law must be sufficiently accessible and precise for those who are affected by it to be able to ascertain the extent of their rights and obligations in order to conduct themselves accordingly.[39] It must also apply impersonally, equally to all and not arbitrarily.[40] The limitation must be authorised by a law.[41]

The courts adopt a two-stage analysis to determine the constitutional validity of a law. It must first be established whether the law infringes[42] the right in question and, if so, whether the infringement can be justified as a reasonable limitation of the right

[35]Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 322.
[36]S 36(1). See Woolman and Botha "Limitations" 34-47-34-67; Rautenbach *LAWSA* 10(1) "Fundamental Rights" *LAWSA* 10(1) par 320.
[37]This follows the wide interpretation of the meaning of "law" elsewhere in the Bill of Rights. See *Larbi-Odam v MEC for Education* (*North-West Province*) 1998 (1) SA 745 (CC); *Du Plessis v De Klerk* 1996 (3) SA 850 (CC); Cheadle, Davis and Haysom *South African Constitutional Law* 30.4.1. Rautenbach and Malherbe *Constitutional law* 345 also mention "legal rules developed by the courts". See, also, Rautenbach "Introduction to the Bill of Rights" par 1A45.
[38]Liebenberg *Socio-Economic Rights* 94 refers to Currie and De Waal *Bill of Rights Handbook* 169. Cf Woolman and Botha "Limitations" 34-53, who cite Brand "Food" *Constitutional Law of South Africa* Chapter 56C.
[39]Woolman and Botha "Limitations" 34-49; Currie and De Waal *Bill of Rights Handbook* 169 refer to *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC), 2000 (8) BCLR 837 par 47.
[40]*S v Makwanyane*; Woolman and Botha "Limitations" 34-48; Cheadle, Davis and Haysom *South African Constitutional Law* 30.4.1; Currie and De Waal *Bill of Rights Handbook* 169.
[41]Cheadle, Davis and Haysom *South African Constitutional Law* 30.4.1; Rautenbach and Malherbe *Constitutional law* 345. Where the law authorises an administrator to exercise a discretionary power which effectively limits rights, as long as the legislation stipulates guidelines for the proper exercise of such discretion, the limitation will be regarded as one "by law of general application". See *Premier of Mpumalanga v Executive Committee of the Association of Governing Bodies of State-Aided Schools*: *Eastern Transvaal* 1999 (2) SA 91 (CC) par 41; *City Council of Pretoria v Walker* 1998 (2) SA 363 (CC) par 82; *Dawood v Minister of Home Affairs* 2000 (3) SA 936, 2000 (8) BCLR 837; *Hoffmann v South African Airways* 2000 (11) BCLR 1211 (CC) par 41.
[42]Or impairs or limits: see Woolman and Botha "Limitations" 34-3 to 34-4; Currie and De Waal *Bill of Rights Handbook* 164.

according to the criteria set out in section 36(1).[43] This two-stage process is clearly apparent in the judgments in *Grootboom* and *Jaftha v Schoeman*. Commentators criticise South African courts for often confusing the analysis required at each stage of the enquiry.[44] Woolman and Botha doubt "whether the benefits of a more flexible test outweigh the potential for confusion with respect to its application by lower courts and its use as a standard by state and private actors". They favour having "clearly articulated rules" rather than allowing courts to follow a casuistic approach.[45]

Turning to the factors which section 36(1) requires to be taken into account, as regards the "nature of the right", in *Jaftha v Schoeman*, Mokgoro J emphasised the link between the right to dignity, the right to have access to adequate housing and the right of access to courts as being vitally important to our constitutional democracy.[46] In relation to the "importance of the purpose of the limitation", the importance of a law's purpose must be measured against the values in an open and democratic society based on human dignity, equality and freedom including *ubuntu*[47] and reconciliation.[48] In *Jaftha v Schoeman*, debt recovery was regarded as sufficiently important to justify a limitation on the right to have access to adequate housing.[49] However, it is arguable whether "administrative convenience" or "the saving of costs", from a creditor's perspective, may be a purpose which justifies a limitation.[50]

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[43]See Cheadle, Davis and Haysom *South African Constitutional Law* 30.2-30.4; Currie and De Waal *Bill of Rights Handbook* 164ff; Woolman and Botha "Limitations" 34-6-34-8 and, for a comprehensive discussion and critique of the position, 34-67-34-136.

[44]See my related criticism of the analysis in the judgment in *ABSA v Ntsane* at 5.5.2.3, and my comment, in relation to *FirstRand Bank v Folscher*, at 5.6.4.2 (e), below. See Woolman and Botha "Limitations" 34-19-34-27, 34-31-34-42; Roux "Property" ch 46.

[45]Woolman and Botha "Limitations" 34-15-34-16. Cf Sunstein *One Case at a Time*. Neither do Woolman and Botha agree with a "jurisprudence of avoidance" as suggested by Currie 1999 *SAJHR* 138.

[46]Woolman and Botha "Limitations" 34-71ff, with reference to *Jaftha v Schoeman* pars 19, 24, 27 and 39, and, with reference to *S v Makwanyane* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 pars 4, 32, and 42. They state that the right to life and the right to human dignity are "central to the society envisaged by the Constitution and only compelling justification should be advanced for their limitation".

[47]See 3.2.2, above.

[48]Cheadle, Davis and Haysom *South African Constitutional Law* 30.4.4. See also *S v Makwanyane* par 185.

[49]Woolman and Botha "Limitations" 34-76ff, with reference to *Jaftha v Schoeman* pars 37-42.

[50]Woolman and Botha "Limitations" 34-77; Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 324. In *Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC), 1999 (12) BCLR 1420, hereafter referred to as "*Chief Lesapo*", pars 23-24, the Constitutional Court regarded the saving of time and costs in the recovery of movable property, which had been provided as security for a loan, as a legitimate

Consideration of "the nature and extent of the limitation" is fundamental to balancing and proportionality because the "more invasive the infringement, the more powerful the justification must be."[51] A court may consider factors such as:[52] whether the limitation affects the "core" values underlying the right; the actual impact of the limitation on those affected by it;[53] the social position of the individuals or group concerned, that is, whether the limitation has a disproportionate impact upon vulnerable persons;[54] whether the limitation is temporary or permanent; and whether the limitation is narrowly tailored to achieve its objective. The last-mentioned consideration overlaps with the final factor which section 36(1) requires to be considered, namely, that the courts must assess the relationship between the limitation and its purpose and whether there are less restrictive means available to achieve the same purpose.[55] In *Jaftha v Schoeman*, the sale in execution of people's homes for trifling debts without judicial oversight was regarded as a "severe limitation" of the right to have access to adequate housing.[56] Indigent persons were seen as most vulnerable to the consequences of a sale in execution of their home.[57] Because the National Housing Code would render the appellants ineligible ever again to receive housing assistance if their homes were sold in execution, the permanence of their resultant homelessness was regarded as inevitable.[58]

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objective, but also emphasised "the importance of the public interest served by the need for justiciable disputes to be settled by a court of law."

[51] *S v Manamela* (*Director-General of Justice Intervening*) 2000 (3) SA 1 (CC), 2000 (5) BCLR 491 par 69.

[52] Woolman and Botha "Limitations" 34-79-34-82.

[53] For example, in *Chief Lesapo* par 25, the limitation of a debtor's right to access to courts was regarded as "extremely prejudicial" to his interests and unjustifiable because "a debtor may be unfairly deprived of … his livelihood".

[54] For example, in *Coetzee v Government of the Republic of South Africa*; *Matiso v Commanding Officer*, *Port Elizabeth Prison* 1995 (4) SA 631 (CC), hereafter referred to as "*Coetzee v Government*" pars 8, 66-67, poor persons and the unemployed were regarded as most vulnerable to imprisonment for judgment debts.

[55] For example, in *Coetzee v Government*, this factor led the court to regard as unconstitutional legislation which authorised the imprisonment of judgment debtors. The legislation was viewed as overly broad in its application, not only to debtors who wilfully refused to pay, but also to debtors who were unable to pay. See Woolman and Botha "Limitations" 34-82, 34-84-34-86, with reference to *Coetzee v Government* pars 13-14 and 32; Rautenbach "Fundamental Rights" *LAWSA* 10(1) pars 326-327; Cheadle, Davis and Haysom *South African Constitutional Law* 30.4.7.

[56] *Jaftha v Schoeman* par 39.

[57] *Jaftha v Schoeman* pars 39 and 43.

[58] *Jaftha v Schoeman* pars 35, 40, and 50. See Woolman and Botha "Limitations" 34-81-34-82.

Assessment of proportionality and the balancing of rights may appear to be relatively straightforward. However, their application presents a number of difficulties.[59] It is not a "sequential exercise"[60] nor a "mechanical enquiry" but one that is "fluid" and "nuanced". In the process, the importance of the purpose of the infringing law must be balanced against the rationality and extent of the invasion of the right bearing in mind that a particular right or freedom may have different values in various contexts.[61] Commentators have expressed concern that the terminology employed often confuses non-specialists and that the subjective influences of judges on the process and the outcome often result unavoidably in an over-cautious, casuistic, incrementalist[62] approach which hinders transformation.[63] Woolman and Botha advocate a more structured, rigorous, sequential enquiry which will make it easier not only for "social actors" to anticipate what would constitute justifiable limitations but also will be easier for the lower courts to apply.[64] It is submitted that these comments are particularly apposite in relation to cases concerning the sale in execution of persons' homes. This is so particularly considering the confusion which followed *Jaftha v Schoeman* and the questions which arise regarding the interpretation and practical implementation of the precedent established in *Gundwana v Steko* and more recent decisions.[65]

[59]Woolman and Botha "Limitations" 34-87-34-88; Rautenbach and Malherbe *Constitutional law* 350-354.
[60]Cheadle, Davis and Haysom *South African Constitutional Law* 30.4.2.
[61]Woolman and Botha "Limitations" 34-94-34-95. The authors describe it as "the 'head-to-head' comparison of competing rights, values or interests": sometimes, a right, interest or value, will simply "outweigh" another, while, in other instances, a balance will be struck between competing rights or interests, with no right being required "to pay the ultimate price." See also *Port Elizabeth Municipality* par 23 on the balancing of rights in the application of PIE.
[62]Woolman and Botha refer, *inter alia*, to van der Walt 1995 *SAJHR* 169; van der Walt 2000 *SALJ* 259.
[63]Woolman and Botha "Limitations" 34-100-34-101.
[64]Woolman and Botha "Limitations" 34-94-34-106 refer to Roach and Budlender who, they say, suggest "that many state actors are either incapable of understanding rules generated by the Constitutional Court (as they are currently constructed) or are wilfully ignoring them". Van der Walt *Constitutional Property Law* 2011 526 observes that the shift towards a contextualised, non-hierarchical balancing process, in eviction matters, as directed by the Constitutional Court, in *Port Elizabeth Municipality*, could make matters "quite complicated".
[65] Such as *Nedbank v Fraser*; *FirstRand Bank Ltd v Folscher and another and several other similar matters* 2011 (4) SA 314 (GNP) and *Mkhize v Umvoti Municipality* (SCA), discussed at 5.6.7, below.

Highly emotive issues surround housing and the concept of home. These contribute to the complexity of the matter which was to some extent conveyed by Jajbhay J who stated:[66]

> Housing forms an indispensable part of ensuring human dignity. "Adequate housing" encompasses more than just the four walls of a room and roof over one's head. Housing is essential for normal healthy living. It fulfils deep-seated psychological needs for privacy and personal space; physical needs for security and protection from inclement weather; and social needs for basic gathering points where important relationships are forged and nurtured. In many societies a house also serves an important function as an economic centre where essential commercial activities are performed.

It is submitted that legislative provisions should spell out the process to be followed, the information required and factors which ought to be taken into account in balancing parties' interests to determine whether execution should be permitted against a person's home in any given circumstances. This might assist not only debtors and creditors but also advice centre and court administrative personnel as well as practitioners and judicial officers, including magistrates and judges.

3.3 Rights potentially affected by the sale in execution of a debtor's home

3.3.1 The right to have access to adequate housing

3.3.1.1 Background

Section 26 provides:

> (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.

[66] *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W), 2006 (6) BCLR 728 (W) par 49.

The Constitutional Court interpreted and applied section 26 for the first time in *Grootboom*, a case which concerned the eviction of a community from private land which had been earmarked for low-cost housing.[67] The court stated that subsections (1) and (2) of section 26 are related and must be read together.[68] The effect is that section 26(2) imposes a qualified, positive obligation on the state to devise a comprehensive and workable programme to meet its responsibilities in relation to the provision of housing.[69] Further, at the very least section 26(1) places a negative duty "upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing".[70] The court also recognised the negative aspect of the obligation contained in section 26(1) to be further spelt out in section 26(3) which prohibits arbitrary evictions.[71]

In *Jaftha v Schoeman*, the Constitutional Court regarded as unconstitutional the sale in execution of two indigent debtors' homes in respect of trifling debts in circumstances where it would render each debtor homeless. The court extended the reasoning applied in *Grootboom* and held that private persons had a duty not to interfere with existing access to adequate housing. In the process of balancing and proportionality assessment, the court acknowledged the importance of debt recovery. However, it found that section 66(1)(a) of the Magistrates' Courts Act, as it was then worded, was unconstitutional in that it was overbroad and permitted execution against debtors' homes in instances where there was no proportionality between the interests of the creditor and of the debtor. It was contended on behalf of the appellants that section 67 of the Magistrates' Courts Act, which exempts certain assets from execution, was unconstitutional for its failure to exempt a debtor's home below a certain threshold value. However, the Constitutional Court rejected this argument. It recognised the

[67] See Liebenberg "The Interpretation of Socio-Economic Rights" 33-17; Rautenbach "Introduction to the Bill of Rights" par 1A74.
[68] *Grootboom* par 34. See also McLean "Housing" 55-9.
[69] *Grootboom* pars 21 and 38. Liebenberg "The Interpretation of Socio-Economic Rights" 33-17 states that s 26(2) thus both defines and limits the positive duties on the state.
[70] *Grootboom* par 34. Liebenberg "The Interpretation of Socio-Economic Rights" 33-17-33-18 explains that the phrase "preventing and impairing" is broader than the standard international formulation of the duty to "respect" socio-economic rights.
[71] *Grootboom* par 34. See Liebenberg *Socio-Economic Rights* 270; Liebenberg "The Interpretation of Socio-Economic Rights" 33-20.

importance to poor people of being able to use their home as security to obtain finance and the importance to creditors of recovering debts. It therefore regarded as relevant the circumstances in which the debt arose, particularly where a judgment debtor provided his house as security for a debt.[72] In the circumstances, it confirmed that, in the absence of judicial oversight, the sale in execution of each debtor's home amounted to an unjustifiable infringement of her right to have access to adequate housing.[73] It also stated that there was a need to find "creative alternatives" which allow for debt recovery but which use the sale in execution of a debtor's home "only as a last resort".[74]

The right to have access to adequate housing formed the basis of the court's decision, in each of *ABSA v Ntsane* and *FirstRand Bank v Maleke*, to refuse to grant an order declaring mortgaged property specially executable even though the mortgagor was in default. In *Gundwana v Steko*, a case emanating from the high court and in which the home had been mortgaged, the Constitutional Court held that judicial oversight, in the course of which a court must consider all the relevant circumstances, is required in every case in which it is sought to execute against a person's home.[75] It also stated that where it is sought to execute against immovable property "[s]ome preceding enquiry is necessary to determine whether the facts of a particular matter are of the *Jaftha*-kind".[76]

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[72] See *Jaftha v Schoeman* pars 51 and 58. Liebenberg *Socio-Economic Rights* 215ff. Van der Walt *Constitutional Property Law* 2005 361 n 294 states that the reference, in the judgment, to the origin of the debt indicates that debt incurred recklessly or irresponsibly could be treated differently from debt incurred for living expenses, especially when the debtor has attempted, and is still willing to make every effort, to pay the debt.

[73] See *Jaftha v Schoeman* pars 34, 39, 40 and 44.

[74] *Jaftha v Schoeman* par 59. Liebenberg *Socio-Economic Rights* 217-218 observes that the European Court of Human Rights applied a similar approach in *Connors v United Kingdom* 2005 40 EHRR 189 par 85. She also comments that *Jaftha v Schoeman* signifies a transformative approach to a legal process which used to cater only for a creditor's interest in enforcing a claim against a debtor and which now regards as an important consideration the interests of poor people, in the protection of their homes. Van der Walt *Constitutional Property Law* 2005 361-362 submits that the decision, in *Jaftha v Schoeman*, "treats poverty, debt and homelessness as different aspects of one larger socio-economic problem … [so] that eviction and sale in execution cases have to be adjudicated with due regard for the history and the social and economic background of the affected persons."

[75] *Gundwana v Steko* pars 41 and 49. Rule 46(1) of the Uniform Rules of Court, applicable in the High Court, had already been amended effectively to provide that only a court, and not a registrar, could grant a writ of execution against the judgment debtor's primary residence and only after considering all of the relevant circumstances. For discussion of the amended rule 46(1), see 4.4.4.3, below.

[76] *Gundwana v Steko* par 43. It would seem, it is submitted, that, in *Mkhize v Umvoti Municipality* (SCA) par 19, the Supreme Court of Appeal interpreted the effect of the judgment, in *Gundwana v Steko*, to be

3.3.1.2 The right to have access to adequate housing as a socio-economic right

The right to have access to adequate housing is one of the justiciable socio-economic rights contained in the Bill of Rights.[77] This necessitates a complex process of balancing a variety of other competing interests such as property rights and contractual rights.[78] It has also raised issues surrounding the "separation of powers" doctrine and reservations have been expressed regarding the competence of the judiciary, without specialised expertise, to make decisions which affect social and economic policy.[79] Liebenberg observes that the courts' frequently narrow interpretation of socio-economic rights and their imposition of little or no accountability on private institutions limit democratic transformation.[80] She advocates an alternative, dynamic model of the separation of powers doctrine in terms of which courts play a nuanced, innovative role in matters concerning socio-economic rights and consistently prompt the legislative and executive branches of government to devise appropriate comprehensive, participatory social programmes and to enact specific legislation where appropriate.[81]

Traditionally, civil and political rights, also referred to as "first generation" rights,[82] have been regarded as imposing on the state duties of restraint and non-interference with people's liberties. These are the so-called "negative obligations". On the other hand, socio-economic, or "second generation", rights impose positive obligations on the state to do as much as it is able to secure for all members of society a basic set of social goods such as education, health care, food, water, shelter, access to land and

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that it is for a court to hold such preceding enquiry in order to determine whether s 26(1) rights will be affected by a sale in execution.

[77] See Liebenberg "Adjudicating Social Rights" 75-77; Langford "The Justiciability of Social Rights" 3-45.

[78] These rights would include, where applicable, the real security rights of a creditor. See Liebenberg *Socio-Economic Rights* 21; Liebenberg "The Interpretation of Socio-Economic Rights" 33-61.

[79] Liebenberg *Socio-Economic Rights* 63-64, 66-71.

[80] Liebenberg *Socio-Economic Rights* 37-39.

[81] Liebenberg *Socio-Economic Rights* 71; see also 70, 75-76.

[82] Such as the rights to equality, freedom, property, freedom of speech and freedom of assembly and association.

housing.[83] These are referred to as "*qualified* rights" because the state is required to take reasonable legislative and other measures *within its available resources* to achieve the progressive realisation of each of these rights.

The positive and negative aspects of the right to have access to adequate housing are evident in the judgment in *Grootboom*. As mentioned above,[84] the Constitutional Court affirmed that section 26(2) imposed on the state a positive duty to adopt comprehensive programmes "capable of facilitating the realisation" of the right to have access to adequate housing.[85] In this regard, the court stated:[86]

> … accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. Housing must be made more accessible not only to a larger number of people but to a wider range of people as time progresses.

The court also recognised that section 26(1) imposes a negative obligation upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing.[87] The court referred extensively to, and endorsed, the views of the United Nations Committee on Economic, Social and Cultural Rights. These included that the state has an implicit duty to avoid "retrogressive measures"[88] and that "measures that have the effect of reducing pre-existing levels of access to socio-economic rights are prima facie incompatible with the Covenant and require justification by the State".[89] Thus, an argument has been put forward that law or conduct which leads to a decline, as opposed to progressive improvement, in living and housing

[83] Currie and De Waal *Bill of Rights Handbook* 567; Liebenberg *Socio-Economic Rights* 54 and the works cited there.
[84] See 3.3.1.1, above.
[85] *Grootboom* par 41.
[86] *Grootboom* par 45.
[87] *Grootboom* par 34. In *Jaftha v Schoeman* pars 31-34, the Constitutional Court elaborated on this negative obligation which it regarded as unqualified to the extent that the state's resources were not necessarily in issue. See also *Minister of Health v Treatment Action Campaign* 2005 (5) SA 721 (CC), in which the negative duty to refrain from preventing or impairing the socio-economic rights was "developed". See Liebenberg *Socio-Economic Rights* 270; Liebenberg "The Interpretation of Socio-Economic Rights" 33-20. See also comments by van der Walt *Constitutional Property Law* 2005 359.
[88] Liebenberg "The Interpretation of Socio-Economic Rights" 33-43, with reference to *Grootboom* par 45.
[89] Liebenberg "The Interpretation of Socio-Economic Rights" 33-43. This is a reference to the International Covenant on Economic, Social and Cultural Rights.

conditions may be regarded as a breach of the negative aspect of the right to have access to adequate housing.[90]

Liebenberg criticises the effects of the distinction between the positive and negative aspects of the right. She points out that positive duties imposed by socio-economic rights are subject to "reasonableness review" whereas negative duties imposed by socio-economic rights are subject to the limitation clause, in section 36 of the Constitution. This means that "claims by people who lack access to socio-economic rights … [are subjected] to a less stringent review standard than those involving a deprivation of existing access". This, Liebenberg submits, cannot be justified in principle. She describes the distinction between the positive and negative aspects of the right as being somewhat arbitrary because infringements of socio-economic rights involve "a complex matrix of positive conduct and omissions". She argues that the state's duty "not to deprive people unjustifiably of access to housing … is inextricably linked with the duty of relevant organs of State to take positive measures to provide alternative accommodation to those who face homelessness as a result of an eviction."[91] She advocates "a more transformative approach which transcends formalistic distinctions and dichotomies between negative and positive duties and which is attuned to the substantive values and interests at stake in particular cases."[92] It is submitted that these arguments are equally apposite in cases where forced sale of persons' homes would render them homeless.

Further, the positive duty which section 7(2) of the Constitution imposes on the state "to protect" the socio-economic rights of persons means that the state is under an obligation to devise and enforce legislative and other measures to ensure that private

[90] Currie and De Waal *Bill of Rights Handbook* 572. See also Rautenbach and Malherbe *Constitutional law* 386.
[91] See Liebenberg *Socio-Economic Rights* 56-58, 87, 163, 199-203 and 219. Liebenberg makes the point that establishing appropriate institutional machinery, training public officials, monitoring mechanisms, and establishing and maintaining judicial and quasi-judicial accountability mechanisms, all require positive measures and an intensive investment of resources. She also refers to Koch "Dichotomies, trichotomies or waves of duties?" 2005 *HRLR* 81 92 who illustrates how, in particular situations, non-interference may require highly "positive" measures, such as the purchase of alternative property instead of expropriation. See also van der Walt *Constitutional Property Law* 2005 362.
[92] Liebenberg *Socio-Economic Rights* 220 and 54-59.

parties do not prevent or impair vulnerable groups' enjoyment of access to socio-economic rights.[93] Section 39(2) of the Constitution imposes a duty on courts, in the absence of specific legislation regulating the position, to develop the common law to give effect to the underlying purposes and values of the Bill of Rights. However, commentators point out that development of the common law is inhibited by the fact that it occurs on a case-by-case basis[94] involving only "incremental", "interstitial" changes[95] and without fully facilitating greater equity and social justice in socio-economic relations.[96] As Liebenberg explains, traditionally, "[t]he legislature is seen as the appropriate institution … to bring about any far-reaching changes in the doctrinal structure and normative content of the common law"[97] and our courts have also adopted the approach that no dramatic change is required to the common law in which foundational constitutional values are already inherent.[98]

It is submitted that an argument may be made not only from a theoretical constitutional, but also from a practical, perspective for the enactment of appropriate legislation regulating the forced sale of a debtor's home, instead of it being left to the courts to develop the common law on a case-by-case basis.[99] For example, the enactment and application of the Promotion of Access to Information Act 2000 and the Promotion of

[93]Liebenberg *Socio-Economic Rights* 332, with reference to *Grootboom* par 35. As Liebenberg points out, the advantage of legislation is that it has legitimacy based on the notion that the preceding "broad and inclusive deliberation and participation … enable legislatures to craft balanced and comprehensive schemes which take into account and attempt to reconcile diverging rights and interests."See also *Grootboom* par 40 in relation to the possible need for the state to put in place national framework legislation. See also Liebenberg "The Interpretation of Socio-Economic Rights" 33-22 and 33-58-33-59; van der Walt *Constitutional Property Law* 2005 441-444 who discusses the emergence of arguments based upon s 7(2) of the Constitution.
[94]Liebenberg *Socio-Economic Rights* 340, with reference also to *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), 2001 10 BCLR 995 (CC) par 55: "We have previously cautioned against overzealous judicial reform …. Not only must the common law be developed in a way which meets the s 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm."
[95]Van der Walt *Constitutional Property Law* 2005 8; van der Walt *Property in the Margins* 218.
[96]Liebenberg *Socio-Economic Rights* 336 highlights the interrelationship between socio-economic rights and equality, a founding constitutional value, in terms of s 1 and s 7(1), and a substantive right in s 9 of the Constitution, defined in s 9(2) to include "the full and equal enjoyment of all rights and freedoms".
[97]Liebenberg *Socio-Economic Rights* 340. See also van der Walt *Property in the Margins* 215-216.
[98]Liebenberg *Socio-Economic Rights* 340 and 358; Bhana and Pieterse 2005 *SALJ* 865 876-884. Pearmain 2006 *THRHR* 287 and Pearmain 2006 *THRHR* 466. See also *Barkhuizen v Napier* 2007 (5) SA 323 (CC), hereafter referred to as "*Barkhuizen v Napier*".
[99]Similar submissions were made in Steyn "*Grootboom*'s reach".

Administrative Justice Act 2000 clearly enhanced the adjudication process in matters concerning, and the level of protection of rights conferred by, sections 32 and 33 of the Constitution.[100] It may be conceded that the Constitution expressly required the enactment of national legislation in order to give effect to section 32 and section 33 rights[101] whereas this was not the case in relation to section 26 rights. However, it is nevertheless submitted that the duty which section 26(2) imposes on the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of section 26(1) rights requires it, in the circumstances, to enact appropriate legislation. This should be done with the purpose of providing clarity in relation to substantive and procedural requirements in order that practitioners, administrative officials and judicial officers might ensure that matters involving debtors' section 26(1) rights are properly adjudicated.

3.3.1.3 The right to have access to adequate housing and its impact on private law

It may be stated with reference to judgments in *Afrox Healthcare Bpk v Strydom*,[102] *Brisley v Drotsky*[103] and, more recently, *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd*,[104] that thus far socio-economic rights have had minimal impact on the law of contract. Liebenberg submits that the strong protection of "vested private property rights" and freedom of contract, expressed in the doctrine *pacta sunt servanda*, has been reinforced by reference, for example, to values found in aspects of the property clause and to freedom and dignity as foundational constitutional values.[105]

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[100]See, generally, Currie and De Waal *Bill of Rights Handbook* 641ff, 683ff; Cheadle, Davis and Haysom *South African Constitutional Law* Chapters 26 and 27.
[101]See ss 32(2) and 33(3) of the Constitution.
[102]*Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA), hereafter referred to as "*Afrox v Strydom*". This case concerned the right to have access to health care services in the context of the law of contract.
[103]*Brisley v Drotsky* 2002 (4) SA 1 (SCA), 2002 (12) BCLR 1229 (SCA). See, particularly, *Brisley v Drotsky* pars 88, 91 (citing s 1(a) and (b) of the Constitution) and 94, where Cameron JA stated that contractual freedom, "shorn of its excesses, informs the constitutional value of dignity" and that the constitutional values of dignity, equality, and freedom "require that the courts approach their task of striking down contracts or declining to enforce them with perceptive restraint".
[104]*Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* 2011 (5) SA 19 (SCA), hereafter referred to as "*Maphango v Aengus*".
[105]Liebenberg *Socio-Economic Rights* 341, with reference to Cameron JA's concurring judgment in *Brisley v Drotsky*, and 367, with reference to *Napier vBarkhuizen* 2006 (4) SA 1 (SCA), 2006 (9) BCLR 1011 (SCA), hereafter referred to as "*Napier vBarkhuizen*", par 13. Liebenberg, at 361, points out that, in

In relation to execution against mortgaged property, where the issue is usually whether a contractual term such as a clause providing for the sale in execution or an acceleration clause may be enforced, aspects of the decision in *Barkhuizen v Napier* are pertinent. In that case, the majority of the Constitutional Court held, *per* Ngcobo J, that a section of the Constitution could not be directly applied to a contractual term, using section 8(2) and (3),[106] and neither could a contractual term be tested by applying the limitation clause in section 36 as it was not "a law of general application". Ngcobo J stated that a constitutional challenge to a contractual term would ordinarily entail determination of whether the term was contrary to public policy which is now "deeply rooted in our Constitution and the values which underlie it."[107] He also stated, with reference to the judgment of the court *a quo*, that the doctrine *pacta sunt servanda* is not "a sacred cow that should trump all other considerations" but that its application is "subject to constitutional control".[108]

However, Liebenberg views the majority of the court in *Barkhuizen v Napier*, as apparently regarding the principle of *pacta sunt servanda* "as having presumptive force

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Brisley v Drotsky, in deciding whether the non-variation clause in the lease was contrary to public policy, the court gave no consideration to the tenant's right to have access to adequate housing, but confined itself to the question of the possible impact of s 26(3) on the granting of an eviction order. Van der Walt *Constitutional Property Law* 2005 440, with reference to Roux 2004 *SALJ* 466, explains how, in *Brisley v Drotsky* and *Afrox v Strydom*, the Supreme Court of Appeal failed to develop the common law because it regarded itself as not having explicit statutory discretion to amend existing private law rights. He cites the eviction part of the decision, in *Brisley v Drotsky*, as illustrating this. See also Botha 2004 *SAJHR* 249-283; van der Walt *Property in the Margins* 42-46. See also, *Maphango v Aengus*, where the Supreme Court of Appeal held that a lessee has no security of tenure beyond the period of the lease and, therefore, termination of a lease in accordance with the terms of the parties' agreement, does not infringe the s 26(1) rights of the lessee.

[106] *Barkhuizen v Napier* pars 23-30.

[107] *Barkhuizen v Napier* pars 28-30. According to Liebenberg *Socio-Economic Rights* 368-369, the court viewed section 39(2) "as the conduit for interpreting (and where necessary developing) common-law doctrines such as public policy so as to be consonant with the rights and values of the Constitution." See similar submissions, in relation to *Brisley v Drotsky* and *Afrox v Strydom*, by van der Walt *Constitutional Property Law* 2005 438-439, with reference to Lubbe 2004 *SALJ* 395 398, 401 and 404; *Carmichele v Minister of Safety and Security* (*Centre for Applied Legal Studies Intervening*) 2001 (4) SA 938 (CC); *Brisley v Drotsky* par 91; *Afrox v Strydom* par 18. For a more recent Supreme Court of Appeal judgment involving *pacta sunt servanda*, public policy and the Constitution, see *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC* 2011 (3) SA 511 (SCA), hereafter referred to as "*African Dawn Property v Dreams Travel*".

[108] *Barkhuizen v Napier* par 15, with reference to *Napier v Barkhuizen*.

as a normative standard" with its basis in "the founding constitutional values".[109] She argues that engagement with constitutional values such as social justice and the content and implications of socio-economic rights is required in contractual disputes.[110] She maintains that in light of the courts' reluctance "to undertake a more robust evaluation of the fairness of contractual provisions in the light of constitutional rights and values, legislative intervention has become critical."[111]

3.3.1.4 The right to have access to adequate housing in eviction cases

(a) Analogies between eviction from and execution against the home

Section 26(3) of the Constitution provides that no one may be evicted from their home without an order of court made after considering all the relevant circumstances. Likewise, in terms of *Jaftha v Schoeman*[112] and *Gundwana v Steko*,[113] only a court may grant an order for execution against a person's home after considering all the relevant circumstances.[114]

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[109]Liebenberg *Socio-Economic Rights* 371-372, quoting from *Barkhuizen v Napier* par 57 and with reference to Bhana 2008 *SAJHR* 300-317. See also similar comments made in relation to *Brisley v Drotsky* and *Afrox v Strydom* by van der Walt *Constitutional Property Law* 2005 439 with reference to Botha 2004 *SAJHR* 249-283; Lubbe 2004 *SALJ* 415.

[110]Liebenberg *Socio-Economic Rights* 360-361. See also 364ff for criticism of the Supreme Court of Appeal's decision, in *Afrox v Strydom*, for not expressing the rationale behind preferring the doctrine of *pacta sunt servanda* above the right to access to health care. Cf 366 where Liebenberg commends the court's approach, in *Mpange v Sithole* 2007 (6) SA 578 (W), for taking into account the realities that poor tenants could not always afford to effect repairs to leased premises themselves and thereafter claim remission of rent, and that the shortage of accommodation for poor people in Gauteng often left them "at the mercy of slum landlords if they wish[ed] to avoid homelessness." (par 47). Liebenberg states that the court thus "affirmed that the exercise of the discretion to award specific performance should be informed by constitutional rights, including the right of access to adequate housing." See also van der Walt *Constitutional Property Law* 2005 440 who detects "signs of uncertainty and hesitation, and even hostility, towards the idea that central principles and institutions of the common law might have to be changed (even perhaps dramatically) in order to promote the spirit, purport and objects of the Constitution". It is submitted that similar comments may be made in relation to the approach which the Supreme Court of Appeal adopted, in *Maphango v Aengus*, that a lessee cannot rely on an infringement of his s 26(1) right when a lessor has terminated the lease.

[111]Liebenberg *Socio-Economic Rights* 374.

[112]See *Jaftha v Schoeman* pars 44, 55.

[113]*Gundwana v Steko* pars 40 and 57, with reference to *Jaftha v Schoeman* par 55 and rule 46(1) of the Uniform Rules of Court, confirmed that judicial oversight, including consideration of all the relevant circumstances, was also required in the High Court process.

[114]The phrase "all the relevant circumstances" is used in s 26(3) of the Constitution and ss 4(6) and 4(7) of PIE. It also formed part of the words which were required, in *Jaftha v Schoeman* par 44, to be read into

In eviction cases, courts must balance the owner's property interests, the occupier's housing interests, and the broader, apparently conflicting, public interest in upholding property rights and the secure tenure of housing. Where occupation was originally acquired in terms of an agreement with the owner, contractual rights are also relevant. When deciding whether to allow execution against a person's home, the court must carry out a proportionality assessment in which it balances the various interests. It must consider, for example, the right of the debtor to have access to adequate housing[115] and the right of the creditor to satisfaction of his contractual claim and, where the home has been mortgaged, the mortgagee's real security rights. Also to be considered are broader social and economic interests reflected in the desirability and importance of holding persons to their contractual undertakings and property-related interests in the security of a mortgage bond.[116] The latter include the interests of property owners and investors, generally, as well as the interests of debtors who own homes to maintain their eligibility to access mortgage finance.[117]

Where a court, having considered all the relevant circumstances, does grant an order for execution against the home and it is sold in execution, a debtor, including an erstwhile mortgagor, may refuse to vacate it. In this situation the new owner, or the mortgagee, will have to apply for an eviction order and the principles and considerations, as mentioned above, in relation to evictions, will be applicable. It is clear from the judgments in *Gundwana v Steko*, *Nedbank v Fraser*, *FirstRand Bank v Folscher* and *Standard Bank v Bekker* that clear analogies may be drawn between the eviction of a person from his home and execution against a debtor's home.[118] It is submitted that, although what would constitute "relevant circumstances" in each

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s 66(1)(a) of the Magistrates' Courts Act. Further, rule 46(1) of the Uniform Rules of Court requires a court to consider all the relevant circumstances where execution is sought against a judgment debtor's primary residence. Rule 46(1) is discussed at 4.4.4.3, below.

[115]And, conceivably, the debtor's property rights, for discussion of which, see van der Walt *Constitutional Property Law* 2011 181-189. See also 3.3.4, below.

[116]See *Jaftha v Schoeman* pars 37-38, 40-42, 51 and 53; *Standard Bank v Saunderson* pars 12-13, 18.

[117]See *Jaftha v Schoeman* par 58.

[118]See *Gundwana v Steko* pars 23, 25, 41, 44 and 46; *Nedbank v Fraser* par 9; *FirstRand Bank v Folscher* par 34 and *Standard Bank v Bekker* par 13.

scenario might be different, there will be a measure of overlap.

In *Brisley v Drotsky*, the Supreme Court of Appeal held that, for the purposes of section 26(3), only *legally* relevant circumstances could be taken into account and these did not include the personal circumstances of the lessee facing eviction.[119] On the other hand, in *ABSA Bank Ltd v Murray and Another*,[120] where eviction proceedings were brought in terms of PIE against the erstwhile mortgagors of the home, the court took into account the personal circumstances of the insolvent spouses when it determined that it would be just and equitable to grant an eviction order. Now it is clear from the Constitutional Court's judgments in *Port Elizabeth Municipality* and *Occupiers of 51 Olivia Road*, *Berea Township and 197 Main Street*, *Johannesburg v City of Johannesburg and Others*,[121] that "relevant circumstances" are not confined to legal grounds justifying an eviction under the common law.[122] It is submitted this would also be the position in cases where an execution order is sought against a debtor's home. The nature of the evaluation, as it is explained in *Gundwana v Steko*, tends to suggest that personal circumstances of the debtor should also be considered.[123]

Further analogous features will be canvassed below, in the course of considering PIE

[119] *Brisley v Drotsky* pars 41-45. The Supreme Court of Appeal expressly rejected Liebenberg's earlier submissions in this regard. The court pointed out, at par 43, that the position was different to cases where legislation, such as ESTA or PIE, "expressly limited the common-law rights of an owner through conferring on the court a discretion to grant an eviction order subject to considerations of justice and equity". It may be noted, however, that Olivier JA, in a concurring judgment, stated that "all relevant circumstances" included "considerations of humanity" before ordering the eviction of tenants after the termination of their lease and that, where appropriate, reasonableness and fairness allowed "a court at least to suspend the execution of an eviction order for a reasonable period." *Brisley v Drotsky* par 87. See Liebenberg *Socio-Economic Rights* 348; Liebenberg "The Interpretation of Socio-Economic Rights" 33-60, with reference to *Grootboom* pars 52, 88-90, for her preferred construction of "all relevant circumstances".

[120] *ABSA Bank Ltd v Murray and Another* 2004 (2) SA 15 (C), hereafter referred to as "*ABSA v Murray*". This case is discussed in 6.3.2, below.

[121] *Occupiers of 51 Olivia Road*, *Berea Township and 197 Main Street*, *Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC), 2008 (9) BCLR 475 (CC), hereafter referred to as "*51 Olivia Road* (CC)".

[122] See Liebenberg *Socio-Economic Rights* 277-278, with reference to *Brisley v Drotsky* pars 38 and 42, *Port Elizabeth Municipality* par 32 and *City of Johannesburg v Rand Properties* (*Pty*) *Ltd* 2007 (6) SA 417 (SCA), 2007 (6) BCLR 643 (SCA) pars 40-41. See also van der Walt *Property in the Margins* 157-158.

[123] See *Gundwana v Steko* pars 43, 49 and 50.

and other aspects of eviction cases.[124]

(b) The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act

PIE was enacted to protect both constitutional housing and property rights.[125] Section 4 of PIE requires that before a court grants an eviction order it must be of the opinion "that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women."[126] Thus, an occupier who has received an eviction notice from the owner[127] is not obliged immediately to vacate the property but is entitled to "hold over" until a court has determined whether it is just and equitable to grant the eviction order.[128] A court will often render an eviction order just and equitable by postponing its execution in order to afford the occupier the opportunity to arrange alternative accommodation.[129]

In *Ndlovu v Ngcobo*; *Bekker and Another v Jika*,[130] the majority of the Supreme Court of Appeal held that PIE applied to persons who had acquired occupation lawfully but whose occupation had become unlawful. This would include a lessee, after the lawful termination of a lease, and an erstwhile mortgagor, pursuant to the calling up of a mortgage bond.[131] The court recognised such persons as belonging to a vulnerable

[124]This discussion of PIE reiterates largely the discussion in Steyn 2007 *Law Dem Dev* 101 115ff.
[125]Liebenberg *Socio-Economic Rights* 271 n 17 points out that the preamble of PIE refers to the content of both s 25(1) and s 26(3) of the Constitution.
[126]S 4(6). This subsection applies where the unlawful occupier has been in occupation for less than six months.
[127]S 4(2)-(5) contains notice requirements.
[128]It also means that eviction of a person from his home may not occur as a result of an administrative decision alone, without a court order, nor may a clerk of the Magistrate's Court, or the registrar of the High Court, issue an eviction order in an application for default judgment. See Currie and De Waal *Bill of Rights Handbook* 588.
[129]See, for example, *ABSA v Murray* par 48. The court postponed the execution of the eviction order for six weeks, having taken into account that the erstwhile mortgagors had been aware for more than a year of the bank's intention to evict them and they had already had a considerable period of time to prepare to vacate their home.
[130]*Ndlovu v Ngcobo*; *Bekker and Another v Jika* 2003 (1) SA 113 (SCA), [2002] 4 All SA 384 (SCA), hereafter referred to as "*Ndlovu v Ngcobo*".
[131]Thus overruling *ABSA Bank Ltd v Amod* [1999] 2 All SA 423 (W). See van der Walt *Constitutional Property Law* 2005 328 and other cases cited there. The facts, in *Gundwana v Steko*, provide an illustration of the application of PIE to an erstwhile mortgagor whose home was sold in execution. In the circumstances, the Constitutional Court referred the eviction case to the Magistrate's Court, pending a decision by the High Court as to the validity of the sale in execution.

class of occupiers.[132] The court emphasised that PIE had to be interpreted in such a way as to promote "the spirit, purport and objects" of section 26(3).[133] It may be noted that a subsequently proposed Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill, that sought explicitly to exclude from the application of PIE occupiers of property who are erstwhile lessees or mortgagors and previous owners, was rejected in 2008.[134]

Where the occupier has been in occupation for more than six months, the court must also consider whether land has been made available or can reasonably be made available by a municipality or other organ of state for the relocation of the unlawful occupier. It may be noted that an exception to this rule applies "where the land is sold in a sale in execution pursuant to a mortgage".[135] It is unclear whether this exception was intended to apply only in respect of the court's duty to consider whether alternative land has been made available, or whether its effect is to relieve the court entirely of the duty to consider the rights and needs of the elderly, children, disabled persons and households headed by women. In *Ndlovu v Ngcobo*, the Supreme Court of Appeal adopted the latter interpretation.[136] However, it is submitted that, as explained by Binns-Ward AJ in *ABSA v Murray*,[137] the former interpretation is more logical. It also avoids the anomalies which would otherwise arise if the housing interests of persons, who

[132] *Ndlovu v Ngcobo* pars 16-17. Van der Walt *Constitutional Property Law* 2005 423 states that Harms JA pointed out that the vulnerability of certain categories of persons – including tenants of urban housing – may well have been a concern when parliament promulgated PIE.
[133] *Ndlovu v Ngcobo* par 16.
[134] The Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill was first drafted in 2003. It sought explicitly to exclude from the application of PIE occupiers of property who are erstwhile lessees or mortgagors and previous owners. In 2006, a revised version was approved by Cabinet and published for comment in GN 1851 in *GG* 29501 of 22 December 2006. Following widespread consultation and discussion, it was again revised and redrafted as a proposed Bill B8-2008 and an explanatory summary was published in GG 30459 of 16 November 2007. This Bill was rejected by the Portfolio Committee on Housing on 6 August 2008. If the proposed amendment were ever to be revived and if it were to become law, it would significantly alter the position where a purchaser of immovable property, sold either in execution or by the trustee of an insolvent estate, seeks to evict an erstwhile mortgagor or owner of the property. Even though it might be argued that the Legislature did not originally intend the provisions of PIE to apply to a mortgagor or previous owner of the property, the practical effect is that such an amendment would deprive such persons of the protective measures afforded by PIE that until now they have enjoyed in light of the decision in *Ndlovu v Ngcobo*. If this were to occur, it is submitted that there would be all the more reason for the need for a court to conduct a thorough evaulation of the personal circumstances, including the housing situation, of a debtor and his family and dependants before his home may be executed against or sold in the course of realisation of the assets of an insolvent estate.
[135] S 4(7).
[136] *Ndlovu v Ngcobo* par 17.
[137] This case is discussed in 6.3.2, below.

occupy the property through the erstwhile mortgagor or the erstwhile lessee of mortgaged property, were to be ignored.[138] It would also be in keeping with "the spirit, purport and objects" of section 26(3).[139]

In *Port Elizabeth Municipality*, the Constitutional Court held that PIE had to be interpreted and applied within a "defined and carefully calibrated constitutional matrix"[140] which recognises that "property rights are not absolute, but incorporate the important social dimension of promoting the public interest".[141] As expressed by Sachs J:[142]

> … The expectations that ordinarily go with title could clash head-on with the genuine despair of people in dire need of accommodation ... The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case.

The court stated that eviction could occur even if it would result in the loss of a person's home, and no alternative accommodation was to be provided. However, it also stated that a court "should be reluctant to grant an eviction against relatively settled occupiers unless it is satisfied that a reasonable alternative is available, even if only as an interim measure pending ultimate access to housing in the formal housing programme".[143]

In similar vein it is submitted that it may be appropriate for a court to postpone the forced sale of a debtor's home so that alternative accommodation arrangements may be made. A court could justify its order on section 172 of the Constitution which permits a court deciding a constitutional matter to "make any order that is just and equitable". It may be noted that, in *Standard Bank v Saunderson*, the Supreme Court of Appeal anticipated that a court might delay execution where there is a real prospect that the

[138] See *ABSA v Murray* pars 24-26, with reference to *Ndlovu v Ngcobo* pars 7-11.
[139] *Ndlovu v Ngcobo* par 16.
[140] *Port Elizabeth Municipality* par 14. See Liebenberg *Socio-Economic Rights* 273-274; van der Walt *Constitutional Property Law* 2005 424.
[141] Liebenberg *Socio-Economic Rights* 274, with reference to *Port Elizabeth Municipality* par 16.
[142] *Port Elizabeth Municipality* par 23. See Liebenberg *Socio-Economic Rights* 274-275.
[143] *Port Elizabeth Municipality* par 28. See Liebenberg *Socio-Economic Rights* 275-276.

debt might yet be paid.[144] In view of the fact that the object of execution would be to obtain payment of the debt out of the proceeds of the sale, it is submitted that execution could just as well be delayed to allow a debtor, including a mortgagor, a reasonable period of time to secure alternative accommodation.

(c) The state's duty to provide housing

Another development in eviction cases has been for the court to direct, where appropriate, that the relevant organs of state provide housing for occupiers who would be rendered homeless by the eviction.[145] *Blue Moonlight Properties 39* (*Pty*) *Limited v The Occupiers of Saratoga Avenue*[146] concerned the eviction from private land of persons who had been employed at a factory business which had operated there and who, or whose relatives, had initially lived there in terms of lease agreements. The applicant had purchased the property for the purposes of investment. The court took into account that the applicant had been deprived of its entitlement to use and develop its property and had been unable to realise any benefit from its investment for five years. It granted the eviction order but decided that it would be just and equitable to postpone the execution of it for a period of almost two months in order for alternative accommodation arrangements to be made.[147] The court further declared the City of Johannesburg's emergency housing programme to be unconstitutional to the extent that it discriminated against persons facing eviction from privately owned land by excluding

[144] *Standard Bank v Saunderson* par 20.
[145] See *City of Cape Town v Hoosain NO and Others* (WCHCCT) case no 10334/2011 (21 October 2011).
[146] *Blue Moonlight Properties 39* (*Pty*) *Limited v The Occupiers of Saratoga Avenue* 2009 (1) SA 470 (W), 2009 (3) BCLR 329 (W), hereafter referred to as "*Blue Moonlight Properties* (WLD)". This case, which came before Masipa J, was postponed *sine die*, and a later judgment in the matter, *per* Spilg J, is reported as [2010] JOL 25031 (GSJ), hereafter referred to as "*Blue Moonlight Properties* (GSJ)". The judgment, on appeal to the Supreme Court of Appeal against the decision, in *Blue Moonlight Properties* (GSJ), is reported as *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2011 (4) SA 337 (SCA), hereafter referred to as "*Blue Moonlight Properties* (SCA)". The appeal to the Constitutional Court is reported as *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) BCLR 150 (CC), hereafter referred to as "*Blue Moonlight Properties* (CC)". (Judgment was delivered, in *Blue Moonlight Properties* (CC), on 1 December 2011.)
[147] *Blue Moonlight Properties* (GSJ) pars 162, 191, 193.

them from eligibility for housing relief including temporary emergency accommodation.[148]

In an appeal by the City of Johannesburg, the Supreme Court of Appeal confirmed the eviction order and gave the occupiers a period of two months after the date of its judgment to vacate the property.[149] The appeal court held that the City of Johannesburg was obliged to provide for the progressive realisation of the right of access to adequate housing within its area of jurisdiction in accordance with the provisions of the Housing Act or the National Housing Code.[150] The court considered that the City of Johannesburg was able, within its available resources, to meet the needs of the occupiers.[151] It confirmed the order for the City of Johannesburg to provide temporary emergency accommodation to specific occupiers whose names appeared in a particular document contained in the court papers, and those persons occupying through them, until they could participate in a permanent housing programme.[152] The Supreme Court of Appeal confirmed the declaration that the City of Johannesburg's emergency housing programme was unconstitutional, in terms of section 9(1) of the Constitution, on the basis that it discriminated against one category of persons who were "desperately poor and … in a crisis".[153] This decision was confirmed by the Constitutional Court which gave the occupants a period of four and a half months to vacate the property and the City of Johannesburg a period of four months to provide accommodation to those who needed it.[154]

It is submitted that the argument may be raised that where a debtor and his family will be rendered homeless, execution against his home should be permitted only where

[148] *Blue Moonlight Properties* (GSJ) pars 144-145, 151 and 154, 196 subpar 4. The court held that the housing programme offended occupiers', and private property owners', rights to equality.
[149] *Blue Moonlight Properties* (SCA) pars 77.5.1, 77.5.2.
[150] *Blue Moonlight Properties* (SCA) pars 42-48.
[151] *Blue Moonlight Properties* (SCA) pars 49-53.
[152] *Blue Moonlight Properties* (SCA) par 77.5.4.
[153] *Blue Moonlight Properties* (SCA) par 59. This aspect of the decision is discussed at 3.3.5, below.
[154] *Blue Moonlight Properties* (CC) par 104.

alternative accommodation is provided by the state in the exercise of its duty under section 26(2) of the Constitution.[155]

(d) "Meaningful engagement"

Whether "meaningful engagement" has occurred between the interested parties, has become an important consideration in eviction cases.[156] The positive effect of this is well illustrated by the outcome in *51 Olivia Road* (CC).[157] This case concerned an application by the Johannesburg City Council for the eviction, in terms of the National Building Regulations and Building Standards Act 103 of 1977 as part of its Inner City Regeneration Strategy, of a large number of impoverished residents in allegedly unsafe buildings in the inner city of Johannesburg. The high court recognised that the respondents were too poor to secure alternative accommodation[158] and, if evicted, would be far worse off than in their current accommodation.[159] It issued an interdict prohibiting the City of Johannesburg from evicting the occupiers pending the implementation of an appropriate programme to accommodate them, as required by

[155]Temporary, emergency accommodation could, ultimately, be replaced by low-rent, leased accommodation, as provided for in the Social Housing Programme, the Institutional Housing Subsidy Programme and the Community Residential Units Programme, explained in *Simplified Guide* Part B: Overview of the Current National Housing Programmes pars 5, 6 and 7, referred to at 4.2.1, below. For a similar submission, in relation to erstwhile lessees, see Maass and van der Walt 2011 *SALJ* 436 450 who state that "low income households should be accommodated by the state as far as possible with the aim to combat an increase in homelessness".

[156]Van der Walt *Property in the Margins* 158. The author states, at 156, that, in *51 Olivia Road* (CC) par 30, the Constitutional Court emphasised that "meaningful engagement should in future cases like this take place prior to litigation unless it is impossible for some compelling reason." In relation to court-supervised engagement, see *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC); 2011 7 BCLR 723 (CC). Parallel developments have taken place in cases involving other socio-economic rights, such as, for example, the right to an education, in *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC), where, ultimately, the Constitutional Court granted the eviction order only because, instead of reaching an agreement with the trustees of the property on which the school was situated, the Member of the Executive Council for Education succeeded in making alternative arrangements for the schooling of the affected children. For discussion of this case, see van der Walt "Constitutional property law" 2011 (2) *JQR* par 2.1.

[157]The decision of the high court, *per* Jajbhay J, is reported as *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (1) SA 78 (W), 2006 (6) BCLR 728 (W), hereafter referred to as "*51 Olivia Road* (WLD)". The decision of the Supreme Court of Appeal is reported as *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 (6) SA 417 (SCA), 2007 (6) BCLR 643 (SCA), [2007] 2 All SA 459 (SCA), hereafter referred to as "*51 Olivia Road* (SCA)".

[158]*51 Olivia Road* (WLD) pars 22, 47.

[159]*51 Olivia Road* (WLD) par 57.

Grootboom, and the provision of suitable alternative accommodation.[160] On appeal, the Supreme Court of Appeal held that the City of Johannesburg was entitled to the eviction order[161] but because eviction would leave at least some of the respondents without shelter or the resources to secure it, this would trigger the obligation recognised in *Grootboom* to put in place a programme to provide emergency shelter.[162] It therefore ordered the City of Johannesburg to provide temporary accommodation to those evicted persons who were desperately in need of housing assistance.[163] In an appeal by the occupiers against this decision, within two days of hearing argument in the matter the Constitutional Court issued an interim order, *inter alia*, requiring the City and occupiers to:[164]

> engage with each other meaningfully … in an effort to resolve the differences and difficulties aired in this application in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned.

A settlement agreement was subsequently reached.[165]

In *Port Elizabeth Municipality*, Sachs J stated that courts are required to "infuse elements of grace and compassion into the formal structures of the law" and "to balance competing interests in a principled way".[166] The court held that individualised consideration of people's accommodation needs was required so as to treat everyone

[160] *51 Olivia Road* (WLD) pars 3-4 of the order.
[161] *51 Olivia Road* (SCA) par 78. At par 40, it adopted its earlier interpretation of s 26(3), in *Brisley v Drotsky*, that the only "relevant circumstances" to be taken into account are those which are "legally relevant".
[162] *51 Olivia Road* (SCA) pars 5, 47, 76-77.
[163] *51 Olivia Road* (SCA) par 5; order par 2.1. The court specified that it be waterproof and provide access to basic sanitation, water and refuse services. In addition, in pars 2.3 and 2.4, the court ordered the parties to consult before the location of accommodation was decided upon and it ordered the City to serve on the respondents' attorneys of record and the *amici curiae*, and to file with the registrar, a compliance certificate within four months of the order.
[164] *51 Olivia Road* (CC) par 5; interim order par 1.
[165] For details of the settlement agreement reached as an outcome of the engagement, see Liebenberg *Socio-Economic Rights* 296.
[166] *Port Elizabeth Municipality* par 37, referred to by Liebenberg *Socio-Economic Rights* 350.

with dignity, "care and concern"[167] by holding proper, participative discussions[168] and, where appropriate, making genuine attempts at mediation.[169] Sachs J stated:[170]

> In a society founded on human dignity, equality and freedom it cannot be presupposed that the greatest good for the many can be achieved at the cost of intolerable hardship for the few, particularly if by a reasonable application of judicial and administrative statecraft such human distress could be avoided.

The decision in *Port Elizabeth Municipality* also established that a court should devise steps to ensure that all relevant information is available to it and that it may adopt an inquisitorial approach, by going beyond the papers placed before it, to establish facts to enable it have regard to "all the relevant circumstances."[171] The court stated that one of the "relevant circumstances" was whether there had been an attempt at mediation.[172] It refused to grant the eviction order in the absence of detailed information regarding the circumstances of the occupiers and any meaningful attempt by the parties to mediate and engage in an effort to reach mutually acceptable solutions.[173]

On the other hand, in *Jackpersad NO and Others v Mitha and Others*,[174] applying the reasoning in *Ndlovu v Ngcobo*, the high court adopted the approach that it was for the occupiers to place before the court information about circumstances which were relevant to the exercise of its discretion.[175] Following *Port Elizabeth Municipality*, the court recognised that it was obliged to have regard to the interests and circumstances of

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[167] *Port Elizabeth Municipality* par 29, with reference to *Grootboom* par 44. See Liebenberg *Socio-Economic Rights* 276.
[168] *Port Elizabeth Municipality* par 30. Liebenberg *Socio-Economic Rights* 278 states that the need is for "face-to-face engagement" with "equality of voice" for all concerned.
[169] *Port Elizabeth Municipality* pars 39-47. See Liebenberg *Socio-Economic Rights* 276-277 who states that this "reinforces the right of people who face the loss of their home to be heard and have their views taken into account." See also van der Walt *Constitutional Property Law* 2011 521ff.
[170] *Port Elizabeth Municipality* par 29.
[171] *Port Elizabeth Municipality* par 32, referred to by Liebenberg *Socio-Economic Rights* 278 who cites, as an example of this, the judgment of Bertelsmann J in *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* [2007] JOL 18960 (T). See also van der Walt *Constitutional Property Law* 2011 524.
[172] *Port Elizabeth Municipality* par 45.
[173] *Port Elizabeth Municipality* pars 58, 59 and 61.
[174] *Jackpersad NO and Others v Mitha and Others* 2008 (4) SA 522 (D), hereafter referred to as "*Jackpersad v Mitha*".
[175] *Jackpersad v Mitha* 528, 531. In this case, the owner of a building had terminated the leases of sixteen lessees, and had given them three months' notice to vacate the property, in order for the building to be demolished so that a neighbouring hospital could be extended. The lessees contended that their eviction would not be just and equitable; see *Jackpersad v Mitha* 524-525, 528-529.

the occupiers, as well as to other broader considerations of fairness and other constitutional values, in order to achieve a just balance between the conflicting interests of the owner and the occupiers. It took into account not only that the applicants had a commercial interest in demolishing the building so that they could extend the neighbouring hospital without delay, but also that the extension of the hospital would be in the broader public interest.[176] The court also considered the personal circumstances of the occupiers including their period of occupation of the building and that most of them were elderly and some were in poor health.[177] The court was not in possession of any information about their financial position or their ability to acquire alternative accommodation but it adopted the approach that this information lay in their exclusive knowledge and that they had chosen not to disclose it to the court.[178] In the result, the court decided that it was just and equitable to grant the eviction order the execution of which it ordered to be delayed for a period of three and a half months.[179]

It is submitted that this approach is in stark contrast to that adopted in *51 Olivia Road* (CC) and, more recently, by the Supreme Court of Appeal in *Occupiers*, *Shulana Court*, *11 Hendon Road*, *Yeoville*, *Johannesburg v Steele*[180] and by the Western Cape High Court in *City of Cape Town v Hoosain NO and Others*.[181] In *Shulana Court* (SCA), the high court had granted an eviction order by default judgment against the former lessees[182] who appealed against a refusal by the court *a quo* to grant rescission of judgment. The Supreme Court of Appeal held that the high court had failed to comply with its constitutional obligations. This was because it had granted the eviction order with insufficient information about the personal circumstances of the occupiers and the availability of alternative accommodation. This meant that it had not considered "all the

[176]The basis was that it would increase the services which the hospital could provide and that it would create employment for the construction workers, in the short term, and for nursing staff, in the long term; see *Jackpersad v Mitha* 529.
[177]*Jackpersad v Mitha* 530.
[178]*Jackpersad v Mitha* 530-531.
[179]*Jackpersad v Mitha* 534-535.
[180]*Occupiers*, *Shulana Court*, *11 Hendon Road*, *Yeoville*, *Johannesburg v Steele* [2010] 4 All SA 54 (SCA), hereafter referred to as "*Shulana Court* (SCA)".
[181]*City of Cape Town v Hoosain NO and Others* WCHCCT case no 10334/2011 (21 October 2011).
[182]The erstwhile lessees had been in occupation for a number of years. They failed to vacate the premises after the termination of their oral lease agreements by the owner, who intended to renovate the dilapidated buildings.

relevant circumstances" as required by sections 4(6) and 4(7) of PIE.[183] The Supreme Court of Appeal stated that it was clear, from the scant information that *was* available to the court *a quo*, that there was a real prospect that eviction would result in homelessness for the poor occupiers. The appeal court stated that it "ought to have been proactive and … [to] have taken steps to ensure that it was appraised of all relevant information in order to enable it to make a just and equitable decision."[184] It further explained that section 4 of PIE imposed a new, "complex, and constitutionally ordained"[185] role on the courts. This required them "to go beyond … [their] normal functions, and to engage in active judicial management",[186] to be "innovative", in some instances "to depart from the conventional approach,"[187] and to use their powers to investigate, call for further evidence or make special protective orders.[188]

It is submitted that it would be appropriate, in cases where execution against a debtor's home is sought, for courts also to include "elements of grace and compassion" in the balancing of the competing interests. This could occur by taking into account people's accommodation needs and insisting that everyone is treated with dignity and that proper, participative discussions are held and, where appropriate, that genuine attempts at mediation are made. It may be noted that, in *ABSA v Ntsane*, Bertelsmann J departed from the conventional approach and commendably, it is submitted, engaged in active judicial management to ascertain as much as possible of the relevant detail. The court expressed the view that an arbitration process should be available to which a court could refer parties in appropriate circumstances.[189] It is submitted that compulsory mediation would go a long way to achieving the objectives, espoused by the Constitutional Court in *Jaftha v Schoeman* and *Gundwana v Steko*. These are that

[183] *Shulana Court* (SCA) par 10. The Supreme Court of Appeal referred, in this regard, to *Occupiers of Erf 101*, *102*, *104 and 112 Shorts Retreat*, *Pietermaritzburg v Daisy Dear Investments* (*Pty*) *Ltd* [2009] 4 All SA 410 (SCA), hereafter referred to as "*Shorts Retreat*", pars 5-6; *Transnet t/a Spoornet v Informal Settlers of Good Hope* [2001] 4 All SA 516 (W); *Ritama Investments v Unlawful Occupiers of Erf 62 Wynberg* [2007] JOL 18960 (T); *Cashbuild* (*South Africa*)(*Pty*) *Ltd v Scott* 2001 1 SA 332 (T).
[184] *Shulana Court* (SCA) par 15.
[185] *Shulana Court* (SCA) par 12, quoting from *Port Elizabeth Municipality* par 13.
[186] *Shulana Court* (SCA) par 12, quoting from *Port Elizabeth Municipality* par 36.
[187] *Shulana Court* (SCA) par 12, quoting from *Shorts Retreat* par 14.
[188] *Shulana Court* (SCA) par 12.
[189] *ABSA v Ntsane* par 98. This case is discussed at 5.5.2, below.

execution against a person's home should occur only as a last resort and that the drastic consequences of persons losing their homes should be avoided by judicial consideration of alternatives ways of obtaining satisfaction of the debt.[190]

3.3.2 Section 10: *Human dignity*

In terms of section 10, everyone has inherent dignity and the right to have their dignity respected and protected. The right to dignity is seriously regarded in our jurisprudence[191] and the infringement of human dignity will be justifiable only if the limitation in question constitutes the "best method" to protect "the human dignity of others or another interest which is constitutionally accorded similarly singular status".[192] Dignity is also linked to the concept of *ubuntu*.[193]

The right to human dignity constitutes the basis for the protection of all other rights and for this reason, an infringement of human dignity usually occurs within the context of the infringement of other rights.[194] Thus, the right to dignity is inherent in the concept of security of tenure and the right to have access to adequate housing.[195] Execution against a debtor's home may infringe the dignity of the debtor as well as of all persons who are dependent on him such as children, elderly persons and other family members or persons residing with him.[196]

Our courts, including the Constitutional Court, have affirmed that the right to dignity also forms the basis of freedom of contract and sanctity of contract, embodied in the

[190] *Gundwana v Steko* pars 53, 54.
[191] See, generally, Woolman "Dignity" ch 36; Liebenberg 2005 *SAJHR* 1.
[192] Rautenbach and Malherbe *Constitutional law* 364-365.
[193] As discussed at 3.2.2, above. See *S v Makwanyane* pars 224-225; Woolman "Dignity" 36-3 and the works cited there; *51 Olivia Road* (WLD) pars 62-64.
[194] *S v Makwanyane* pars 44, 144 and 328-329; *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), 1998 (3) BCLR 257 (CC) par 35. See also Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 333; Rautenbach and Malherbe *Constitutional law* 364ff who refer to *Coetzee v Government* par 10.
[195] See *Grootboom* pars 2, 23, 44 and 83; *Jaftha v Schoeman* pars 21, 24 and 27; *51 Olivia Road* (WLD) par 30. In relation to the relationship between the right to dignity and socio-economic rights, see Woolman "Dignity" 36-58ff; Liebenberg 2005 *SAJHR* 11-12. See also *Port Elizabeth Municipality* pars 10, 12, 15, 17, 18, 29 and 41-42; *Blue Moonlight Properties* (GSJ) pars 114, 117 and 118; *Blue Moonlight Properties* (SCA) par 67.
[196] *Jaftha v Schoeman* pars 20-21; *ABSA v Ntsane* par 82.

principle *pacta sunt servanda*,[197] which was received into the South African common law via the Roman-Dutch law. This implicates the right to human dignity in a situation where a mortgagee seeks to enforce the terms of the mortgage agreement by executing against the mortgaged property. In relation to the constitutionality of contractual clauses that limit a person's rights, Rautenbach states that "the common law and statutory law that authorise and regulate the conclusion of the contract concerned constitute the law of general application, or more particularly, the outcome of action that was executed in terms of the law of general application."[198] He submits that the court overlooked this in *Barkhuizen v Napier*.[199]

3.3.3 Section 28: *Children's rights*

Section 28 provides for specific rights, applicable to children,[200] in addition to the other rights contained in the Bill of Rights. Section 28(1)(b) provides that every child has a right to "family care or parental care"; section 28(1)(c) provides that every child has a right to shelter; and section 28(2) provides that "[a] child's best interests are of paramount importance in every matter concerning the child". The reach of section 28(2) is viewed as extending beyond the rights enumerated in section 28(1) and creating a self-standing right that is independent of those specified in section 28(1).[201] Thus, whenever a child is dependent upon the debtor and lives in the debtor's home, these rights must be considered.[202]

Our courts approach the right to "family care or parental care"[203] from a child-centred perspective.[204] For example, where a court was deciding whether to deport a person,[205]

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[197] *Brisley v Drotsky* pars 94-95; *Afrox v Strydom* par 23; *Standard Bank v Saunderson*; *Napier v Barkhuizen* pars 7, 13; *Barkhuizen v Napier* pars 11-15, 24-26, 28, 30 and 57; *Breedenkamp v Standard Bank* par 37; *African Dawn Property Finance v Dreams Travel* pars 15-16; Woolman 2007 *SALJ* 762, 763.

[198] Rautenbach "Introduction to the Bill of Rights" par 1A45. See, also, 3.2.3, above.

[199] See Rautenbach "Introduction to the Bill of Rights" par 1A45, with reference also to Vos 2011 *TSAR* 287.

[200] S 28(3) defines a child is as a person under the age of 18 years.

[201] Friedman, Pantazis and Skelton "Children's Rights" 47-41-47-42.

[202] *Grootboom* 76-78. Liebenberg *Socio-Economic Rights* 232ff.

[203] This may be said to fulfil, to some extent, the "right to family life". In *Ex Parte Chairperson of the Constitutional Assembly In Re Certification of the Constitution of the Republic of South Africa Act*, *1996*

it considered this right.[206] Also, where a custodial sentence was being considered for a criminal offender who was a primary caregiver,[207] the Constitutional Court stated that section 28(1)(b), read with section 28(2), required the court "to make best efforts to avoid, where possible, any breakdown of family life or parental care".[208] There is controversy as to what is meant by "shelter", in section 28(1)(c).[209] However, it is clear, from *Grootboom*, that a child's right to shelter will be dependent on the availability of state resources.[210] Further, it seems that the state has an indirect duty to create the necessary "legal and administrative infrastructure" for the maintenance of children and their protection from neglect or degradation.[211]

Section 28(2) is treated as reiterating the common law concept of the best interests of the child which is applied by the high court as upper guardian of every minor child.[212] The Constitutional Court has applied this concept to adopt the view that the child's right to proper parental care, provided by section 28(1)(b), imposes an obligation on the state to create the necessary environment for parents to provide proper parental care.[213] The "best interests" criteria also arise when a court determines the ambit of another right in the Bill of Rights or when assessing whether the limitation of another right is justified.[214]

1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC), the court found that the non-inclusion of the "right to family life" in the final Constitution allowed for flexibility in the recognition of different family forms in a diverse society. See Friedman, Pantazis and Skelton "Children's Rights" 47-8, with reference to Sloth-Nielsen "Children" *The South African Constitution*: *The Bill of Rights* Davis and Cheadle (eds) 2nd ed 2006 511.

[204] For example, see *Heystek v Heystek* 2002 (2) SA 754 (T) 757C-D, [2002] 2 All SA 401 (T); *Fv F* 2006 (3) SA 42 (SCA), [2006] 1 All SA 571 (SCA) and *S v M* (*Centre for Child Law as Amicus Curiae*) 2008 (3) SA 232 (CC), hereafter referred to as "*S v M*".

[205] In terms of the Aliens Control Act 96 of 1991.

[206] *Patel v Minister of Home Affairs* 2000 2 SA 343 (D) 350E-F. See Friedman, Pantazis and Skelton "Children's Rights" 47-8.

[207] *S v M*. See also, more recently, *S v S* 2011 (2) SACR 88 (CC), 2011 (7) BCLR 740 (CC).

[208] *S v M* par 20.

[209] See *Grootboom* par 73. Cf *Grootboom v Oostenburg Municipality* 2000 (3) BCLR 277 (C) 293A. See Friedman, Pantazis and Skelton "Children's Rights" 47-10ff.

[210] See *Grootboom* par 74. See Friedman, Pantazis and Skelton "Children's Rights" 47-10-47-18; De Vos 1997 *SAJHR* 67, 87-88, 93.

[211] Liebenberg *Socio-Economic Rights* 241, with reference to *Grootboom* par 78.

[212] Friedman, Pantazis and Skelton "Children's Rights" 47-40.

[213] *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) pars 24-25. See Friedman, Pantazis and Skelton "Children's Rights" 47-41.

[214] For example, in *Hay v B* 2003 (3) SA 492 (W), the court read the child's right to life, together with the right to have the child's best interests considered, as paramount to the parents' right to freedom of religion. See Friedman, Pantazis and Skelton "Children's Rights" 47-41.

As the Constitutional Court has explained, "[c]hild law is an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case" and "the courts are essentially guarding the best interests of a child, not simply settling a dispute between litigants".[215] On the other hand, children's best interests may validly be limited as they are not absolute.[216] In *S v M*, the Constitutional Court stated:[217]

> The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely the interests of children who may be concerned.

None of the reported judgments concerning execution against a debtor's home, in the individual debt enforcement process, has dealt specifically with children's rights.[218] It is submitted that the above considerations, including the impact of homelessness on family life, should be applied when deciding whether to authorise the forced sale of the home of a debtor who has minor children who live with him or who are dependent on him.[219]

3.3.4 Section 25: Property

The reported judgments have not specifically addressed the impact of sale in execution of a debtor's home upon the property rights of the parties involved but reference has been made in a number of cases to a possible infringement of section 25 in this context.[220] Section 25(1) provides that "[n]o one may be deprived of property except in

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[215] *AD v DW* (*Centre for Child Law*, *Amicus Curiae*) 2008 (3) SA 183 (CC)par 55. See Friedman, Pantazis and Skelton "Children's Rights" 47-43.
[216] *S v M* pars 25-26.
[217] *S v M* par 42.
[218] Although arguments by the *amici curiae*, in *Standard Bank v Saunderson*, and, on appeal, in *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank Ltd and Another* 2006 (6) SA 103 (CC), included submissions relating to children's rights, these were not alluded to in the reported judgments. Copies of the heads of argument are on file with the author.
[219] In relation to children's rights in their parent's insolvency, see Stander and Horsten 2008 *TSAR* 203, discussed in Chapter 6, below.
[220] For example, in *Jaftha v Schoeman*, argument based on s 25 was presented to the Constitutional Court but Mokgoro J found it unnecessary to address it; see 5.2.3, below. In *Standard Bank v*

terms of law of general application, and no law may permit arbitrary deprivation of property." It provides protection against the deprivation of property by state actors and by private actors when exercising statutory rights.[221] "Deprivation" of property entails any limitation in respect of acquisition and use of, and control over, property.[222] Since the decision in *First National Bank of SA Ltd t/a Wesbank v Commissioner*, *South African Revenue Service*; *First National Bank of SA Ltd t/a Minister of Finance*,[223] it is clear that every law that deprives a person of property must satisfy the requirements of section 25(1). This means the deprivation must occur in terms of law of general application and the law must not be arbitrary.[224] This qualification overlaps with the general limitation clause. Therefore, in order to determine whether any deprivation is arbitrary, the court takes into account all the factors mentioned in section 36(1).[225]

The Bill of Rights does not define property[226] and, in *FNB*, the Constitutional Court viewed it as "practically impossible and judicially unwise" to attempt a comprehensive

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Saunderson, the *amici curiae* referred, in their arguments, to, *inter alia*, s 25. Although s 25 was not canvassed in the judgment, Cameron JA did state, at par 2, that a "mortgage bond … curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself". In *Gundwana v Steko* par 51, the Constitutional Court found it unnecessary, in view of its stance in relation to the effect of s 26 of the Constitution, to deal with the argument, advanced by counsel for the applicant, that the right to property is also implicated when immovable property is declared specially executable.

[221] Roux "Property" 46-6. See van der Walt *Constitutional Property Law* 2011 57ff on the horizontality of s 25. In relation to the debate whether it extends protection against a person acting in terms of the common law, see Roux "Property" 46-6 who refers to van der Walt *The Constitutional Property Clause* 106 and De Waal, Currie and Erasmus *The Bill of Rights Handbook* 4th ed 2001 412; van der Walt *Constitutional Property Law* 2011 63-66.

[222] *First National Bank of SA Ltd t/a Wesbank v Commissioner*, *South African Revenue Service*; *First National Bank of SA Ltd t/a Minister of Finance* pars 58, 100. See further Rautenbach and Malherbe *Constitutional law* 384; van der Walt *Constitutional Property Law* 2011 Chapter 4. See also Mostert and Badenhorst "Property and the Bill of Rights".

[223] *First National Bank of SA Ltd t/a Wesbank v Commissioner*, *South African Revenue Service*; *First National Bank of SA Ltd t/a Minister of Finance* 2002 4 SA 768 (CC) (hereafter referred to as "*FNB*"). For discussion of this case, see Roux "Property" 46-20.

[224] Roux "Property" 46-20-46-21 states that this means that the focus of the s 25(1) inquiry will fall on a law rather than any other type of state action and that administrative action that deprives a person of property without being authorised by a law of general application will be reviewable under the Promotion of Administrative Justice Act 3 of 2000 and, possibly, also under s 33 of the Constitution.

[225] *FNB* par 100. See Rautenbach and Malherbe *Constitutional law* 384 who criticise the judgment in *FNB* in relation to the difference, and overlap, between "arbitrariness" in s 25 and "proportionality" in the limitation clause. See also van der Walt *Constitutional Property Law* 2011 73ff.

[226] Except for providing, in s 25(4)(b), that it is not limited to land.

definition of property.[227] However, not only the debtor's rights of ownership come under consideration in relation to section 25 but also the security rights of a mortgagee[228] and, possibly, the right of a judgment creditor in respect of an unsecured claim.[229] Although an argument may be raised for a debtor's housing rights to be regarded as a form of property, this would seem unlikely to succeed, given the protection expressly afforded by section 26.[230] Section 25(4) provides that, for the purposes of this section, "the public interest includes the nation's commitment to land reform"[231] and that "property is not limited to land".[232] Section 25(5) places a general duty upon the state to take reasonable legislative and other measures within its available resources "to foster conditions which enable citizens to gain access to land on an equitable basis".[233] Section 25(6) places a specific duty upon the state to provide, in legislation, for security of tenure or comparable redress for "[a] person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices."[234]

Thus, section 25 may be viewed as consisting of two parts: the first, protecting existing property rights; and the second, authorising and mandating property law reform including aspects of land reform and security of tenure.[235] Van der Walt explains how this has brought about a close relationship between section 25 and section 26 of the

[227] *FNB* par 51. The court referred to *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 72 where it was stated that "no universally recognised formulation of the right to property exists". See also Roux "Property" 46-10.
[228] Van der Walt *Constitutional Property Law* 2011 140; Roux "Property" 46-13.
[229] By virtue of a *pignus judiciale*; see 2.2.5.1, above. See, further, van der Walt *Constitutional Property Law* 2011 151, 160, 188.
[230] See van der Walt *Constitutional Property Law* 2011 127, 138, 143, 168, 183, 188-189 who also submits that socio-economic or "new property" interests are unlikely to be protected or adjudicated in terms of the property clause). See also Roux "Property" 46-15-46-17.
[231] S 25(4)(*a*).
[232] S 25(4)(*b*).
[233] Examples are the Land Reform (Labour Tenants) Act 3 of 1996 and the Communal Property Associations Act 28 of 1996. See also van der Walt *Constitutional Property Law* 2011 21.
[234] An example of legislation envisaged in s 25(6) is the Land Reform (Labour Tenants) Act 3 of 1996, the Extension of Tenure Act 62 of 1997, the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998 (PIE) and the Interim Protection of Informal Land Rights Act 31 of 1996. See van der Walt *Constitutional Property Law* 2011 21; Rautenbach and Malherbe *Constitutional law* 385; Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 348 who points out, with reference to *Grootboom* par 42, that reasonable legislative measures must be supported by appropriate, well-directed policies and programmes implemented by the executive.
[235] See van der Walt *Constitutional Property Law* 2011 12.

Constitution.[236] As discussed above,[237] section 26(3) and the provisions of PIE place limitations on rights of ownership by permitting the owner to evict unlawful occupiers only in accordance with substantive and procedural restrictions that take into account the personal, social and economic circumstances of the occupiers.[238] Van der Walt explains how the decision in a number of the leading cases decided on the basis of section 26, including *Port Elizabeth Municipality* and *Jaftha v Schoeman*, are capable of explanation and justification in terms of section 25(1).[239] With reference to *Port Elizabeth Municipality*, he states that, in "the historical and constitutional context, the protection of property rights and the protection of a person's home are equally important … [and it is therefore] necessary to establish an appropriate constitutional relationship between section 25 … [and] section 26 …".[240]

The question may be raised whether the judgment in *Shulana Court* (SCA)[241] effectively imposes an additional burden upon the owner of property by requiring a court to ensure, before it may grant an eviction order, that it is appraised of the personal circumstances of all of the occupiers, and details of alternative accommodation available to them. The reality is that it will be up to the owner to obtain, and to present, the required, detailed, information to place the court in a position to consider granting an eviction order. Concern has been expressed that the effect of this decision will have wider, adverse

[236]Van der Walt *Constitutional Property Law* 2011 30, 54-55, 521ff. See *Port Elizabeth Municipality* par 19.
[237]See 3.3.1.4 (b), above.
[238]Van der Walt *Constitutional Property Law* 2011 521ff. See *Ndlovu v Ngcobo*; *Port Elizabeth Municipality*; *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC), 2005 (8) BCLR 786 (CC), hereafter referred to as "*Modderklip* (CC)"; *Shorts Retreat*; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes, Minister for Housing and Minister of Local Government and Housing, Western Cape (Centre on Housing Rights and Evictions and Community Law Centre, University of the Western Cape as amici curiae)* [2009] ZACC 16, 2009 (9) BCLR 847 (CC); *51 Olivia Road* (CC); *Blue Moonlight Properties* (GSJ); *Shulana Court* (SCA).
[239]See van der Walt *Constitutional Property Law* 2005 161; van der Walt *Constitutional Property Law* 2011 521.
[240]Van der Walt *Constitutional Property Law* 2011 297, with reference to *Port Elizabeth Municipality* pars 19, 23. Van der Walt *Constitutional Property Law* 2005 161-162 observes that, in *Port Elizabeth Municipality*, the Constitutional Court emphasised that the rights of ownership and the interests of unlawful occupiers must be balanced in an individualised, non-hierarchical, context-sensitive manner and that, in *51 Olivia Road* (WLD) par 30, the high court pointed out, with reference, in turn, to *Jaftha v Schoeman* par 30, that eviction is not simply a matter of property but also one of dignity and poverty. See also van der Walt *Property in the Margins* 159-160; van der Walt *Constitutional Property Law* 2011 521ff.
[241]See 3.3.1.4 (d), above.

implications for investment in, and the value of, property in South Africa.[242] A measure of controversy[243] has emerged since similar concerns were expressed, in a more recent judgment, by Willis J who stated:[244]

> … [financial institutions] and others in comparable situations such as banks will have to ponder the security of a mortgage bond – hitherto considered as "good as gold" provided there was a comfortable positive margin between the value of the property and the amount lent.
> …
> … [O]ne does not make housing more widely available by rendering the ownership of property which is let to tenants a serious economic hazard. … Why buy or build housing to let to tenants, if the fundamental link between tenancy and the payment of rentals to landlords is undermined? Why invest in property if there is a serious risk that the "investment" will be worthless?

Referring to *Grootboom* and *Port Elizabeth Municipality*, Willis J concluded that, ultimately, an eviction order is the only legal remedy effectively available for the unlawful occupation of property and, although exercised with compassion, grace and an awareness of human dignity, the making of the order, even if it were to be postponed, is unavoidable.[245] Willis J further expressed concern about a single judge ordering the government to provide alternative accommodation and stressed the need for clarity.[246]

Van der Walt presents a more rational, it is submitted, account of a shift from a rights-based perspective to one which considers the need for social and economic justice. He does, however, recognise that the rights paradigm still dominates "the rhetoric, logic and doctrine of the law" and, in this sense, "still exercises a stabilising effect that can inhibit

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[242] See Kok 2010 *Realestateweb* (1 April 2010) http://www.residential-property.co.za/1743_news_Court-ruling-could-have-dire-consequences-for-property-owners.html [date of use 15 March 2012].

[243] See Motala "Sorting one judge's opinion from the law of the land" *Sunday Times* South Africa (15 May 2010) http://www.timeslive.co.za/sundaytimes/article451180.ece/Sorting-one-judges-opinion-from-the-law-of-the-land [date of use 15 March 2012], who comments that "it is not the function of a judge to evaluate economic success or to legislate his or her economic world view. This is a policy decision that falls on the democratically elected organs of government." Cf Grootes "Analysis: Property rights in SA, not to be messed with" *The Daily Maverick* South Africa (11 May 2010) http://dailymaverick.co.za/article/2010-05-11-analysis-property-rights-in-sa-not-to-be-messed-with [date of use 15 March 2012], who sees some truth in it the remarks of Willis J.

[244] *Emfuleni Local Municipality v Builders Advancement Services CC* 2010 (4) SA 133 (GSJ), hereafter referred to as "*Emfuleni v Builders Advancement Services*", pars 14-15 and 19, with footnotes omitted.

[245] *Emfuleni v Builders Advancement Services* par 28.

[246] *Emfuleni v Builders Advancement Services* par 28-31.

reforms of the property regime."[247] He observes that "stability … creates trust and encourages investment of resources and effort in the acquisition, development and useful exploitation of property".[248] It is submitted that the desired stability would be more easily achieved if clearer analysis were provided of the substantive and procedural requirements and the specific criteria to be applied by a court in the process of balancing property, including real security and housing rights, in cases where execution against a person's home is sought. With reference, *inter alia*, to "the principles regulating sale in execution of a home", van der Walt has urged that a re-evaluation of the common law should be conducted.[249] He anticipates that "[n]ew legislation may be required to bring about the necessary reforms and changes in some areas." It is my submission that this is surely one of them.

3.3.5 The right to life, the right to equality, and the right of access to courts

Section 11 of the Constitution provides that "[e]veryone has the right to life". This encompasses a broad conception of "life".[250] Read with the state's duty, in terms of section 7(2) of the Constitution, to "respect, protect, promote and fulfil the rights in the Bill of Rights", the right to life imposes upon the state "a duty to create conditions to enable all persons to enjoy the right".[251] This includes "material means and access to social goods" necessary for the enjoyment of life.[252] Therefore, the state is under a duty to satisfy the socio-economic dimensions of the right to life[253] which may be viewed as overlapping with, or affirming, its obligations in terms of section 26 of the Constitution.

In *51 Olivia Road* (WLD), homelessness was stated to have "a very wide reach … [in that i]t affects the very quality of a person's life, dignity and a person's freedom and

[247] Van der Walt *Property in the Margins* 160-161.
[248] Van der Walt *Property in the Margins* 215.
[249] Van der Walt *Constitutional Property Law* 2011 528.
[250] See, generally, Pieterse "Life" ch 39. In *S v Makwanyane* par 326, O'Regan J explained it as, *inter alia*, "the right to live as a human being, to be part of a broader community, to share in the experience of humanity."
[251] *Per* Sachs J in *S v Makwanyane* par 353.
[252] Pieterse "Life" 39-17.
[253] See Pieterse "Life" 39-17 n 5.

security."[254] The court regarded eviction of the occupiers as potentially affecting their right to life as they would lose their informal employment in the inner city, if they were relocated, and this would mean the loss of their livelihood, their right to dignity and "perhaps even their right to life … [as t]o work means to eat and consequently to live."[255] On appeal, in the same matter, the Constitutional Court held that the City of Johannesburg had an obligation to fulfil the objectives mentioned in the preamble to the Constitution to "[i]mprove the quality of life of all citizens and free the potential of each person" and, in terms of section 7(2) of the Constitution, to respect, protect, promote and fulfil the rights in the Bill of Rights. In the circumstances, it identified the right to human dignity and the right to life as the most important of these rights. Thus, a municipality's ejection of persons from their homes without meaningful engagement was regarded as conduct which was "broadly at odds with the spirit and purpose of the constitutional obligations" taken together.[256]

Section 9(1) of the Constitution provides that "[e]veryone is equal before the law and has the right to equal protection and benefit of the law". The right to equality featured in *Blue Moonlight Properties* (SCA) where the Supreme Court of Appeal declared that the City of Johannesburg's housing programme was unconstitutional in light of section 9(1). This was because it provided temporary emergency accommodation only to "persons evicted from privately-owned unsafe buildings by the City itself, acting in terms of s 12(6) of the National Building Regulations and Building Standards Act, and [not to] those evicted from privately-owned buildings (which are not necessarily, but could be, dangerous buildings) by private landowners."[257] The Supreme Court of Appeal reasoned that the policy was inflexible because it included one "category" of evicted persons while excluding entirely another "category" where both were "desperately poor and … in a crisis ... without concerning itself with any other personal circumstances of those to be evicted."[258] The court found this inflexibility to be irrational and arbitrary,

[254] *51 Olivia Road* (WLD) par 1.
[255] *51 Olivia Road* (WLD) par 64.
[256] *51 Olivia Road* (CC) par 16.
[257] *Blue Moonlight Properties* (SCA) par 57.
[258] *Blue Moonlight Properties* (SCA) par 59.

thus rendering the policy unconstitutional.[259] This finding was confirmed by the Constitutional Court.[260]

It is submitted that, arguably, a housing policy which restricts state housing assistance to first-time homeowners[261] in like manner infringes the right to equality by ignoring the housing needs of debtors, including erstwhile mortgagees, whose homes have been sold in execution and who are "desperately poor and find themselves in a crisis". It is submitted that this may also found the contention that an equivalent level of statutory protection ought to be available to a debtor whose home is sold in execution, regardless of whether or not he "holds over". The argument could possibly be extended even further to submit that, for similar reasons, there should not be different treatment in insolvency.

Section 34 of the Constitution provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair, public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." Courts have stated that section 34 protects the public interest in the prevention of self-help.[262] However, because section 34 primarily protects the private interests which a person wishes to assert in disputes, matters concerning section 34 rights usually involve issues concerning the violation of other constitutional rights.[263] Section 34 applies horizontally to the extent that private persons are under a duty not to interfere with the exercise of another's access to courts.

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[259] *Blue Moonlight Properties* (SCA) par 56-66.
[260] *Blue Moonlight Properties* (CC) pars 84-95.
[261] For discussion of the National Housing Code, see 4.2, below.
[262] *Chief Lesapo* pars 18, 20; *First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa*; *Sheard v Land and Agricultural Bank of South Africa* 2000 (3) SA 626 (CC), 2000 (8) BCLR 876 (CC) par 6; *Modderklip* (*CC*) par 45. See Rautenbach and Malherbe *Constitutional law* 391; Brickhill and Friedman "Access to Courts" ch 59.
[263] Rautenbach and Malherbe *Constitutional law* 391-392. See, for example, the statement, in *FirstRand Bank v Folscher* par 14, that "[t]he protection afforded to owners and occupiers of their dwellings in section 26 is rooted in section 34 of the Constitution". *FirstRand Bank v Folscher* is discussed at 5.6.4, below.

The state is under a positive duty to establish courts and other tribunals or forums and to provide for their proper functioning as well as to provide legislative frameworks and procedures and the infrastructure for execution of court orders.[264] This is illustrated by *Modderklip* (CC), where the Constitutional Court based it decision on the rule of law[265] and the resultant duty of the state to provide the necessary mechanisms for citizens to resolve disputes that arise between them, as well as its corollary reflected in the right of access to courts provided for in section 34.[266] It concluded that the duty on the state is to provide "effective relief".[267] In the context of forced sale of a debtor's home, it is submitted that the rule of law and section 34 may found an argument to support a call for legislation to create the necessary infrastructure and co-ordinated mechanisms. This would be to provide effective relief for mortgagees, in the enforcement of their real security rights, and debtors, including mortgagors, in protection of their existing access to adequate housing.

Because there are limits to state resources, "access to courts" is not interpreted to include "access to justice". As Currie and De Waal state, "[t]his is unfortunate, since the biggest single impediment to access to justice is the prohibitive cost of litigation."[268] Ironically, an argument, based on access to courts, that only a court should decide whether a debtor's, including a mortgagor's, home may be sold in execution, surely means increased cost to the litigants. It is submitted that a more pressing issue, in this context, is access to justice, well illustrated, it is submitted, by the facts of cases such as *January v Standard Bank of South Africa Ltd*,[269] *FirstRand Bank Ltd v Meyer*,[270] and

[264]Rautenbach "Fundamental Rights" *LAWSA* 10(1) par 355: Rautenbach and Malherbe *Constitutional law* 392. See *Modderklip* (CC) par 41.
[265]S 1(c) of the Constitution refers to the "[s]upremacy of the constitution and the rule of law" as some of the values that are foundational to our constitutional order.
[266]*Modderklip* (CC) pars 39-51. See van der Walt *Constitutional Property Law* 2005 369 who, at the time of writing, identified new initiatives emerging via arguments based on the state's duty to provide suitable and efficient remedies for the enforcement and protection of rights as set out in s 34.
[267]*Modderklip* (CC) par 51.
[268]Currie and de Waal *Bill of Rights Handbook* 708-709. For a media article on the prohibitive cost of litigation, see Jooste "Cost bars public access" *Financial Mail* South Africa (2 March 2011) http://www.fm.co.za/Article.aspx?id=136035 [date of use 15 March 2012].
[269]*January v Standard Bank of South Africa Ltd* (2235/2008) [2010] ZAECGHC 6 (28 January 2010), discussed at 5.5.4.7, below.
[270]*FirstRand Bank Ltd v Meyer* ECPE Case no 3483/10 [2011] (17 March 2011), discussed at 5.5.4.6, below.

Gundwana v Steko.[271] It is submitted that a clear, streamlined, process is required so that judicial oversight and the balancing of the various rights by courts occur with optimal efficiency and effectiveness in every case with minimal cost to all concerned parties.

3.4 Conclusion

The Constitution, with its Bill of Rights, brought about significant changes to our jurisprudence and legal system. The permeating effect of the Constitution is evident in the provisions which regulate its application. Section 8(1) provides that the Bill of Rights "applies to all law, and binds the legislature, the executive, the judiciary and all organs of state." In terms of section 8(2), the Bill of Rights also "binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."[272] In *Jaftha v Schoeman*, the right of a person not to be deprived of existing access to adequate housing was held to bind private persons.[273] In terms of section 8(3), where no legislation, or existing common-law rule, applies to give adequate effect to a right or where a common law rule is deficient, the court is obliged to develop the common law to give effect to the right. Further, section 39(2) provides that, when interpreting any legislation and when developing the common law, a court "must promote the spirit, purport and objects of the Bill of Rights." This means that, even where the Constitution does not have direct application, "the values and principles encapsulated in section 39(2)" should clearly influence how the matter will be resolved.[274]

Section 39(1)(a) requires a court, when interpreting the Bill of Rights, "to promote the values that underlie an open and democratic society based on human dignity, equality and freedom." The duty to *promote* emphasises that "transformative constitutionalism" and "a socially interconnected and embodied concept of humanity" are envisaged. The

[271]For discussion of which, see 5.6, below.
[272]See 3.2.1, above.
[273]See 3.3.1.2, above.
[274]See 3.2.1, above.

Constitutional Court has recognised the significance of *ubuntu*, in this context, as one of the values that section 39(1) requires to be promoted.[275]

The Constitution has impacted fundamentally on the position in relation to the sale in execution of a debtor's home in the individual debt enforcement process. The combined effect of the judgments in *Jaftha v Schoeman* and in *Gundwana v Steko* is that the Constitutional Court recognised that the sale in execution of a debtor's home, including where it has been mortgaged in favour of the creditor,[276] may unjustifiably infringe his right to have access to adequate housing, protected by section 26(1) of the Constitution. It held that judicial oversight is required in every matter in which it is sought to execute against a person's home in order to determine whether, in terms of section 36 of the Constitution, execution is justifiable in the circumstances.[277]

The right to have access to adequate housing must be viewed in its broader context as a justiciable socio-economic right. Section 26(2) of the Constitution provides that the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of every person's right to have access to adequate housing, recognised in section 26(1). In *Grootboom*, the Constitutional Court held that this imposed on the state a qualified, positive obligation to devise comprehensive programmes capable of facilitating the realisation of the right. It envisaged that, over time, the state should lower legal, administrative, operational and financial hurdles so that housing is made more accessible not only to a larger number but also to a wider range of people as time progresses. It also held that section 26(1) places a negative duty on the state and private persons to desist from preventing or impairing the right of access to adequate housing.[278]

"Progressive realisation" of the right to have access to adequate housing logically entails not only providing currently homeless persons with access to adequate housing

[275]See 3.2.2, above.
[276]See 3.3.1.1, above.
[277]See 3.2.3 and 3.3.1.1, above.
[278]See 3.3.1.2, above.

but also minimising the number of people who become homeless. "Progressive realisation" should be viewed as entailing the minimisation of the number of homeowners who lose ownership and, in the process, their existing access to housing, bearing in mind also that, should they be rendered homeless, they will increase the burden on the state by requiring it to provide for their housing needs. As acknowledged in *Ndlovu v Ngcobo*, even erstwhile mortgagors are vulnerable to homelessness if they lose their home through forced sale.[279] "Retrogressive measures" in the form of law or conduct which leads to a decline in living and housing conditions may be regarded as a breach of the negative duty to desist from preventing or impairing the right of access to adequate housing.[280]

The state also has a duty, in terms of section 7(2) of the Constitution, to "respect, protect, promote and fulfil" the rights in the Bill of Rights.[281] Besides the debtor's right to have access to adequate housing, other constitutional rights potentially affected by the forced sale of a debtor's home include his and his dependants' right to dignity,[282] the rights of any children who reside with him[283] and the right to property.[284] In *Gundwana v Steko* and subsequent high court judgments, connections have been made and analogies drawn between the forced sale of a debtor's home and the eviction of a person from his home.[285] Therefore, constitutional rights which have featured in eviction cases, including the right to life, the right to access to courts and the right to equality,[286] may also be pertinent. However, constitutional rights are not absolute.[287] This is obvious, for example, when one considers the competing rights of persons other than the debtor and his family, in the context of execution against the home. The forced sale of a debtor's home usually involves a contractual relationship between the creditor and the debtor, and, where the home has been mortgaged, the real security rights of the

[279] See 3.3.1.4 (b), above.
[280] See 3.3.1.2, above.
[281] See 3.2.1, above.
[282] See 3.3.2, above.
[283] See 3.3.3, above.
[284] See 3.3.4, above.
[285] See 3.3.1.4, above.
[286] See 3.3.5, above.
[287] See 3.2.3, above.

creditor. Thus the creditor's rights to dignity, inherent in his right to enforce a contract, as recognised in the common law maxim *pacta sunt servanda*, and property rights, may be infringed.[288] These are at direct variance with the debtor's and his dependants' rights. Where the refusal to permit execution against debtors' homes is perceived as a failure to uphold contractual, or real security, rights, this has the potential to affect broader, commercial, economic and even property interests of individuals.[289] On the other hand, allowing execution against debtors' homes in circumstances where they are thereby rendered homeless places a burden on the state and, indirectly, society.[290] Housing, and the concept of home, are highly emotive issues, but, on the other hand, so are commercial and financial interests, property and capital investments. It is within this context that a court must carry out the balancing exercise which is required by section 36(1) of the Constitution. This is to determine whether, in the particular circumstances of the case, execution against a debtor's home would be an infringement of the debtor's right to have access to adequate housing which is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.[291]

Constitutional limitation analysis and proportionality assessment entail a complicated, nuanced, two-stage process. The arbitrary nature of the positive-negative obligations dichotomy, in relation to socio-economic rights, and the fact that positive duties imposed by such rights are subject to "reasonableness review" whereas the negative duties are subject to the limitation clause, in section 36 of the Constitution, further complicates matters.[292] Commentators have noted that, in practice, reported judgments often reflect confusion, as far as the applicable terminology is concerned, with resultant incorrect application of the criteria and required process. One cannot anticipate such a sophisticated level of constitutional and limitation analysis and expertise from lower

[288] See 3.3.1.3, 3.3.2 and 3.3.4, above.
[289] See 3.3.1.4 (a), above.
[290] See 3.3.3.1 and 3.3.1.2, above.
[291] See 3.2.3, above.
[292] See 3.2.3 and 3.3.1.2, above.

courts, practitioners, creditors, debtors, or advice centre staff who do not necessarily have specialised constitutional litigation knowledge and skills.[293]

A right may be limited only in terms of law of general application and, to have this quality, the law must be sufficiently accessible and precise for those who are affected by it to be able to ascertain the extent of their rights and obligations in order to conduct themselves accordingly. Commentators have called for a more structured, rigorous, sequential enquiry and clearly articulated rules to facilitate everyone's anticipation of what limitations would or would not pass constitutional muster and their understanding of how to adapt their actions accordingly. It would also facilitate the application of limitation analysis by the lower courts.[294]

Another concern which has been expressed is that outcomes often reflect unavoidable, subjective influences of judicial officers. Further, the courts' often over-cautious, casuistic, incrementalist approach stifles the transformative potential of the Constitution.[295] In the absence of legislation, section 39(2) of the Constitution requires a court to interpret and develop the common law in such a way as to promote the spirit, purport and objects of the Bill of Rights. However, development of the common law is slow due to its casuistic occurrence and an apparent reluctance on the part of the judiciary to develop contract law and property law principles more liberally in favour of constitutional values. It is therefore submitted, along with a number of academic commentators, that there is a need for the enactment of specific legislation to regulate the forced sale of a debtor's home.[296]

Analogies may be drawn between eviction cases and cases in which execution is sought against a person's home. Developments and solutions achieved, as reflected in reported judgments in eviction cases, provide useful pointers for approaches which may

[293]See 3.3.1.2, above.
[294]See 3.2.3 and 3.3.1.2, above.
[295]See 3.2.3 and 3.3.1.2, above.
[296]See 3.2.3, 3.3.1.2, 3.3.1.3 and 3.3.4, above.

be followed in cases where the forced sale of a person's home is in issue.[297] PIE, a statute containing substantive and procedural requirements, was enacted specifically to regulate evictions of persons from their homes.[298] Examination of reported judgments in eviction cases provides valuable insights into the courts' construction of "relevant circumstances", for the purposes of section 26(3) of the Constitution and section 4 of PIE.

In *Brisley v Drotsky*, the Supreme Court of Appeal held that, for the purposes of section 26(3) of the Constitution, only *legally* relevant circumstances could be taken into account and these did not include the personal circumstances of the lessee facing eviction.[299] Now it is clear, from the Constitutional Court's judgments, in *Port Elizabeth Municipality* and *51 Olivia Road* (CC), that "relevant circumstances" are not confined to legal grounds justifying an eviction under the common law. It is submitted this would also be the position in cases where an execution order is sought against a debtor's home. The explanation, in *Gundwana v Steko*, of the nature of the evaluation which is required tends to suggest that personal circumstances of the debtor should also be considered.[300]

A clear development has been that courts commonly require parties to engage meaningfully with one another before they are prepared to adjudicate upon an application for eviction. An example of this may be seen in *Port Elizabeth Municipality* where the Constitutional Court regarded as a "relevant circumstance" that there had been no attempt at mediation. Reported judgments also reflect that courts have granted interim orders directing that "meaningful engagement" should take place. This has been done with a view to achieving a balanced, mutually satisfactory resolution of conflicting rights and interests. This is reminiscent of the recommendation of Bertelsmann J, in *ABSA v Ntsane*, that banks should be required to submit to an arbitration process, where appropriate, before they may approach a court for an order for execution against

[297] See 3.3.1.4, above.
[298] See 3.3.1.4 (b), above.
[299] See 3.3.1.4 (a), above.
[300] See 3.3.1.4 (a), above, with reference to *Gundwana v Steko* pars 43, 49 and 50, also discussed at 5.6.2, below.

a person's home.[301] The introduction of a requirement of "meaningful engagement", or a compulsory mediation process, would provide an avenue for achieving the position, as espoused by Mokgoro J in *Jaftha v Schoeman*, that execution against a person's home should occur only as a last resort.[302]

The Constitutional Court's decision in *Port Elizabeth Municipality* also establishes precedent for a court to devise steps to ensure that all relevant information is available to it and to adopt an inquisitorial approach, going beyond the papers placed before it, to establish facts to enable it have regard to "all the relevant circumstances." A similar approach was adopted in *51 Olivia Road* (CC) and in *Shulana Court* (SCA). Notably, in *Shulana Court* (SCA), the Supreme Court of Appeal held that the court *a quo* had failed to comply with its constitutional obligations by granting an eviction order with insufficient information about the personal circumstances of the occupiers, and the availability of alternative accommodation, for it to have considered "all the relevant circumstances", as required by sections 4(6) and 4(7) of PIE. The Supreme Court of Appeal stated that the scant information that *was* available to the court *a quo* made it clear that there was a real prospect that eviction would result in homelessness for the poor occupiers. The appeal court stated that the court *a quo* should have proactively taken steps to ascertain all relevant information in order to enable it to make a just and equitable decision. The Supreme Court of Appeal stated that section 4 of PIE imposed a new, "complex, and constitutionally ordained" role on the courts which required them "to go beyond … [their] normal functions, and to engage in active judicial management", to be "innovative", in some instances "to depart from the conventional approach," and to use their powers to investigate, call for further evidence or make special protective orders.[303] This, too, is reminiscent of the approach adopted by Bertelsmann J in *ABSA v Ntsane*.[304]

In line with the Constitutional Court's direction, in eviction cases, for elements of grace and compassion to be infused into the formal structures of the law, courts have stated

[301]See 3.3.1.4 (d), with reference to *ABSA v Ntsane*, also discussed at 5.5.2, below.
[302]See 3.3.1.4 (d), above.
[303]See 3.3.1.4 (d), above.
[304]See 3.3.1.4 (d), above, with reference to *ABSA v Ntsane*, also discussed at 5.5.2, below.

that what is required is individualised consideration of occupiers' personal circumstances, including their accommodation needs, treating everyone with dignity, care and concern.[305] For example, in *ABSA v Murray*, the court took into consideration the personal circumstances of the erstwhile mortgagors who were "holding over" after their home had been sold to the mortgagee in a public auction held at the instance of the trustee of their insolvent estate. As also occurred in *ABSA v Murray*, courts are prepared to postpone the execution of the eviction order for a period of time which is reasonable in the circumstances, in order to render the granting of the eviction order just and equitable. In the same vein, it is submitted that it may be appropriate for a court to postpone the forced sale of a debtor's home in order for arrangements to be made for alternative accommodation. It may be noted that in *Standard Bank v Saunderson* it was anticipated that a court might delay execution where there is a real prospect that the debt might yet be paid.[306] In light of the fact that the object of execution would be to obtain payment of the debt out of the proceeds of the sale, it is submitted that execution could just as well be delayed to allow a debtor, including an erstwhile mortgagor, a reasonable period in which to arrange alternative accommodation. As things stand, a court could justify an order postponing a sale in execution on the basis that it is just and equitable in terms of section 172(1)(b) of the Constitution.[307]

Where appropriate, courts have postponed the execution of eviction orders pending the provision of accommodation by the relevant organ of state, as occurred in *Blue Moonlight Properties*. In this case, the Supreme Court of Appeal granted the occupiers a period of two months to vacate the property and confirmed the order of the court *a quo* for the municipality to provide temporary emergency accommodation to specific occupiers identified in the court papers, and those persons occupying through them, until they could participate in a permanent housing programme. Further, it confirmed the declaration that the municipality's emergency housing programme was unconstitutional, in terms of section 9(1) of the Constitution, on the basis that it was discriminatory for providing temporary emergency accommodation only to persons evicted from privately-

[305] See 3.3.1.4 (d), above.
[306] See 3.3.1.4 (b), above.
[307] See 3.3.1.4 (b), above.

owned unsafe buildings by the municipality itself, and not to persons evicted from privately-owned buildings by private landowners. The court regarded the policy as inflexible, irrational and arbitrary because it included one category of desperately poor, evicted persons who found themselves in a crisis while entirely excluding another without concerning itself with any other personal circumstances of those to be evicted. The decision was confirmed by the Constitutional Court which granted the occupants a period of four and a half months to vacate the property and granted the City of Johannesburg a period of four months to provide accommodation to those who needed it.[308]

This raises the issue whether, in all matters concerning the forced sale of a debtor's home, the court ought to enquire into the personal housing needs of debtors, including erstwhile mortgagors, and insolvent debtors, when assets are being liquidated in terms of the Insolvency Act, lest the process should otherwise also be regarded as discriminatory. These debtors could very well be desperately poor and "in a crisis" and vulnerable to homelessness. Further, if the forced sale of the home would affect any children, their interests must be regarded as being of paramount importance, in terms of section 28(2) of the Constitution. Children's rights are an issue which require attention, not yet having featured in any of the reported judgments concerning execution against a debtor's home in the individual debt enforcement process. The state ought also to be regarded as being under a duty, albeit qualified, to provide temporary housing to debtors and their families, in such circumstances, pending their inclusion in a formal housing programme.[309]

In the result, it is submitted that there is a need for clear substantive and procedural requirements to be applied uniformly in cases where the forced sale of the home of a debtor, including an erstwhile mortgagor or an insolvent person, is sought. Ideally, there should be meaningful engagement between the parties and, if no settlement can be reached, factors to be taken into account by a court should be explicit. There should be

[308]See 3.3.1.4 (c), above.
[309]See 3.3.1.4 (c), above.

clear guidelines as to how a court should exercise its discretion in balancing the various parties' constitutional rights with the view to allowing the forced sale of the home only as a last resort. Where sale of the home is unavoidable, and its effect would be to render homeless the debtor and his family and other dependants, the state should provide accommodation, albeit temporary, pending their integration into formal housing programmes or the making of more permanent arrangements.

It is submitted that it is already clear, from this chapter, that legislative intervention may be required. The advantages of special legislation are evident in relation to the Promotion of Access to Information Act 2000 and the Promotion of Administrative Justice Act 2000 which enhanced the adjudication process in matters concerning, and the level of protection of rights conferred by, sections 32 and 33 of the Constitution.[310] It is submitted that the duty which section 26(2) imposes on the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of section 26(1) rights requires it, in the circumstances, to enact appropriate legislation. Uniform statutory regulation of treatment of the home of a debtor would provide greater clarity in relation to substantive and procedural requirements in order that practitioners, administrative officials and judicial officers might ensure that matters involving debtors' section 26(1) rights are properly adjudicated. It would also promote our constitutional values and a commitment to transformation and "a socially interconnected and embodied concept of humanity" as reflected in *ubuntu*. The recognition of such a duty would in all likelihood necessitate a change to the policy currently reflected in the National Housing Code. This will be considered in the next chapter along with other aspects of law and policy relevant to an understanding of the reported judgments and the general position pertaining to execution against a person's home.

[310] See 3.3.1.2, above.

CHAPTER 4

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

> Even when laws have been written down, they ought not always to remain unaltered.
>
> - Aristotle *Politics* II.1269[a]9

4.1 Introduction

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

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

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

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

4.2 Housing law and policy

4.2.1 Statutory housing law and policy

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

[3]See 3.3.1.1, above.
[4]*Grootboom* par 41. See, also, 3.3.1.1 and 3.3.1.2, above.
[5]*Grootboom* par 45. See, also, 3.3.1.1 and 3.3.1.2, above.

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

South African housing law and policies[7] are contained mainly in the Housing White Paper,[8] the Housing Act and the National Housing Code.[9] Fundamental, also, was the Reconstruction and Development Programme[10] which was replaced in September 2004 by "Breaking New Ground", an amended "comprehensive plan for the creation of sustainable human settlements".[11] In 2009, the Department of Housing was renamed the Department of Human Settlements,[12] the Social Housing Act 16 of 2008 and the Housing Development Agency Act 23 of 2008 came into operation and the National Housing Code 2009 was issued to accord with the Breaking New Ground policy.[13] The *National Development Plan: Vision for 2030*, compiled by the National Planning Commission and made public on 11 November 2011, envisages even more enhanced human settlements initiatives.[14]

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

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

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

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

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

[11]See *Strategic Statement*.

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

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

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

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

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

[15]See *Strategic Statement*.
[16]See *Strategic Statement*.
[17]See *Strategic Statement*.
[18]See *National Development Plan* 243ff.
[19]See *National Development Plan* 255.
[20]See the National Housing Code of 2000, which was effective at that time, Part 3 Chapter 2 par 2.2(e) and (f), respectively.

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

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

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[21] *Jaftha v Schoeman* par 39.
[22] *Jaftha v Schoeman* par 34.
[23] See *A Simplified Guide to the National Housing Code* http://www.dhs.gov.za [date of use 15 March 2012], hereafter referred to as "*Simplified Guide*", Part C par 2.10.
[24] See *Simplified Guide* Part B pars 1.1 and 8.2.
[25] See *Simplified Guide* Part B pars 2.2 and 4.2. The Emergency Housing Assistance Programme, described at par 4.1, would apparently be inapplicable in this context as it covers persons who lose their homes during the upgrading of informal settlements, or as a result of disasters, such as fires and storms.
[26] See details regarding the Social Housing Programme, the Institutional Housing Subsidy Programme and the Community Residential Units Programme in *Simplified Guide* Part B pars 5, 6 and 7.

4.2.2 Sale of a state-subsidised home

Amendments to the Housing Act, in 2001,[27] included the insertion of new sections 10A and 10B[28] to deal with the sale of state-subsidised houses. This was done in an effort to curb the escalating private sale of houses by recipients of housing subsidies, often for substantially lower prices than the amounts of the original subsidy investment made by the government.[29]

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

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

[27]By the Housing Amendment Act 4 of 2001.
[28]Inserted by ss 7 and 8, respectively, of the Housing Amendment Act 4 of 2001.
[29]See *Memorandum on the objects of the Housing Amendment Bill 2006* par 2.3 published in *GG* 29502 of 22 December 2006.
[30]Presumably, as this is not expressly stated in the Housing Act.
[31]Only a credit-linked subsidy is excluded; see s 10B(1) of the Housing Act.
[32]*Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2003 10 BCLR 1149 (C).

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

The Housing Amendment Bill, published for comment in 2006,[34] seeks to merge sections 10A and 10B and to create a clear pre-emptive right in favour of the provincial housing department.[35] It seeks to prescribe a clear process to be followed[36] in any voluntary sale by the beneficiary of the subsidy, and in any sale by "successors in title or creditors in law", within five years of the acquisition of the property.[37] Significantly, it also proposes a new subsection which will have the effect that the provisions will not apply to a mortgagee exercising its rights under a mortgage bond passed over the property, upon default by the mortgagor.[38] Presumably, the thinking behind this proposal is that a mortgagee's rights should not be undermined lest this would lead to a reduction in the provision of finance and access to credit for owners of state-subsidised homes. The importance to poor homeowners of being able to use their houses to access credit was emphasised by the Constitutional Court in *Jaftha v Schoeman* and was the basis for its rejection of the notion of an exemption from execution for homes of low value.[39] The proposed amendment to section 10B of the Housing Act may suit the interests of mortgagees, in relation to the enforcement of debts, and of individual owners of state-subsidised homes, in relation to their ability to access credit. However, it is submitted that it tends to overlook the loss arising from the wasted investment by the state of public funds in the form of the subsidy which it originally granted. It is important for the state to recoup such investment in order to sustain the provision of housing through official housing programmes. It is therefore submitted that the state should have a pre-emptive right in all cases, including where the forced sale occurs at the instance of a mortgagee. It is also submitted that the question of a possible exemption from execution of state-subsidised homes should receive thorough, policy-based

[33] *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2003 10 BCLR 1149 (C) par 47.
[34] Housing Amendment Bill, 2006, published for comment in General Notice 1852 in *GG* 29502 dated 22 December 2006.
[35] In terms of the proposed s 10A(1).
[36] In terms of the proposed subsecs (2)-(8) of s 10A.
[37] See the proposed s 10A in s 9 of the Housing Amendment Bill, 2006.
[38] See the proposed s 10A(10) in s 9 of the Housing Amendment Bill, 2006.
[39] *Jaftha v Schoeman* par 51, referred to at 3.3.1.1, above, and 5.2.3, below.

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

4.2.3 Housing delivery

The Department of Human Settlements to some extent acknowledges its shortcomings in housing delivery.[41] The slow pace and poor quality of housing delivery continues to attract media attention.[42] In 2008, when Irene Grootboom died, a street had been named after her but she had not yet received state housing and was still living in a "shack".[43] It is reported that the housing backlog increased from 1,5 million in 1994 to 2,1 million in 2010.[44] It is estimated that about 12 million South Africans, perhaps even

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

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

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

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

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

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

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

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

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

[45] See Tissington "Resource Guide" 33.
[46] See *National Development Plan* Chapter 8 "Transforming Human Settlements" 243.

4.3 Selected aspects of private law: contract and mortgage

4.3.1 Enforcement of a contractual debt

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

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

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[47]Van der Merwe *et al Contract* 2ff, 8ff; Christie *Law of Contract* 2.
[48]See 4.3.3, below.
[49]See Hu and Westbrook 2007 *Columbia Law Review* 1389; Rajak and Henning 1999 *SALJ* 273. See, also, 1.1, 2.3.5.3 and 3.3.2, above.
[50]Van der Merwe *et al Contract* 11, 20; Christie *Law of Contract* 199. *Pacta sunt servanda* is also discussed at 3.3.1.3, 3.3.2, above. See, specifically, cases cited at 3.3.2, above.
[51]Van der Merwe *et al Contract* 380ff; Christie *Law of Contract* 522ff; Van Rensburg, Lotz and Van Rhijn "Contract" *LAWSA* 5(1) par 495.

4.3.2 Debt relief measures available in the common law of contract

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

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[52]Van der Merwe *et al Contract* 512ff.
[53]That is, in the absence of any other reason for the termination of the contract, such as, for example, by operation of law, by supervening impossibility of performance, extinctive prescription, merger or set-off; see Van der Merwe *et al Contract* 511-512, 541ff.
[54]Van der Merwe *et al Contract* 526ff.
[55]In the case of delegation and assignment, which occur where contracting parties agree that a third party will be substituted for one of them, as a consequence, the obligation between the original contracting parties comes to an end. To this extent, these may be regarded as forms of novation, although such a construction is not preferred by all commentators. See van der Merwe *et al Contract* 530ff.
[56]Van der Merwe *et al Contract* 538ff.
[57]Van der Merwe *et al Contract* 154, Christie *Law of Contract* 447. Variation of the terms of a contract may entail a waiver by one party of a right conferred in terms of that contract and the waiver of all such terms would amount to the termination of the contractual obligations; see Christie *Law of Contract* 437.
[58]See 2.2.4 and 2.3.5.3, above.

4.3.3 Mortgage

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

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

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[59] As set out in 2.2.5 and 2.3.4, above.
[60] Lubbe and Scott "Mortgage and Pledge" *LAWSA* 17 pars 439 – 441, 459, 464, 467 and 479.
[61] See 4.5, below. It may be noted, however, that, in *Rossouw v FirstRand Bank Ltd* 2010 (6) SA 439 (SCA), hereafter referred to as "*Rossouw v FirstRand Bank*", it was held that s 130(2) does not apply to mortgage bonds.
[62] See *Kilburn v Estate Kilburn* 1931 AD 501.
[63] See 2.3.4 above.
[64] Lubbe and Scott "Mortgage and Pledge" *LAWSA* 17 par 509.

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

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

[65]Lubbe and Scott "Mortgage and Pledge" *LAWSA* 17 pars 465, 472.
[66]Christie *Law of Contract* 420-421; Van der Merwe *et al Contract* 380.
[67]Such as was the case in *ABSA v Ntsane*; see pars 67-68, 81-82, 85, 91 and 93-94 of the judgment.
[68]See 3.2.3, above.
[69]Lubbe and Scott "Mortgage and Pledge" *LAWSA* 17 par 476.
[70]*Colonial Mutual Life Assurance Society Ltd v Tilsim Investments* (*Pty*) *Ltd* 1952 (4) SA 134 (C) 135.

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

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

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

[71]Lubbe and Scott "Mortgage and Pledge" *LAWSA* 17 par 480.
[72]*Iscor Housing Utility Co v Chief Registrar of Deeds* 1971 (1) SA 613 (T), approved in *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA) par 7, *Citibank NA v Thandroyen Fruit Wholesalers CC and others* 2007 (6) SA 110 (SCA) par 13 and *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd and Others* 2008 (3) SA 544 (SCA). This was also the position at the time of Grotius, see 2.3.4, above.
[73]As was the position in Roman law, after the passing of the *lex commissoria*, in AD 320.
[74]*Smiles*' *Trustee v Smiles* 1913 CPD 739; ABSA *Bank Ltd v Bisnath NO and Others* 2007 (2) SA 583 (D), hereafter referred to as "*ABSA v Bisnath*". See also *Cronje and Others v Hillcrest Village (Pty) Ltd and Another* 2009 (6) SA 12 (SCA).
[75]In *Rossouw v FirstRand Bank*, it was held that s 130(2) of the NCA does not apply to mortgage bonds. *ABSAv Bisnath* 589-590 is authority for the proposition that, if the mortgagee thereafter sells the property to a third party for a price higher than the total cost that he has been occasioned, the mortgagee must account to the mortgagor for any ultimate profit arising from his subsequent transactions.
[76]See discussion of PIE at 3.3.1.4 (b), above.

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

4.4 Selected aspects of the individual debt enforcement procedures

4.4.1 General

In this section, specific provisions of the Magistrates' Courts Act, the Magistrates' Courts Rules, the Supreme Court Act and the High Court Rules, and other relevant rules or practice directives, will be set out. By and large, the provisions concern execution against a judgment debtor's assets and the exemption from execution of certain types of assets as well as execution against immovable property in the individual debt enforcement process. The provisions, with respect to the procedure followed in the magistrates' courts and the high court, largely mirror one another but with some differences. The NCA, which provides substantive and procedural requirements for the enforcement of credit agreements entered into by consumers[77] and which introduced alternative debt relief mechanisms for over-indebted consumers,[78] will be discussed under a separate heading.[79]

4.4.2 Jurisdiction

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

[77]For a succinct account, and analysis of, the debt enforcement process since the coming into operation of the NCA, see Coetzee *Impact*.
[78]See the objects of the legislation, set out in s 3 of the NCA.
[79]See 4.5, below.
[80]*Thermo Radiant Oven Sales* (*Pty*) *Ltd v Nelspruit Bakeries* (*Pty*) *Ltd* 1969 (2) SA 295 (A) 305C; *Veneta Mineraria Spa v Carolina Collieries* (*Pty*) *Ltd* 1987 (4) SA 883 886I; Cilliers, Loots and Nel *Herbstein and Van Winsen The Civil Practice of the High Courts*, hereafter referred to as "Cilliers, Loots and Nel *Herbstein and Van Winsen*", 69.
[81]See van Loggerenberg and Farlam *Superior Court Practice* A1-21; s 19 of the Supreme Court Act.

factors to determine the most appropriate court.[82] A defendant may consent to the jurisdiction of a specific court.[83] The high court has inherent jurisdiction to make orders, without any monetary limit,[84] unless there is a specific statutory prohibition[85] or its jurisdiction is limited by the common law.[86] On the other hand, the magistrate's court, being a creature of statute, will have jurisdiction only where it is specially conferred on it by statute.[87] General limitations placed on the powers of a court include territorial limitations or those based on subject matter or type of claim, or limitations on the amount claimed or on the parties to the dispute.[88] These general limitations may be specifically overridden by legislation such as, for example, the provisions in the Magistrates' Courts Act and the NCA which confer jurisdiction, without any express monetary limit, upon the magistrates' courts in actions on, or arising out of, any credit agreement.[89]

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

[82]Cilliers, Loots and Nel *Herbstein and Van Winsen* 44. *Bid Industrial Holdings* (*Pty*) *Ltd v Strang* (*Minister of Justice and Constitutional Development*, *third party*) 2008 (3) 355 (SCA) 370C.
[83]See s 45 of the Magistrates' Courts Act and commentary to it by Van Loggerenberg *Jones and Buckle*.
[84]It derives its jurisdiction from s 173 of the Constitution and is further regulated by s 19 of the Supreme Court Act; see Cilliers, Loots and Nel *Herbstein and Van Winsen* 49.
[85]Such as, for example, where legislation has created special courts for income tax appeals and land claims. See s 169 of the Constitution; Cilliers, Loots and Nel *Herbstein and Van Winsen* 53-56. See also *Phillips v National Director of Public Prosecutions* 2006 1 SA 505 (CC) 520F-H; *Standard Credit Corporation Ltd v Bester* 1987 (1) SA 812 (W).
[86]Cilliers, Loots and Nel *Herbstein and Van Winsen* 56.
[87]For example, by provisions contained in the Magistrates' Courts Act and the NCA. See Cilliers, Loots and Nel *Herbstein and Van Winsen* 49; Van Loggerenberg *Jones and Buckle* commentary to s 28(1). *Mason Motors* (*Edms*) *Bpk v Van Niekerk* 1983 (4) SA 406 (T) 409E-F.
[88]See ss 26-29A of the Magistrates' Courts Act; s 172 of the Constitution. See also Cilliers, Loots and Nel *Herbstein and Van Winsen* 53; Van Loggerenberg *Jones and Buckle* commentary to ss 26-29A.
[89]Cilliers, Loots and Nel *Herbstein and Van Winsen* 52. See s 29(1)(e) of the Magistrates' Courts Act, read with s 1 of the NCA.
[90]Unless its jurisdiction has been specifically ousted by statute.
[91]*Goldberg v Goldberg* 1938 WLD 83 85-86; Van Loggerenberg and Farlam E12-13-E12-14; Cilliers, Loots and Nel *Herbstein and Van Winsen* 52-53. Further, High Court Rule 69(3) provides that the maximum civil magistrate's court fees for advocates on party-and-party scale will apply where matters were instituted in the high court while the claim fell within the monetary jurisdiction of the magistrate's court; see Coetzee *Impact* 26.

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

4.4.3 The magistrates' courts

4.4.3.1 Summons

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

> A summons in which an order is sought to declare executable immovable property which is the home of the defendant shall contain a notice in the following form:
>
> > "The defendant's attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for eviction [*sic*] will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court".

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

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[92] S 19(1)(a) of the Supreme Court Act; see Cilliers, Loots and Nel *Herbstein and Van Winsen* 52.
[93] S 6(2) of the Supreme Court Act; see Van Loggerenberg and Farlam *Superior Court Practice* A1-21.
[94] See *Nedbank Ltd v Mateman*; *Nedbank Ltd v Stringer* 2008 (4) SA 276 (T), [2008] 1 All SA 593 (T), hereafter referred to as "*Nedbank v Mateman*" 283I-284G, 286B-D, 599-600 and 601.
[95] S 26 of the Supreme Court Act.
[96] *Standard Bank v Saunderson* par 27.

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

4.4.3.2 Judgment

After a summons commencing action in the magistrate's court[97] has been served on a defendant, the latter may oppose the matter, settle the matter, or decide not to oppose it. Where the defendant opposes the matter, it may go to trial and the court will ultimately either grant absolution from the instance or grant judgment against the defendant. Where the parties settle, and they have carried out the terms of the settlement, it will be the end of the matter. Likewise, where the defendant does not oppose the claim but pays the amount claimed it will be the end of the matter. On the other hand, the defendant may offer to pay the amount claimed in instalments. Usually, if a plaintiff accepts such an offer, it will be subject to an agreement that, if the defendant fails to pay the agreed instalments, the plaintiff may obtain judgment against him without further notice to him. It will therefore have the effect of a default judgment.[98] The defendant may also, instead of opposing the matter, unconditionally consent to judgment in the amount claimed or some other amount, including costs, and may agree to pay it in instalments. Upon the plaintiff's written request, the clerk of the court is obliged to grant judgment against the defendant. This will also have the effect of a default judgment.[99]

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

[97] Issued by the clerk of the court; see rule 5 of the Magistrates' Courts Rules.
[98] See s 57 of the Magistrates' Courts Act. This procedure is also available to a defendant upon receiving a letter of demand; service of summons is not required.
[99] See s 58 of the Magistrates' Courts Act, as well as the commentary to it by Van Loggerenberg *Jones and Buckle*. As in the case of s 57, this procedure is also available to a defendant upon receiving a letter of demand; service of summons is not required. See, particularly, ss 57(4) and 58(2) of the Magistrates' Courts Act.
[100] See rule 12(1) of the Magistrates' Courts Rules, as well as the commentary to it by Van Loggerenberg *Jones and Buckle*.

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

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

4.4.3.3 Execution against immovable property

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

[101]See Van Loggerenberg *Jones and Buckle* commentary to rule 12(1)of the Magistrates' Courts Rules. Default judgment may also be granted where a party has not delivered or served a pleading within the prescribed time limits. Another instance is where a party, or his legal representative, fails to appear in court on the date that the matter has been set down; see rule 32 of the Magistrates' Courts Rules.
[102]See rule 12(1) of the Magistrates' Courts Rules.
[103]Coetzee *Impact* 34-35 states that this was the position in terms of the now repealed Hire Purchase Act 36 of 1942 and the Credit Agreements Act 75 of 1980, the latter now having been replaced by the NCA.
[104]See rule 14(1) of the Magistrates' Courts Rules, as well as Van Loggerenberg *Jones and Buckle* commentary to it. See also *Mosehla v Sancor CC* 2001 (3) SA 1207 (SCA).
[105]See Van Loggerenberg *Jones and Buckle* commentary to Rule 14.
[106]Rule 14(1) of the Magistrates' Courts Rules.
[107]Cilliers, Loots and Nel *Herbstein and Van Winsen* 1020.
[108]See s 66(1)(a) of the Magistrates' Courts Act, as well as Van Loggerenberg *Jones and Buckle* commentary to s 66(1)(a).

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

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

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

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

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

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

[109] *Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T) 633E-F.
[110] See 4.3.3, above.
[111] See rule 43 of the Magistrates' Courts Rules, as well as Van Loggerenberg *Jones and Buckle* commentary to Rule 43.
[112] *Jaftha v Schoeman* par 44.

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

[113]Powers are conferred and duties are placed upon the sheriff, in this regard, by rule 43 of the Magistrates' Courts Rules and s 68 of the Magistrates' Courts Act.
[114]Rule 43(10) of the Magistrates' Courts Rules. Rule 43(10) contains a proviso that this is subject to the provisions of s 66(2) of the Magistrates' Courts Act, which requires notice to be given to a creditor who has a claim in respect of the immovable property which is preferent to that of the judgment creditor, and subject to the other conditions of sale.
[115]Rule 43(11) of the Magistrates' Courts Rules.
[116]As occurred, for example in *Jaftha v Schoeman*. See *Jaftha v Schoeman* par 12, with reference to *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2003 (10) BCLR 1149 (C) par 25.
[117]See 4.3.3, above.
[118]See *Mkhize v Umvoti Municipality* 2010 (4) SA 509 (KZP), hereafter referred to as "*Mkhize v Umvoti Municipality* (KZP)", *Mkhize v Umvoti Municipality* (SCA); Sapa "Pensioner's home confiscated, sold for profit" *iol news* South Africa (26 December 2004) http://www.iol.co.za/news/south-africa/pensioner-s-home-confiscated-sold-for-profit-1.230318 [date of use 15 March 2012]; Sapa "Protest over pensioner's plight" *News24* South Africa (6 January 2010) http://www.news24.com/SouthAfrica/News/Protest-over-pensioners-plight-20100106 [date of use 15 March 2012]. Rogers "Court case over sale of family house to defray R6000 debt" *The Herald* South Africa (5 June 2008); see also the Legal Resources Centre website for a media article entitled "Leaving Vulnerable People Homeless", where the sheriff's agent bought the auctioned property for between R1 and R100 (26 November 2008) http://www.lrc.org.za/index.php?option=com_content&view=article&id=64:leaving-vulnerable-people-homeless&catid=84:other-news&Itemid=856 [date of use 15 March 2012]; Mtshali "House sale: MPs step in" *Words and Deeds* South Africa (14 February 2005) http://www.lawlibrary.co.za/notice/wordsanddeeds/2005/2005_02_14.htm [date of use 15 March 2012]. See, also for example, *Campbell v Botha* 2009 (1) SA 238 (SCA) par 6, where the creditor's attorney's wife purchased the debtor's property at the sale in execution for R3 500.
[119]*Jaftha v Schoeman* par 67.

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

4.4.3.4 Property protected from seizure, attachment and execution

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

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

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

[120] As I have been informed by Mr J Balkishun, of the Department of Justice and Constitutional Development, Pretoria, in a telephonic conversation held on 15 March 2011.
[121] See 2.3.2, above.
[122] The section is subject to the proviso that, in respect of subsections (*b*), (*c*), (*e*) and (*f*), the court will have a discretion, in exceptional circumstances, and on such conditions as it may determine, to increase the amounts that have been determined by the Minister.

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

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

4.4.3.5 Alternative orders for payment

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

[123] See 2.2.3.
[124] See Evans *Critical Analysis* 2.4.2.
[125] Ellis "Court wrestles with sales in execution question" *The Mercury* South Africa (12 May 2004). As mentioned at 4.2.2, above, Evans criticises the absence of an exemption of an insolvent debtor's home of low value as a *lacuna* in South African insolvency law. He also advocates that similar exemption provisions should apply in insolvency and in the individual debt enforcement process. See Evans 2008 *De Jure* 262-263; Evans *Critical Analysis* 423; Evans "Does an insolvent debtor have a right to adequate housing?". The issue of a possible "low value" home exemption is also discussed at 3.3.1.1, above, and 4 5.2.3, 5.6.8, 6.6 and 6.11, below.
[126] *Jaftha v Schoeman* pars 50-51; see 5.2.1, below. It may be noted that, to the extent that s 67 conflicts with provisions contained in the NCA, s 172(1) of the NCA determines that the provisions of Part D of Ch 4, ss 127, 129, 131-132, Ch 7 and s 164 of the NCA will prevail.
[127] See 4.4.3.2, above. See ss 58 and 65A of the Magistrates' Courts Act, as well as the commentary to these sections by Van Loggerenberg *Jones and Buckle*.

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

Section 65A of the Magistrates' Courts Act, in its amended form,[131] creates a procedure for a court[132] to inquire into the financial position of a judgment debtor who has not satisfied a judgment for the payment of a sum of money granted against him, and to make an order which it deems just and equitable with the aim of the settlement of the judgment debt.[133] At an inquiry held in terms of section 65A, information regarding the debtor's income, expenditure, dependants, assets and liabilities, and other relevant factors, should be obtained.[134] Provision is also made in section 65A for a summary inquiry into the alleged wilful failure of a debtor to appear before court for such a financial inquiry and, on conviction of the debtor, for a suitable penalty. Section 65 of the Magistrates' Courts Act provides:

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

[128]The court may suspend execution either wholly or in part on specific conditions as to security; see s 73(1). Subsec (2) states: "(2) Nothing in this section contained shall be construed as authorizing the court to suspend the execution of a judgment upon any property subject to a hypothec for the judgment debt existing irrespective of attachment in execution." Subsec (3) states: "(3) An order under paragraph (*e*) of section *forty-eight* or under this section may at any time and for good cause be varied or rescinded by the court." Note that, in the event of any conflict between this section and those contained in the NCA, the latter will prevail; see s 172(1) of the NCA.
[129]Any garnishee order under s 73 may be suspended, amended or rescinded by the court upon good cause shown; see s 72(2). In terms of s 172(1) of the NCA, where there is a conflict between s 72 of the Magistrates' Courts Act and the NCA, the latter prevails.
[130]See ss 62(2) and 62(3).
[131]After the declaration of invalidity of parts of ss 65A-65M of the Magistrates' Courts Act, in *Coetzee v Government*, and the subsequent repeal of other parts; see Van Loggerenberg *Jones and Buckle* commentary to s 65A.
[132]S 65A provides for a judgment debtor to appear before a magistrate in chambers.
[133]*Lombard v Minister of Verdediging* 2002 (3) SA 242 (T) 245E-F; see Van Loggerenberg *Jones and Buckle* commentary to s 65A.
[134]*Minter NO v Baker* 2001 (3) SA 175 (W) 178C-E.

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

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

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

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

[135]Van Loggerenberg *Jones and Buckle* commentary to s 65D.
[136]See s 65D(2).
[137]Under the provisions of s 65E(1) and (3).
[138]See s 65E(1)(*a*).
[139]See s 65E(1)(*b*).
[140]By virtue of s 65J(1) for the payment of the judgment debt and costs by the employer of the judgment debtor; see s 65E(1)(*c*).
[141]See s 65E(1)(*c*).
[142]This has been the position since *Coetzee v Government*, referred to at 3.2.3, above.

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

4.4.3.6 Administration order

Section 74 of the Magistrates' Courts Act provides for administration of a debtor's estate.[145] This is a formal debt relief measure which may be viewed, in some respects, as an alternative to insolvency where the total amount of the debt does not exceed R50 000.[146] Upon application by a debtor[147] who is unable to pay any amount of any judgment against him or to meet his financial obligations and has insufficient assets capable of attachment to satisfy such judgment or obligations,[148] the magistrate's court may grant an order for the administration of the debtor's estate. An administration order provides for the appointment of an administrator and for the payment of the debtor's debts in instalments or otherwise.[149] Thus, the administration process amounts to a statutory rescheduling of debt sanctioned by a court order.[150]

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

[143]See 4.4.3.6, below.
[144]See s 65I(1).
[145]See Boraine 2003 *De Jure* 217-251; Boraine "Reform of Administration Orders" 187-216.
[146]S74(1)(b). See also Boraine "Reform of Administration Orders" 187.
[147]Or under s 65I; see s 74(1)(b).
[148]S 74(1)(a).
[149]S 172(1) of the NCA provides that, to the extent that there is any conflict between the provisions of the NCA and s 74 of the Magistrates' Courts Act, the provisions of Part D of Chapter 4, ss 127, 129, 131-132, Chapter 7 and s 164 of the NCA will prevail.
[150]Boraine "Reform of Administration Orders" 187.
[151]See Boraine "Reform of Administration Orders" 191 and cases cited there, namely, *Hack's Furnishers v McKinlay* 1952 PH 17 (T); *Carletonville Huishoudelike Voorsieners* (*Edms*) *Bpk v Van Vuuren* 1962 (2) SA 296 (T) 300; *Cape Town Municipality v Dunne* 1964 (1) SA 741 (C), in relation to the treatment of hire purchase agreements, mortgage bonds and *in futuro* debts, generally.
[152]See Boraine and Roestoff 2000 *Obiter* 241 263; Boraine and Roestoff 2002 *Int Ins Rev* 1 2; Roestoff and Renke 2005 *Obiter* 561 and Roestoff and Renke 2006 *Obiter* 98.

debts means that it would not cover a mortgage obligation. Abuse of the administration process became rife[153] which led to an investigation into possible reform.[154] Although the investigation was suspended pending the enactment of the NCA and there was some suggestion that administration orders might be abolished, it has now been revived. Currently, the proposal is to amend section 74 of the Magistrates' Courts Act by, *inter alia*, imposing a limit to the duration of an administration order and allowing a measure of discharge, at the end of the period, for the debtor.[155]

In 2000, the South African Law Reform Commission proposed the insertion of a new section 74X in the Magistrates' Courts Act to provide for a pre-liquidation[156] composition procedure in terms of which a majority in number and two-thirds in value of the concurrent creditors could bind the majority.[157] Various aspects of the proposed procedure were unclear, including, for example, that it did not indicate what the relationship would be between the pre-liquidation composition and debt relief measures, such as administration orders, and whether the pre-liquidation composition process would become a pre-requisite for every insolvency case.[158] Some commentators suggested that it could replace the administration process.[159] It was also posited that it might be appropriate to retain a modified form of the administration order – a combination of the current administration order and the proposed section 74X process – for debtors with limited debt, but to be made available only if an offer of pre-liquidation

[153]See Greig 2000 *SALJ* 622; *Weiner NO v Broekhuysen* 2003 (4) SA 301 (SCA).
[154]Boraine "Reform of Administration Orders" 187-188, 213. In 2002, on the request of the then Minister of Justice and Constitutional Development, the South African Law Reform Commission initiated an investigation into possible reform of administration orders. This investigation became Project 127 *Review of Administration Orders*.
[155]See the media statement released by the South African Law Reform Commission (7 March 2008) http://www.justice.gov.za/salrc/media/2008%2003%2007%20Media%20statement%20Questionnaire%20Administration%20Orders.pdf [date of use 15 March 2012]; South African Law Reform Commission 2010/2011 *Annual Report* 53 http://www.justice.gov.za/salrc/anr/2010-2011-anr.pdf [date of use 22 October 2011].
[156]The term "liquidation" was proposed to replace "sequestration", in relation to the insolvency of a natural person.
[157]See cl 11 of the Draft Insolvency Bill which forms part of the *Report on the Review of the Law of Insolvency* Project 63 February 2000.
[158]See Boraine "Reform of Administration Orders" 197; Boraine 2003 *De Jure* 228; Boraine and Roestoff 2002 *Int Insolv Rev* 8; Roestoff and Jacobs 1997 *De Jure* 189; Roestoff and Renke 2006 *Obiter* 101-102.
[159]See Boraine "Reform of Administration Orders" 197 who refers also to Roestoff *'n Kritiese Evaluasie* 437 and the *Interim Report on the Review of Administration Orders in terms of Section 74 of the Magistrates' Courts Act 32 of 1944* 56; Roestoff and Renke 2006 *Obiter* 102ff.

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

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

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[160]See Boraine "Reform of Administration Orders" 197; Boraine 2003 *De Jure* 229-230; Boraine and Roestoff 2002 *Int Insolv Rev* 9-10, with reference to Roestoff 2000 *De Jure* 133; Roestoff and Renke 2006 *Obiter* 102; Boraine and Roestoff 2000 *Obiter* 266.
[161]See Boraine and Roestoff 2002 *Int Insolv Rev* 10. See, also, Roestoff *'n Kritiese Evaluasie* 370.
[162]See 1.6, above.
[163]That this was yet another debt relief process which would be available to debtors was pointed out by Coetzee in "Personal bankruptcy and alternative measures".
[164]This submission is made in spite of the fact that it is proposed, in terms of s 118(22), that, if a debtor fails to comply with his obligations under the composition, and a court revokes it, it must determine whether s 74 of the Magistrates' Courts Act can be applied.
[165]Coetzee "Personal bankruptcy and alternative measures" made these submissions which echoed sentiments expressed, in relation to the earlier proposed s 74X, by Boraine 2003 *De Jure* 230; Boraine "Reform of Administration Orders" 197.

It may be noted that the proposed section 118(17) provides that, once the requisite majority of concurrent creditors[166] has accepted the composition and such acceptance has been certified by the court, it will be binding on all creditors who appeared at the meeting or who had been notified of it. However, it also provides that "the right of a secured or otherwise preferent creditor is not prejudiced by the composition, unless he or she consents to the composition in writing." Thus, a mortgagee who does not consent to the composition will not be bound by it and the debtor must fulfil the mortgage terms as originally agreed.[167] It is submitted that this is a positive feature of the proposed pre-liquidation process. This is because, from the perspective of a debtor, it would constitute a debt relief mechanism that would allow him to retain his mortgaged home. At the same time the mortgagee will be secure in the knowledge that its claim cannot be compromised without its specific consent.

4.4.3.7 Sale in execution invalid in absence of judicial oversight

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

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

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

[166] A majority in number and a two-thirds majority in value is required.
[167] For further discussion of s 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, see 1.6, above and 6.4.3 and 6.10.6, below.
[168] *Menqa and Another v Markom and Others* 2008 (2) SA 120 (SCA), hereafter referred to as "*Menqa v Markom*". See 5.5.3.2, below.
[169] *Menqa v Markom* pars 16-22, 47. This precedent was followed in *Campbell v Botha* 2009 (1) SA 238 (SCA).

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

4.4.4 The high court

4.4.4.1 Summons

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

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

[170] *Menqa v Markom* pars 21, 28-29.
[171] *Gundwana v Steko* par 52.
[172] *Standard Bank v Saunderson* par 27. Judgment was delivered on 15 December 2005.
[173] Van Loggerenberg and Farlam *Superior Court Practice* B1-124.
[174] As mentioned in *Gundwana v Steko* par 28 n 18, the North West High Court, Mafikeng issued Practice Direction No 30 of the North West High Court Practice Directions and the Eastern Cape High Court issued Court Notice 1 of 2010 on 30 July 2010 inserting rule 14A into the Joint Rules of Practice for the High Courts of the Eastern Cape. In *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) 473D-H, the court also laid down rules of practice. The Western Cape High Court adopted the practice direction stated in *Standard Bank v Saunderson* par 27. See also *Standard Bank of South Africa Ltd v Hunkydory Investments 188* (*Pty*) *Ltd* (*No 2*) 2010 (1) SA 634 (WCC) par 29.
[175] See Van Loggerenberg and Farlam *Superior Court Practice* B1-124A. Compare KwaZulu-Natal's Rule of Practice 28, the Western Cape's Consolidated Practice Notes par 33(1), and the North Gauteng Practice Manual Appendix III.

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

4.4.4.2 Judgment

The procedure in the high court is similar to that described above, for the magistrate's court, except that it is the registrar[177] who issues the summons commencing action and the High Court Rules prescribe the form of a summons.[178] After summons has been served, the defendant may consent to judgment.[179] The plaintiff may then apply in writing, through the registrar, to a judge for judgment in accordance with it.[180]

Default judgments based on debt or liquidated demands[181] may be granted by the registrar of the high court.[182] The plaintiff may apply in writing to the registrar and no notice to the defendant is required.[183] The registrar may:[184]

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

[176] See 4.5.1, below.
[177] And not the clerk of the court.
[178] Rule 17 of the High Court Rules.
[179] Rule 31(1)(a) and 31(1)(b) of the High Court Rules.
[180] Rule 31(1)(c) of the High Court Rules.
[181] See s 27A of the Supreme Court Act and rule 31(5)(a) of the High Court Rules. In respect of unliquidated claims, evidence must be led and, therefore, the registrar must refer then to open court; see rule 31(2)(a) of the High Court Rules.
[182] See rules 31(2)(a), 31(4), and 31(5)(a) of the High Court Rules, for default judgment granted when the defendant fails timeously to deliver a notice of intention to defend, and also rules 24(1), 26 31(3) and 39, for other situations in which default judgment may be granted. In relation to the implications of *Gundwana v Steko*, see Van Loggerenberg and Farlam *Superior Court Practice* B1-204A and see, further, 4.4.4.3 and 5.6.2, below.
[183] Except when the defendant is in default of delivery of a plea; see rule 31(5)(a) of the High Court Rules.
[184] Rule 31(5)(b) of the High Court Rules.

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

4.4.4.3 Execution

To enforce or execute a judgment, the plaintiff must obtain a writ of execution issued by the registrar[187] and then delivered to the sheriff.[188] Rule 45(1) of the High Court Rules, corresponding with section 66(1)(*a*)of the Magistrates' Courts Act,[189] used to provide:

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

Rule 46(1) used to provide:

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

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

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[185]Rule 31(5)(d) of the High Court Rules.
[186]High Court Rule 32. See 4.4.3.2.
[187]High Court Rule 45(1).
[188]Rule 45(3).Van Loggerenberg and Farlam *Superior Court Practice* B1-324A.
[189]Discussed at 4.4.3.3, above.
[190]Amended by the Rules Board for Courts of Law in terms of section 6 of the Rules Board for Courts of Law Act 107 of 1985 and approved by the Minister of Justice and Constitutional Development. See Amendment: Rules regulating the Conduct of the Proceedings of the Supreme Court of Appeal of South Africa: Rules regulating the Conduct of the Proceedings of the High Courts of South Africa; Government Notice R981 of 2010 published in *GG* 33689 dated 19 November 2010.

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

The amended rule 46(1) now provides:

> (a) No writ of execution against the immovable property of any judgment debtor shall issue until –
>
> (i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or
>
> (ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31 (5), by the registrar:
>
> Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property.
>
> (b) A writ of execution against immovable property shall contain a full description of the nature and situation (including the address) of the immovable property to enable it to be traced and identified by the sheriff; and shall be accompanied by sufficient information to enable him or her to give effect to subrule (3) hereof.

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

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

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

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

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

[192] *Mkhize v Umvoti Municipality* (SCA) par 13.
[193] The same observation is made in *Nedbank Ltd v Fraser* par 15.
[194] See 5.5.2, below.
[195] *FirstRand Bank Limited v Maleke*; *FirstRand Bank Limited v Motingoe and Another*; *Peoples Mortgage Ltd v Mofokeng and Another*; *FirstRand Bank Limited v Mudlaudzi* 2010 (1) SA 143 (GSJ), hereafter referred to as *FirstRand Bank v Maleke*; see 5.5.4.3, below.
[196] See *FirstRand Bank Ltd v Meyer* ECPE Case No. 3483/10 [2011] (17 March 2011), discussed at 5.5.4.6, below.
[197] *Standard Bank v Bekker* pars 10, 30.

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

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

[198] *Gundwana v Steko* pars 49, 65.
[199] *Gundwana v Steko* par 43.
[200] *Mkhize v Umvoti Municipality* (SCA) par 19.
[201] See, for example, *Practice Manual of the North Gauteng High Court* Appendix IV – Applications for Default Judgments and Authorisation of Writs of Execution 157 (25 July 2011) http://www.saflii.org/userfiles/file/Court%20Rolls/South%20Africa/Pretoria%20High%20Court/North%20Gauteng%20Practice%20Manual%20final%20version%20-%20%2025%20July%2011.pdf [date of use 15 March 2012]; the South Gauteng High Court's *Practice Note: Default Judgments and Execution against Primary Residence* (20 May 2011) http://www.northernlaw.co.za/images/stories/files/Practice_Note.pdf [date of use 15 March 2012]. See also 5.6.5, below.
[202] *Gundwana v Steko* par 59. For comments on the implications of this aspect of the judgment, see Mills 2010 *De Rebus* (June) 50-51. For insights into the implications for creditors, see *FirstRand Bank v Woods and Similar Cases* 2011 (5) SA 536 (ECP).
[203] S 36 of the Supreme Court Act.
[204] High Court Rule 46(7).
[205] See 4.4.3 and 4.4.3.3, above.

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

4.4.4.4 Assets protected from seizure

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

4.5 The National Credit Act

4.5.1 Overview

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

[206] As I have been informed by Mr J Balkishun, of the Department of Justice and Constitutional Development, Pretoria, in a telephonic conversation held on 15 March 2011; see 4.4.3.3, above.
[207] See 4.4.3.4, above.
[208] See s 3 of the NCA.
[209] A credit agreement is defined, in s 1, as "an agreement that meets all the criteria set out in section 8". A "credit agreement" includes a "credit facility", a "credit transaction", a "credit guarantee", or a combination of them; see s 8(3), s 8(4) and s 8(5). A "mortgage agreement or a secured loan" constitutes a "credit transaction"; see s 8(4)(*d*). In s 1, a "mortgage agreement" is defined as "a credit agreement that is secured by a pledge of immovable property" and a "mortgage" is defined as "a pledge of immovable property that serves as security for a mortgage agreement".

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

4.5.2 Debt enforcement under the NCA

In terms of section 130 of the NCA, a credit provider cannot enforce a credit agreement unless the consumer has been in default under that credit agreement for at least 20 business days.[211] The credit provider must then deliver to the consumer a notice as contemplated in section 129(1)(*a*).[212] Such notice must draw the consumer's attention to the default and propose that he consults a debt counsellor,[213] alternative dispute resolution agent,[214] consumer court,[215] or ombud with jurisdiction[216] so that they may resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.[217] Section 129(3) permits a consumer who has fallen into default, at any time before the credit provider has cancelled the agreement, to "reinstate" such agreement by paying all amounts overdue and all permitted default charges and costs. The NCA does not set a limit to the number of times which a consumer is entitled to rely on this provision.

Where at least 10 business days have elapsed[218] after delivery of the section 129(1)(a) notice, the court may hear the matter. This is as long as there is no issue regarding the

[210]See s 3 of the NCA.
[211]S 130(1).
[212]See, also, s 129(1)(b). For declaratory orders regarding, *inter alia*, ss 129 and 130, see *National Credit Regulator v Nedbank Ltd* 2009 (6) SA 295 (GNP), [2009] 4 All SA 505 (GNP), hereafter referred to as "*NCR v Nedbank* (GNP)" and, on appeal, *Nedbank v The National Credit Regulator* 2011 (3) SA 581 (SCA), hereafter referred to as "*Nedbank v NCR* (SCA)".
[213]"Debt counsellors" must be registered in terms of s 44 of the NCA.
[214]An "alternative dispute resolution agent", according to s 1, is "a person who provides services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration".
[215]In terms of s 1 of the NCA, a "consumer court" is defined as "a body of that name, or a consumer tribunal established by provincial legislation".
[216]In terms of s 1 of the NCA, an "ombud with jurisdiction" in respect of any particular dispute arising out of a credit agreement in terms of which the credit provider is a "financial institution" as defined in the Financial Services Ombud Schemes Act 37 of 2004 means an "ombud" or the "statutory ombud", as those terms are respectively defined in that Act, who has jurisdiction in terms of that Act to deal with a complaint against the financial institution.
[217]S 129(1)(a).
[218]S 130(1)(a). The consumer must also not have responded or rejected the credit provider's proposals; see s 130(1)(b).

credit agreement pending before the National Consumer Tribunal[219] or the matter is not already serving before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction.[220] Further, the consumer must not have already surrendered property to the credit provider, brought the payments under the agreement up to date, or agreed to a proposal or complied with an agreed plan[221] to bring them up to date.[222] The failure to issue a section 129 notice in compliance with the NCA will prevent a mortgagee from obtaining judgment against a debtor upon the latter's default and, consequently, an order of executability in respect of the mortgaged property.[223]

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

In terms of the NCA, a consumer may apply to a debt counsellor for debt review with a view to being to be declared over-indebted.[224] A court, in any proceedings in which a credit agreement is being considered, may also refer the matter directly to a debt counsellor with a request for an evaluation to be made of the consumer's circumstances.[225] In either event, the debt counsellor may recommend to the magistrate's court, in the former situation, and to the court which made the request, in the latter, that the consumer should be declared over-indebted. Where such a declaration is made, the court may order the rearrangement of the consumer's obligations[226] by, for example, extending the period of credit agreements and reducing the amount of each payment due or by postponing the dates on which payments are due.

[219]S 130(3)(b).
[220]S 130(3)(c)(i).
[221]As contemplated in s 129(1)(*a*).
[222]S 130(3)(c).
[223]See *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011), hereafter referred to as "*Dwenga v FirstRand Bank*".
[224]See s 86 of the NCA.
[225]See s 85 of the NCA.
[226]See s 87 of the NCA.

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

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

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

4.5.4 Difficulties experienced in interpretation and application of the NCA

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

[227]See, specifically, s 83 and, in relation, more generally, to "reckless credit", see also ss 80, 81 and 84 of the NCA. See Boraine and Van Heerden 2010 *THRHR* 650.
[228]See s 80(1)(*a*) and s 81(2) of the NCA.
[229]See s 80(1)(*b*) and s 81(2) of the NCA.
[230]See *Nedbank v NCR* (SCA) par 2; Roestoff *et al* 2009 *PELJ* 251 and media reports cited there.

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

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

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

[231]Roestoff *et al* 2009 *PELJ* 249.
[232]*NCR v Nedbank* (GNP).
[233]*Nedbank v NCR* (SCA).
[234]See Gabriel Davel's affidavit par 36 in support of the applicant's notice of motion.
[235]Marud "Regulator takes Credit Act to court for clarity" in *Pretoria News* South Africa (27 February 2009) 7.
[236]There were eleven main issues on which clarity was sought; see *NCR v Nedbank* (GNP). See the National Credit Regulator's *Communique*: *Declaratory Order* http://www.ncr.org.za/publications/Communique_Declaratory_Order/NCR%20Communique_01.pdf [date of use 15 March 2012]. See also the reservations expressed by De Villiers 2010 *PELJ* 128 157.

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

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

[237] See 4.5.2, above.

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

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

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

Another issue which was clarified was that, where a debt counsellor refers a matter to the court, under sections 86 and 87, the formal application process, according to the Magistrates' Courts Act and the Magistrates' Courts Rules, must be followed, and that no less formal, more speedy, or less expensive process was intended.[242] Yet another concerned the interpretation of section 103(5), read with subsections 101(1)(*b*)-(*g*) of the NCA, in relation to the amount of interest and charges which a credit provider may levy. It was held that, while the consumer is in default, the amount of interest and other charges which accrue "may not exceed … the unpaid balance of the principal debt when the default occurred" and that, once the total amount of the charges reaches that of the unpaid balance, no further charges may be levied. Further, even if, thereafter, a consumer makes payments which reduce the amount outstanding, the credit provider is not permitted "to charge further interest while such default persists".[243] It is anticipated that this stance, adopted by the Supreme Court of Appeal, will be cause for concern on the part of mortgagees[244] and may make them less inclined willingly to participate in the debt review process under the NCA.

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

[240]This is in terms of rule 46(1) of the High Court Rules and *Gundwana v Steko*. See 4.4.4.3, above.
[241]Or "primary residence", to use the terminology employed in rules 45 and 46 of the High Court Rules.
[242]*NCR v Nedbank* (GNP) 310E. It was decided that a court performs a judicial role, and not an administrative role, in this context; see *NCR v Nedbank* (GNP) 306H.
[243]See *NCR v Nedbank* (GNP)319C-320C; *Nedbank v NCR* (SCA) pars 33-49.
[244]See Wasserman "Blow to banks as indebted get a break" *fin24.com* (30 March 2011) http://www.fin24.com/Money/Money-Clinic/Blow-to-banks-as-indebted-get-a-break-20110331 [date of use 15 March 2012].
[245]See *Nedbank Ltd v Mateman*; *Nedbank Ltd v Stringer* 2008 (4) SA 276 (T); [2008] 1 All SA 593 (T); *FirstRand Bank v Maleke*.
[246]See 4.4.2, above.

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

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

[247]Scholtz *et al Guide to the National Credit Act* 12-41. See, for example, *Collett v FirstRand Bank Ltd and Another* 2011 (4) SA 508 (SCA) pars 16-17, where the Supreme Court of Appeal held that s 86(11) of the NCA, which refers only to the “Magistrate's Court”, should be construed as also referring to the High Court.
[248]See *Standard Bank of South Africa Ltd v Panyiotts* 2009 (3) SA 363 (W); Roestoff *et al* 2009 *PELJ* 258, 291; cf Van Heerden 2008 *TSAR* 840 845; Coetzee *Impact* 74ff.
[249]*Nedbank Ltd v Mateman*; *Nedbank Ltd v Stringer* 2008 (4) SA 276 (T); [2008] 1 All SA 593 (T), hereafter referred to as "*Nedbank v Mateman*".
[250]S 90(2)(k)(vi)(*aa*) states that a provision in a credit agreement, in which a consumer consents to the jurisdiction of the High Court, is unlawful, if the Magistrate's Court has concurrent jurisdiction.
[251]*Nedbank v Mateman* 284C, 284F-G; 599, 601. Thus the full bench overruled the decision of Bertelsmann J in *ABSA Bank Ltd v Myburgh* 2009 (3) SA 340 (T). See Roestoff and Coetzee 2008 *THRHR* 678; Kelly-Louw "Consumer Credit" *LAWSA* 5(2) par 83.
[252]*Collett v FirstRand Bank Ltd and Another* 2011 (4) SA 508 (SCA), hereafter referred to as "*Collett v FirstRand Bank*".

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

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

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

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

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

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

In the interim, a Task Team on Debt Counselling[258] which the National Credit Regulator had appointed "to identify the blockages in the debt review process" and to make recommendations on addressing the problems identified, completed its work.[259] It reported that the backlogs were being caused by a complex set of factors related to: severe capacity constraints in the judicial system; process weaknesses; inadequate operational compliance by credit providers and debt counsellors as well as lack of co-operation between them; and possible abuse of the process by consumers.[260] It recommended codes of conduct and proposed principles and processes to be agreed upon by all stakeholders[261] and, if these did not work, that the NCA should be amended as a matter of urgency.[262]

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[255] *Collett v FirstRand Bank* par 9.
[256] *Collett v FirstRand Bank* pars 9, 12.
[257] Sapa "Banks can end credit agreement during debt review" *The Citizen* South Africa (12 August 2011).
[258] Or Debt Review Task Team, as it referred to itself.
[259] See Task Team Report (May 2010) http://www.ncr.org.za/Debt%20Counselling%20Task%20Team/Full%20Task%20Team%20Report.pdf [date of use 15 March 2012]. See also the National Credit Regulator's *Communique*: *Debt Counselling* http://www.ncr.org.za/publications/Communique_Debt_Counselling/DC_Communique_Feb'11.pdf [date of use 15 March 2012].
[260] Debt Review Task Team Report par 2.
[261] Debt Review Task Team Report par 3.
[262] Debt Review Task Team Report par 4.

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

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

[263]The terms of the conditional moratorium were that, as long as the consumer had a mortgage and was already under debt counselling on 30 November 2010, and that, by 31 March 2011, the consumer was paying 80% of the contractual mortgage instalment, 70% of any vehicle finance instalment and 1.67% of the outstanding balance in respect of all unsecured debts, the banks undertook not to terminate the agreements, subject to a new proposal being finalised and a consent or court order being obtained in terms of the newly agreed rules before 30 June 2011. Presumably the reference to the "newly agreed rules" was a reference to the rules formulated by the task team and accepted as protocol in matters governed by the NCA. See conditional moratorium http://www.ncr.org.za/publications/Communique_Declaratory_Order/Conditions_of_Moratorium.pdf [date of use 15 March 2012].
[264]Govender and Naidoo "We are drowning in debt" *Sunday Times Business Times* South Africa (23 October 2011) 1.
[265]*Naidoo v ABSA Bank* 2010 (4) SA 597 (SCA), hereafter referred to as "*Naidoo v ABSA*".
[266]*FirstRand Bank Ltd v Evans* 2011 (4) SA 597 (KZD), hereafter referred to as "*FirstRand Bank v Evans*".
[267]For discussion of these cases, see 6.10, below.
[268]This is evident, it is submitted, from the facts of *Investec v Mutemeri*, *Naidoo v ABSA* and *FirstRand Bank v Evans*.

the debt review process provided by the NCA has become problematic in recent times.[269] This issue will be discussed in more detail in Chapter 6.[270]

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

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

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

[269]See Van Heerden and Boraine 2009 *PELJ* 22; Boraine and Van Heerden 2010 *PELJ* 84; Maghembe 2011 *PELJ* 171. See, also, the cases cited in the preceding note.
[270]See 6.10, below.

It is submitted that another drawback of the NCA, with its stated purpose[271] being that the consumer should ultimately fulfil all of his financial obligations, is that it does not provide the debtor with any measure of discharge or, as it is termed in some foreign jurisdictions, a "fresh start".[272] Neither does the NCA limit the duration of a debt rearrangement plan. The practical effect is that, often, where debtors are severely over-indebted, completion of the plan will take place over a considerable number of years.[273] Similar criticisms have been levelled at administration orders under section 74 of the Magistrates' Courts Act.[274] The situation is reminiscent to some extent of that described by the court, in *Sasfin* (*Pty*) *Ltd v Beukes*,[275] in relation to the illegality of requiring a person to work solely to service his debt.[276] It is also submitted that debt rearrangement over an extended period does not always serve the interests of creditors, the benefit to whom often lies in a more clear-cut, speedy resolution of the matter.[277]

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

[271]See s 3 of the NCA.
[272]Van Apeldoorn *Int Insolv Rev* 2008 57-72; Gross *Failure and Forgiveness*; Gross 1986 *U Penn L Rev* 59-152.
[273]The realities, in this regard, were highlighted in *Ex parte Ford and two similar cases* 2009 (3) SA 376 (WCC), discussed at 6.4.1 and 6.10.4, below.
[274]See 4.4.3.6, above.
[275]*Sasfin* (*Pty*) *Ltd v Beukes* 1989 1 SA 1 (A), hereafter referred to as "*Sasfin v Beukes*".
[276]*Sasfin v Beukes* 13H-I. It is also reminiscent of the Roman contract of *nexum*, discussed at 2.2.2, above, which is no longer permissible in modern times. See, also, references to peonage, in Gross 1990 *Notre Dame L Rev* 165-205.
[277]See Van Heerden and Boraine 2009 *PELJ* 51-52.
[278]Govender and Naidoo "We are drowning in debt" *Sunday Times Business Times* South Africa (23 October 2011) 1.
[279]*FirstRand Bank Ltd t/a First National Bank v Seyffert and Others* 2010 (6) SA 429 (GSJ), hereafter referred to as "*FirstRand Bank v Seyffert*".

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

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

4.6 The Consumer Protection Act

The Consumer Protection Act 68 of 2008[285] contains provisions which largely override the common law relating to commercial transactions and the enforcement of obligations intended to have been created by them. The CPA aims, *inter alia*, to "promote and

[280] *FirstRand Bank v Seyffert* par 10.
[281] *SA Taxi Securitisation* (*Pty*) *Ltd v Nako and Others* Case No 842/2010 (11 May 2010) (Eastern Cape Division Bisho) (unreported decision), hereafter referred to as "*SA Taxi Securitisation v Nako*".
[282] *SA Taxi Securitisation v Nako* par 3 n 4.
[283] See *Jaftha v Schoeman* par 59, discussed at 5.2.3, below.
[284] See *Gundwana v Steko* par 53, discussed at 5.6.2.3, below.
[285] Hereafter referred to as the "CPA".

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

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

[286]See the preamble to the Consumer Protection Bill.
[287]In terms of section 5(1)(a), it applies to "every transaction occurring within the Republic", unless it is exempted in terms of subsections (2), (3) or (4) of section 5, and to "goods or services that are supplied or performed in terms of a transaction to which … [it] applies". In terms of section 1, "'service' includes, but is not limited to[,] …any banking services, or related or similar financial services". See comments by Du Preez 2009 *TSAR* 58 61.
[288]See s 48(1) and (2), as well as the other sections contained in Part G of the CPA. See, generally, Sharrock "Unfair contract terms" 115, 129.
[289]See 4.3.3, above.

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

A particular area of controversy[290] is that the Consumer Protection Regulations[291] provide specific rules for the holding of auction sales[292] which are not capable of application to sales in execution carried out by the sheriff in the exercise of the powers conferred him by the Magistrates' Courts Act and Rules.[293] It is submitted that there should be separate, dedicated provisions which apply to sales in execution.

4.7 Conclusion

4.7.1 The state's duty to provide housing

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

[290]"New auction regulations to have massive impact on sales in execution" *Citizen Online* South Africa (15 April 2011) http://www.citizen.co.za/citizen/content/en/citizen/news-auctions-announcements?oid=188055&sn=Detail&pid=146842&New-Law [date of use 15 March 2012].
[291]See GN R293 in *GG* 34180 of 1 April 2011.
[292]See Consumer Protection Regulations 18-31.
[293]See s 68 of the Magistrates' Courts Act and rule 43 of the Magistrates' Courts Rules.
[294]See 4.2.1, above, with reference to *Grootboom* par 45.
[295]See 4.2.1, above, with reference to *Jaftha v Schoeman* par 34.

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

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

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

[296] See 4.2.1, above.
[297] See 4.2.2, above.

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

4.7.2 Contract and mortgage

The forced sale of a debtor's home usually involves a contractual relationship between the creditor and the debtor and, where the home has been mortgaged, the real security rights of the mortgagee. Sanctity of contract, expressed in the maxim *pacta sunt servanda*, regarded as "the first premise of contract law", is fundamental to the conduct of business as is the ability to rely on and realise security rights acquired in a debtor's home, where it has been mortgaged. The principle reflected in the maxim *pacta sunt servanda* derives from the Roman-Dutch law[299] and the principles applicable in relation to mortgage are based firmly in the Roman law and Roman-Dutch law.[300]

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

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

[298] See 4.2.3, above.
[299] See 1.1, 2.3.5.3, 3.1, 3.3.2 and 4.3, above.
[300] See 2.2.5 and 2.3.4, above.
[301] See 4.3.2, above.
[302] See 2.2.4, 2.3.5.3 and 3.3.2, above.

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

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

4.7.3 The debt enforcement process: substantive and procedural requirements

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

[303] See 3.2.3 and 4.3.3, above.
[304] See 3.3.1.4 (b), above.
[305] See 4.3.4, above.
[306] See discussion of PIE at 3.3.1.4 (b), above.

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

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

[307] See 2.3.2, 2.3.3, and 2.5, above.
[308] See 4.4.3.3, above.
[309] See 4.4.4.3, above.

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

4.7.4 Consumer debt relief

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

[310]See 4.4.4.3, above. This issue is also discussed at 5.6.5, below.
[311]See 4.3.2 and 4.7.2, above.
[312]See 4.4.3.6, above.
[313]See 4.5.4 and 4.5.5, above.

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

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

[314]See 4.5.5, above, with reference to *Sasfin v Beukes* 13H-I.
[315]See 2.2.2, above.
[316]See 4.5.5, above.
[317]See 4.5.4, above.
[318]See 4.5.4, above. This issue is also discussed at 6.10, below.

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

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

[319]See 4.5.4, above.
[320]See 4.5.5, above.
[321]See 4.5.5, above.
[322]See 1.6 and 4.4.3.6, above.

CHAPTER 5

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

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

5.1 Introduction

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

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

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

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

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

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

5.2 Jaftha v Schoeman

5.2.1. The issue and the facts

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

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

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

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

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

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

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

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

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

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

5.2.2 The decision of the high court

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

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

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

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

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

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

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

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

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

5.2.3 The decision of the Constitutional Court

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

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

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

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

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

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

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

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

(Emphasis added by Mokgoro J.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.3 Developments following Jaftha v Schoeman

5.3.1 Background

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

5.3.2 Divergent approaches in the high court

5.3.2.1 Standard Bank v Snyders

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

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

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

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

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

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

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

5.3.2.2 Practice Rules in the KwaZulu-Natal High Court

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

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

5.3.2.3 Nedbank v Mortinson

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

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

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

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

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

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

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

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

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

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

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

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

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

- Rule 31(5)(*d*) provides "a valuable safeguard" for the debtor in that any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court. Unlike section 62 of the Magistrates' Courts Act, which the Constitutional Court dismissed in *Jaftha v Schoeman* as rescuing section 66(1) from unconstitutionality, rule 31(5)(*d*) requires the court to reconsider the application *de novo* without any onus being placed on the debtor other than to bring the matter to the attention of the court.[118] Considering whether the debtor would be aware of this provision, Joffe J was of the view that "[d]ebtors who participate in economic activity to the extent of hypothecating immovable property would normally have access to legal advice". He observed that a rule of practice could be prescribed requiring the writ of execution presented to the registrar to contain advice to the debtor of the provisions of rule 31(5)(*d*).[119]
- It would not be practicable for all applications for default judgment where immovable property was sought to be declared executable to be heard in open court.[120] The majority of these applications were uncomplicated and would not require judicial oversight.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Words inserted by Joffe J appear in italics.)

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

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

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

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

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

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

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

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

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

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

[145] *Nedbank v Mashiya* par 10.

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

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

[148] *Nedbank v Mashiya* par 51.

[149] *Nedbank v Mortinson* par 31.

[150] *Nedbank v Mortinson* par 33.1.

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

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

[153] *Nedbank v Mashiya* par 29.

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

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

5.3.3 Comments on the position post-Jaftha v Schoeman

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

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

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

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

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

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

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

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

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

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

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

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

5.4 Standard Bank v Saunderson

5.4.1 The issues and the decision

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, from the date of this judgment, inform the defendant as follows: "The defendant's attention is drawn to s 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court."

5.4.2 On appeal: Campus Law Clinic v Standard Bank

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

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

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

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

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

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

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

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

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

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

5.4.3 Comments on Standard Bank v Saunderson

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

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

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

5.5 Developments following Standard Bank v Saunderson

5.5.1 Background

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

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

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

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

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

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

5.5.2 ABSA v Ntsane

5.5.2.1The facts and the issues

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

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

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

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

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

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

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

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

enrolled for argument.[235]

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

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

[235] *ABSA v Ntsane* par 26.

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

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

5.5.2.2 The decision

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.5.2.3 Comments on ABSA v Ntsane

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

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

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

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

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

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

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

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

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

5.5.3 Other issues arising during this period

5.5.3.1 Wording of the summons

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

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

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

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

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

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

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

5.5.3.2 Retrospective effect of Jaftha v Schoeman

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

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

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

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

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

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

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

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

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

5.5.4 The impact of the NCA

5.5.4.1 Background

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

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

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

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

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

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

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

5.5.4.2 Standard Bank v Hales

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

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

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

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

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

5.5.4.3 FirstRand Bank v Maleke

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.5.4.4 FirstRand Bank v Seyffert

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

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

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

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

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

5.5.4.5 FirstRand Bank v Siebert

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

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

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

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

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

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

5.5.4.6 FirstRand Bank v Meyer

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

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

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

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

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

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

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

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

5.5.4.7 January v Standard Bank

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

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

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

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

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

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

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

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

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

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

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

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

5.5.5 Comments on developments after Standard Bank v Saunderson

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.6 Gundwana v Steko and subsequent cases

5.6.1 Background

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

5.6.2 Gundwana v Steko

5.6.2.1 The principle established

In *Gundwana v Steko*, the Constitutional Court unanimously declared, *per* Froneman J, that it was unconstitutional for a registrar of a high court to declare immovable property specially executable when ordering default judgment under rule 31(5) of the High Court Rules to the extent that it permits the sale in execution of the home of a person.[436] The court did not regard the invalidity as being cured by provisions in the High Court Rules

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

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

5.6.2.2 The facts

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

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

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

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

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

5.6.2.3 The issues, the arguments, and the decision

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

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

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

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

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

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

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

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[455]The court noted the following: The North West High Court, Mafikeng had issued Practice Direction No. 30 of the North West High Court Practice Directions. The Eastern Cape High Court issued Court Notice 1 of 2010 on 30 July 2010 inserting rule 14A into the Joint Rules of Practice for the High Courts of the Eastern Cape. In *Nedbank v Mortinson* 473D-H, the court also laid down rules of practice. The Western Cape High Court had adopted the practice direction, stated in *Standard Bank v Saunderson* par 27. The court also referred to *Standard Bank of South Africa Ltd v Hunkydory Investments 188* (*Pty*) *Ltd* (*No 2*) 2010 (1) SA 634 (WCC) par 29.
[456]*Gundwana v Steko* pars 28-30.
[457]*Gundwana v Steko* par 32.
[458]*Gundwana v Steko* par 33.
[459]*Gundwana v Steko* pars 35-37.
[460]*Gundwana v Steko* par 37, with reference to *Gerber v Stolze* 1951 (2) SA 166 (T).
[461]*Gundwana v Steko* pars 38-41, with reference to *Chief Lesapo* pars 15-16 and *Jaftha v Schoeman* pars 52, 55.
[462]*Gundwana v Steko* par 41, with reference to *Jaftha v Schoeman* par 55.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.6.3 Nedbank v Fraser

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.6.4 FirstRand Bank v Folscher

5.6.4.1 Background

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

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

5.6.4.2 Main aspects of the judgment

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

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

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

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

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

(b) The meaning of "relevant circumstances"

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

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

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

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

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

(c) Execution in the context of mortgage

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

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

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

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

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

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

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

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

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

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

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

(d) Abuse of process

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

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

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

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

(e) A list of relevant factors

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

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

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

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

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

[574] *Nedbank v Fraser* par 16.

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

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

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

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

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

(f) Informing the debtor

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

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

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

(g) Manner of obtaining information

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

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

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

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

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

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

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

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

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

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

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

5.6.5 High court practice in Gauteng

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[609] See *Practice Note: Default judgments and execution against primary residence* (20 May 2011) http://www.northernlaw.co.za/images/stories/files/Practice_Note.pdf [date of use 15 March 2012].
[610] *Practice Note: Default judgments and execution against primary residence* par 4.
[611] *Practice Note: Default judgments and execution against primary residence* par 5.
[612] *Practice Note: Default judgments and execution against primary residence* pars 8 and 9.

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

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

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

5.6.6 Standard Bank v Bekker

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The court further remarked:[632]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.6.7 Mkhize v Umvoti Municipality

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5.6.8 Comments on the position post-Gundwana v Steko

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[722] *Gundwana v Steko* par 54.

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

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

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

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

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

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

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

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

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

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

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

international consumer debt relief recommendations.[733]

5.7 Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Enforceability of the principal debt

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

Infringement of section 26(1) rights

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

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

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

Compliance with procedural rules and practice directives

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

Details concerning the debt itself

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

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

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

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

The debtor's circumstances

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

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

Conduct of the debtor

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

Conduct of the creditor

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

Alternative means of satisfaction of the debt

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

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

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

Alternative accommodation arrangements

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

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

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

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

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

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

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

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

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

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

CHAPTER 6

TREATMENT OF THE HOME IN SOUTH AFRICAN INSOLVENCY LAW

How does it feel
To be without a home
Like a complete unknown
Like a rolling stone?

- From *Like a Rolling Stone* by Bob Dylan (1965)

6.1 Introduction

Developments in relation to the forced sale of a debtor's home have thus far occurred only in the context of the individual debt enforcement process. As discussed in Chapter 5, the position is that, in every case in which a creditor seeks in the individual debt enforcement process to execute against a person's home, a court is required to carry out an evaluation taking into account "all the relevant circumstances" to determine whether execution should be permitted.[1] Essentially, the purpose of such evaluation is to prevent execution against a person's home occurring where it would constitute an unjustifiable infringement of the right to have access to adequate housing or an abuse of the process.[2] It is anticipated that it will not be long before the courts are called upon to address the question whether the realisation of an insolvent debtor's home, in the insolvency, that is, the sequestration or collective debt enforcement[3] or debt

[1]The position reflects the combined effect of *Jaftha v Schoeman*, the amended rule 46(1) of the High Court Rules, *Gundwana v Steko*, *FirstRand Bank v Folscher* and *Mkhize v Umvoti Municipality* (SCA).
[2]See *Jaftha v Schoeman*, discussed at 5.2, above, and *Gundwana v Steko*, discussed at 5.6.2, above. In *Nedbank v Fraser* par 27, Peter AJ seemed to suggest that, in relation to mortgaged property, the main purpose of the evaluation is to determine whether there has been an abuse of court procedure.
[3]As stated at 1.5, above, this may be regarded as a misnomer, in light of *Investec v Mutemeri* and *Naidoo v ABSA*, in which it was held that sequestration of a debtor's estate does not amount to "debt enforcement" for the purposes of s 88(3) of the NCA. See Boraine, Kruger and Evans "Policy Considerations" 637 639; Van Heerden and Boraine 2009 *PELJ* 40-41.

settlement,[4] process has constitutional implications which require similar considerations to be applied.[5]

This chapter deals with the current position in insolvency law in terms of which the home of the insolvent, often the most valuable asset in his estate, must be realised together with all the other assets in the insolvent estate in the liquidation process which is provided for the benefit of the creditors. It also considers the potential impact of recent developments in the individual debt enforcement process for the insolvency law and process. More specifically, it reflects on the need, bearing in mind constitutional imperatives, for clear policies to be formulated in relation to treatment of an insolvent debtor's home and for judicial oversight to be specifically focused upon issues surrounding the realisation of the home of the insolvent. This chapter deals with recent cases which illustrate the lack of a clearly defined interface between the Insolvency Act and the National Credit Act which has the effect that, in South Africa, consumer debt relief measures are not aligned with insolvency procedures. It also considers the desirability of the introduction of some form of statutory provision geared towards averting, or postponing, the realisation of the home of the insolvent, where appropriate, and perhaps even exempting it, or a portion of the proceeds of its sale, from the insolvent estate.

6.2 Overview of the applicable insolvency law and process

South Africa's insolvency regime has a pro-creditor orientation. Insolvency law is regulated mainly by the Insolvency Act. Where the Insolvency Act is silent, the common law applies.[6] To ensure "the orderly and equitable distribution of a debtor's assets where they are insufficient to meet the claims of all his creditors",[7] the Insolvency Act provides for an order to be granted by the high court[8] for the sequestration of a debtor's

[4]Van Heerden and Boraine 2009 *PELJ* 23.
[5]See Van Heerden, Boraine and Steyn "Perspectives" 260; Boraine "The Law of Insolvency and the Bill of Rights" par 4A8 (g); Evans "Does an insolvent debtor have a right to adequate housing?"; Els *De Rebus* 2011 (October) 21 23; Evans *Critical Analysis* 412-427; Stander and Horsten 2008 *TSAR* 215-216.
[6]The South African common law of insolvency is based largely on Roman-Dutch law; see 2.3, above.
[7]Sharrock *et al Hockly's Insolvency Law* 4.
[8]See definition of "court" in s 2 of the Insolvency Act.

estate. A sequestration order may be obtained either through voluntary surrender by a debtor of his estate or through application by a creditor for the compulsory sequestration of the estate of the debtor. If the procedural and substantive requirements have been met, the high court may grant the sequestration order although it always has the discretion to refuse it.

One of the requirements for the granting of a sequestration order is that it should be to the "advantage of creditors".[9] Indeed, that there should be a benefit for the creditors is a clear policy behind, and the main objective of, the Insolvency Act. Smith referred to it as "the recurrent motif of the Insolvency Act"[10] and Evans calls it the "golden rule" or the "golden thread in South African insolvency law that is woven through insolvency proceedings."[11] It has been held that an advantage to creditors will be shown where there is a "reasonable prospect – not necessarily a likelihood, but a prospect that is not too remote – that some pecuniary benefit will result to creditors".[12] It has also been held that sequestration should yield "a not negligible dividend" for creditors.[13] A court may also take into account the potential advantages which sequestration may bring for creditors. These might include, for instance, the prospect of investigation by the trustee in terms of the provisions of the Insolvency Act and the setting aside of transactions under sections 26, 29 and 30 of the Insolvency Act yielding assets for realisation for the benefit of creditors.[14] If advantage to creditors is not shown, a sequestration order cannot be granted. This means that a debtor who is "too poor" for the sequestration of his estate to yield sufficient advantage for his creditors will be denied access to the

[9]See ss 6, 10 and 12 of the Insolvency Act.
[10]Smith 1985 *MB* 27.
[11]Evans 2010 *SA Merc LJ* 483; Evans *Critical Analysis* 469.
[12]*Meskin & Co v Friedman* 1948 (2) SA 555 (W) 558.
[13]*Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1945 (2) SA 109 (N) 111. By creditors is meant the "general body of creditors" (see *Peycke v Nathoo* 1929 NLR 178) or "the body of creditors as a whole" (see *Stainer v Estate Bukes* 1933 OPD 86 89). It is submitted that, in this context, "creditors" means "concurrent creditors"; see Bertelsmann *et al Mars* 75; *Ex parte Brown* 1917 JDR 211.
[14]*Stainer v Estate Bukes* 1933 OPD 86 90; *Dunlop Tyres (Pty) Ltd v Brewitt* 1999 (2) SA 580 (W) 583; *Lynn & Main Inc v Naidoo* 2006 (1) SA 59 (N) 68-69; *Commissioner South African Revenue Services v Hawker Air Services (Pty) Ltd; Commissioner, South African Revenue Services v Hawker Aviation Partnership* 2006 (4) SA 292 (SCA) 306. See, also, Van Heerden and Boraine 2009 *PELJ* 44-46.

insolvency system.[15] The implications of this, and associated problems, are discussed below.[16]

The effect of a sequestration order is, *inter alia*, to stay any proceedings brought by creditors against the debtor, to bring about a *concursus creditorum*[17] and to vest the insolvent debtor's assets, with the exception of assets which are specifically excluded or exempted, in the Master of the High Court and, upon his appointment, the trustee of the insolvent estate.[18] The trustee's duty is, *inter alia*, to collect and liquidate estate property.[19] During the sequestration process, decisions are taken by the trustee, who is obliged to act for the benefit of creditors, in consultation with them or by their votes, in accordance with the provisions of the Insolvency Act. It is by a system of meetings that creditors, *inter alia*, prove their claims against the insolvent estate, elect a trustee, and give directions to the trustee in relation to the administration of the estate.[20] Meetings are required to be presided over by the Master or an officer in the public service designated by him or, in districts where there is no Master's Office, a magistrate or an officer in the public service designated by him.[21]

It is also the duty of the trustee to distribute the proceeds of the sale of the estate assets to the creditors in a predetermined order of preference as laid down by the Insolvency Act.[22] A secured creditor who holds "security" in relation to his claim against an insolvent estate which in terms of its definition includes "property of that estate over which the creditor has a preferent right by virtue of any special mortgage",[23] must be paid out of the proceeds of the sale of such property.[24] After all of the secured creditors have been paid out of the proceeds of the secured assets, preferent creditors are paid

[15]Evans 2011 *PELJ* 39 52; Evans 2010 *SA Merc LJ* 483; Evans 2001 *SA Merc LJ* 485 508, referred to by Van Heerden and Boraine 2009 *PELJ* 161.
[16]See 6.4, below.
[17]A "coming together of creditors"; see Sharrock *et al Hockly's Insolvency Law* 4.
[18]S 20 and s 23 of the Insolvency Act.
[19]See Sharrock *et al Hockly's Insolvency Law* 160ff.
[20]See ss 39-42 of the Insolvency Act.
[21]See s 39 of the Insolvency Act.
[22]See Sharrock *et al Hockly's Insolvency Law* 167ff.
[23]See s 2 of the Insolvency Act. See Sharrock *et al Hockly's Insolvency Law* 169.
[24]See Sharrock *et al Hockly's Insolvency Law* 171.

out of the "free residue",[25] in their order of ranking according to the Insolvency Act and thereafter, the concurrent creditors, who rank *pari passu*, share proportionately in the balance remaining.[26]

Section 119 of the Insolvency Act makes provision for a statutory composition between a debtor whose estate has been sequestrated finally and his creditors in which the required majority of creditors may bind the others. A statutory composition of this type may be entered into at any time after the first meeting of creditors. It does not discharge the sequestration order, although the insolvent may in certain circumstances apply for early rehabilitation.[27] The insolvent may regain his solvent status by rehabilitation. This will discharge him from liability for pre-sequestration debt. This may occur either by the high court granting an order rehabilitating the insolvent, upon *ex parte* application to it by the insolvent in terms of the Insolvency Act or, in the absence of an application, automatically, after a period of 10 years.[28]

6.3 *Considerations pertaining to the insolvent's home*

6.3.1 Constitutional considerations

Once a sequestration order has been granted by the high court, unless specific issues are litigated by the trustee on behalf of the insolvent estate, decisions are taken either by the trustee, in consultation with the creditors, or by creditors' votes in accordance with the provisions of the Insolvency Act.[29] Thus, no judicial oversight of the process of realisation of the insolvent's home necessarily occurs, except to the extent that in some situations a magistrate presides over a creditors' meeting. Certainly, there is no formal requirement, as there now is in the individual debt enforcement process, that a court should specifically consider any circumstances which may be relevant to the realisation

[25]S 2 of the Insolvency Act defines "free residue" as "that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention".
[26]See Sharrock *et al Hockly's Insolvency Law* 173-177.
[27]See Sharrock *et al Hockly's Insolvency Law* 187ff.
[28]See ss124-127A of the Insolvency Act.
[29]See ss 39-42 of the Insolvency Act.

of the insolvent debtor's home.[30] On the contrary, the trustee is obliged to have the home of the insolvent sold as a matter of course. The notion, expressed by the Constitutional Court, that execution against a person's home should occur only as last resort and that alternatives ought to be sought,[31] simply does not come into it, in the course of the administration of an insolvent estate. Indeed, very often, the application for sequestration is brought for the very reason that the debtor owns a home which, when realised, will yield a benefit for creditors. Moreover, it is submitted that it is cause for concern that, in instances where creditors opt for sequestration of the debtor's estate rather than bringing an action to execute against the home of the debtor using the individual debt enforcement procedure, they are able to avoid having to comply with the requirements of the NCA. In effect, this denies the debtor access to the protective elements of the consequences of an application for debt review and debt rearrangement.[32] It also undermines the effect of precedent established by the decisions in *Jaftha v Schoeman*, *Gundwana v Steko* and other cases. It is submitted that any such tendency on the part of creditors to circumvent the requirements and effects of the NCA should be averted by the introduction of appropriate statutory amendments.

As Evans has pointed out, the Insolvency Act and most of its amendments were enacted well before the introduction of our modern constitution with its bill of rights. The reality, therefore, is that "[t]he values and principles upon which the Constitution is built differ radically from many of the values, principles and policies that are the foundation of the Insolvency Act."[33] All law is subject to, and therefore must comply with, the provisions of the Constitution.[34] Therefore, in light of the developments in the individual debt enforcement process regarding the protection of a debtor's home against execution, it may be anticipated that it will be only a matter of time before the lack of

[30]For similar comments, see Evans "Does an insolvent debtor have a right to adequate housing?"; Evans "A brief comparative analysis"; Stander and Horsten 2008 *TSAR* 203 214.
[31]*Jaftha v Schoeman* par 59; *Gundwana v Steko* pars 53 and 54.
[32]This is evident, it is submitted, by the facts of *Investec v Mutemeri*, *Naidoo v ABSA* and *FirstRand Bank v Evans*. See also, Van Heerden and Boraine 2009 *PELJ* 22; Boraine and Van Heerden 2010 *PELJ* 84; and discussion at 4.5.4, above, and 6.10, below.
[33]Evans "A brief comparative analysis".
[34]See 3.2.1, above.

judicial oversight and evaluation of the position in relation to the insolvent debtor's home will be subjected to constitutional challenge.

Rights potentially infringed by the vesting in, and realisation by, the trustee of the home of an insolvent and/or his or her spouse or partner and family and/or dependants are, *inter alia*, the right to dignity,[35] the right to property,[36] the right to have access to adequate housing[37] and children's rights.[38] In the judgments in cases involving the individual debt enforcement process, courts have focused on the right to have access to adequate housing. It is submitted that this right, as well as children's rights, require closer consideration in the insolvency process. Essentially, the question is whether, given the debt collection and other purposes served by the sequestration process and other insolvency law mechanisms, any infringement of the rights of the insolvent debtor and his dependants, through realisation of the insolvent's home in terms of the provisions of the Insolvency Act, is justifiable in terms of section 36 of the Constitution.[39]

Evans submits that "this housing issue cannot be addressed without a well considered policy in respect of estate assets".[40] Further, such policy must conform to and promote the spirit, purport and objects of the Constitution and the Bill of Rights. As Evans has pointed out, such policy should be based, as exemptions policy generally is, on socio-economic and humanitarian grounds and the recognition of the need to assist the debtor in his financial recovery and to avoid becoming a welfare burden on the state and society.[41] Consideration of certain aspects of the South African insolvency law and process yields insights into the type of policy which is called for and the need for statutory provisions containing additional, or alternative, rules and mechanisms to regulate treatment of the debtor's home in the insolvency process.

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[35]Protected by s 10 of the Constitution, discussed at 3.3.2, above.
[36]Protected by s 25 of the Constitution. Courts have not yet based any of the relevant decisions, in the individual debt enforcement process, on the right to property. See, for example, *Gundwana v Steko* par 51, where the Constitutional Court opted to express no view on the merits of the argument based on s 25.
[37]Protected by s 26 of the Constitution. See 3.3.1, above.
[38]Protected by s 28 of the Constitution. See 3.3.3, above. None of the decisions, in the individual debt enforcement process, has been based on s 28.
[39]Stander and Horsten 2008 *TSAR* 215; Steyn '"Safe as Houses?"'.
[40]Evans "A brief comparative analysis". See, also Evans 2008 *De Jure* 262-263, 270-271.
[41]Evans 2008 *De Jure* 257, with reference to Milman *Personal Insolvency Law*.

6.3.2 Possible eviction and homelessness after sequestration

Issues surrounding the right to have access to adequate housing have not yet arisen directly in any insolvency matter.[42] Considerations pertaining to the insolvent's housing rights, the loss of his home or, for that matter, his or his dependants' accommodation arrangements, and his children's rights, do not form part of the procedural or substantive statutory requirements for either voluntary surrender or compulsory sequestration.[43] It will be unlikely in practice for a debtor to raise his right to have access to adequate housing as an issue in a voluntary surrender orin a friendly sequestration[44] where, in both instances, the debtor would be giving up his home "willingly".[45] Presumably, the debtor will have made alternative accommodation arrangements in anticipation of the effect of the sequestration order which he seeks either directly, in an application for voluntary surrender, or indirectly, in a friendly sequestration. However, it is conceivable that a spouse, married to him or her out of community of property, and his or her dependants might be averse, and wish to intervene in opposition, to the sequestration of the estate with the consequent liquidation of estate assets, including their home. In such circumstances, a pertinent question might be the likelihood of their finding alternative adequate housing.

In light of the fact that the home is often the most valuable asset in the estate, the situation might be that if the home is not sold, sequestration will not be shown to be to the "advantage of creditors".[46] The reality is also that, in South Africa, insolvency cases do not deal with apparently indigent debtors for whom access to "adequate housing" is an issue. Ironically, it is only more "affluent" debtors who can afford to be declared

[42]Although, in *ABSA v Murray*, insolvent persons were ultimately evicted from their former home after it was realised by the trustee. This case is discussed in this section, as well as at 3.3.1.4, above, and 6.6.3, below.
[43]Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?"; Stander and Horsten 2008 *TSAR* 203; Van Heerden, Boraine and Steyn "Perspectives" 261.
[44] In relation to friendly sequestrations, see 6.4.2, below.
[45]Although, conceivably, there is scope for the argument that the debtor is "seeking" sequestration of his estate out of desperation and a lack of any alternative, in the circumstances.
[46]Evans 2001 *SA Merc LJ* 485; Boraine, Kruger and Evans "Policy Considerations" 689-690.

insolvent given that the Insolvency Act requires that sequestration should be to the advantage of creditors and that it entails the cost of a high court application.[47] Be that as it may, it must be acknowledged that an indigent person in a similar position to that of the appellants in *Jaftha v Schoeman*, who cannot afford to become involved in the insolvency process, is nevertheless usually *de facto* insolvent.[48] It is submitted, contrary to the approach of the Constitutional Court in *Jaftha v Schoeman* and the full bench of the Western Cape High Court in *Standard v Bekker*, that a limited exemption from forced sale should be introduced in respect of a "low value" home to protect such debtors from being rendered homeless. As far as state-subsidised homes are concerned, in the interests of the owners and of the state, in view of its investment in such homes and its duty to provide accommodation for indigent persons, it is submitted that introduction of an exemption from forced sale should be considered.[49] This would mean, *inter alia*, that provisions contained in section 10B of the Housing Act, and the proposed amendments to it, will need to be reconsidered.[50]

It is conceivable that there will be instances where the insolvent and his dependants will be rendered homeless by the sequestration of his estate.[51] Personal financial difficulties, both before and, to a greater extent, since the recent global recession led to serious problems of homelessness of erstwhile mortgagees world wide and South Africa has also been affected by it.[52] The right to have access to adequate housing of the

[47]Van Heerden, Boraine and Steyn "Perspectives" 262-263; Evans 2001 *SA Merc LJ* 485.See, for example, *Van Rooyen v Van Rooyen (Automutual Investments (EC) (Pty) Ltd, Intervening Creditor* [2000] 2 All SA 485 (SE).

[48]See Steyn "'Safe as Houses?'". Evans developed this point further in "Does an insolvent debtor have a right to adequate housing?".

[49]This suggestion is discussed further, at 6.6.3 and 6.11, below. See, also, Evans "Does an insolvent debtor have a right to adequate housing?".

[50]For discussion of provisions, in the Housing Act, relating to the sale of state-subsidised homes, see 4.2.2, above.

[51]As were the circumstances, according to the respondent's version, in *ABSA v Murray*.

[52]See 7.2.4 and 7.5.4, below. Evidence exists that frequently over-indebted, *de facto* insolvent, erstwhile mortgagees and middle class debtors are being rendered homeless. See McKenzie Skene 2011 *Int Insolv Rev* 29 35; Glaister and Bruce-Lockhart "Subprime crisis: US foreclosures bring homelessness to the middle class" *The Guardian* England (25 June 2008) http://www.guardian.co.uk/world/2008/jun/25/usa.subprimecrisis [date of use 15 March 2012]; McKim "More being foreclosed into homelessness" *The Boston Globe* United States of America (22 April 2009) http://www.boston.com/business/articles/2009/04/22/more_being_foreclosed_into_homelessness/ [date of use 15 March 2012]; Cauvin "More families became homeless in recession" *Washington Post* United States of America (13 January 2011) http://www.washingtonpost.com/wp-

insolvent and his dependants as well as any affected children's rights may become an issue in compulsory sequestration proceedings where the parties are dealing at arm's length with one another and the debtor and his family members and dependants oppose the application for sequestration. The issue could also arise in an application for voluntary surrender where the applicant debtor's spouse or other dependants intervene to oppose the granting of a sequestration order on the basis of their constitutional rights. This may be particularly problematic where a spouse, partner, children or disabled or elderly persons rely on the insolvent for shelter and for maintenance.[53]

Another aspect which would need to be addressed is whether there is any difference between the situation in which a homeowner mortgaged his home in order to acquire funds to purchase it,[54] or whether he mortgaged it in order to provide security for the debts of, or to acquire working capital for, a business which is a separate legal entity. The question may be raised whether there should be any regulation of the sale of the mortgagor's home where the business fails and is liquidated as insolvent. Extrapolating from this, the question also arises, where a corporate entity owns a house which a director, a member, or an employee of that entity uses as their home, whether the housing position of the latter ought specifically to be addressed in the course of liquidation of such entity's assets, should it become insolvent. It may be remembered that, in the individual debt enforcement process, there is controversy in relation to whether differential treatment of the position is required depending on the purpose for which the home was mortgaged.[55] There are also conflicting decisions as to whether, in the event of the sale in execution of a house owned by a corporate entity, the section 26

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dyn/content/article/2011/01/12/AR2011011206298.html [date of use 15 March 2012]. See also Naidoo "Now for the big squeeze" *Sunday Times Business Times* South Africa (9 July 2006) 1; Duffett "No place like home" *Carte Blanche* South Africa (11 September 2005) featured at http://beta.mnet.co.za/carteblanche/Article.aspx?Id=2889 [date of use 15 March 2012].

[53] See Evans 2008 *De Jure* 263; Stander and Horsten 2008 *TSAR* 203. It may be noted that the "deserted wife's equity" was the basis, initially, for protection of the matrimonial home in England; see 7.5.3.1, below.

[54] See 2.3.4 and 4.3.3, above, for discussion of a *kustingbrief*.

[55] See *Nedbank v Fraser* pars 20-21 and 27, discussed at 5.6.3, above; cf *Standard Bank v Bekker* pars 17-24, discussed at 5.6.6, above.

rights of a director, a member or an employee who uses the property as his home, require judicial evaluation.[56]

As stated above,[57] the position is that, where a sequestration order is granted and the home of the insolvent and his dependants is sold in the process of liquidation of the assets of the insolvent estate, if they have not vacated it, the new owner will have to apply for an eviction order and comply with the requirements of PIE. The position would be the same where a corporate entity is liquidated as insolvent and it is sought to evict occupiers of a home which was owned by it prior to its liquidation. In *ABSA v Murray*,[58] the court found that it would be just and equitable in terms of the provisions contained in PIE to evict the insolvent spouses and their family from their mortgaged home which had been sold in a public auction held, almost a year before, in terms of the Insolvency Act.[59] However, one may wonder what the outcome might have been in slightly different circumstances if the position of the insolvent and his family had been more precarious and the issues less clear-cut even for a "creditor-orientated" court. If, for example, the insolvent had been less articulate, had come across as less capable and less intelligent and the family's circumstances had presented as more desperate or hopeless, without resources to acquire alternative accommodation, one may wonder what would have constituted a just and equitable order.

ABSA v Murray underscores the fact that one cannot simply assume that a mortgagor, who might previously have been in a position to obtain credit and to afford mortgage bond instalments, is necessarily in a wholly separate category from, for example, indigent dwellers in informal settlements or occupiers of derelict inner city buildings. An erstwhile mortgagor and his family who have no access to resources and no alternative accommodation, once their home is realised, could well be as "desperately poor" and as

[56]See *Nedbank v Fraser* par 12, discussed at 5.6.3, above; cf *FirstRand Bank v Folscher* par 32, discussed at 5.6.4.2 (a), above.
[57]See 3.3.1.4 (b), above.
[58] Discussed at 3.3.1.4, above, and 6.6.3, below.
[59]*ABSA v Murray* par 48.

much "in a crisis" as such a person.[60] The lack, or minimal level, of housing subsidy and support which is available in the national housing programmes[61] to persons rendered homeless after falling on hard times might be a relevant factor which would weigh in favour of an insolvent debtor.[62] Apart from humanitarian reasons for permitting an insolvent and his family to retain a roof over their heads, as the Constitutional Court held in *Grootboom*, the state has a duty to provide access to adequate housing. It may well be in the interests of the state and society generally to allow the insolvent to retain possession of his home, even temporarily, or to receive some sort of exemption. This could take the form of an exemption from sale of "low value" or state-subsidised homes or of a portion of the proceeds of its sale to enable him to provide alternative accommodation for his dependants. Otherwise, the result could well be, after possibly protracted legal proceedings, to render the insolvent and his family an additional burden on the state or the local municipality, as seen in the recent decision of the Constitutional Court, in relation to evicted erstwhile lessees, in *Blue Moonlight Properties* (CC).[63]

ABSA v Murray is also a reminder of the fact that, in the eviction process, consideration of personal circumstances of the occupiers is required while, on the other hand, this is not required during the insolvency process in which the insolvent's home is realised by the trustee as a matter of course.[64] Thus, the insolvent mortgagor who, with his family, vacates their home immediately after the sequestration of his estate and who becomes homeless as a result, receives less statutory protection than one who "holds over".[65]

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[60]See, also, the comments of Harms JA in *Ndlovu v Ngcobo* pars 16-17, referred to at 3.3.1.4 (b). "Being desperately poor and … in a crisis" is a reference to *Blue Moonlight Properties* (SCA) par 59, referred to at 3.3.5, above.
[61]See 4.2, above.
[62]Boraine, Kruger and Evans "Policy Considerations" 638.
[63]See *Blue Moonlight Properties* (CC),discussed at 3.3.1.4 (c), above.
[64]Note the situation in *Mollem Boerdery (Pty) Ltd v Modisane* [2010] JOL 25457 (LCC), where the court, in an automatic review, in terms of s 19(3) of the Extension of Security of Tenure Act 62 of 1997, hereafter referred to as "ESTA", set aside orders, granted by a magistrate, for the eviction of residents of farm land whose employer, the lessee of the farm, had allegedly been liquidated. In the circumstances, there was insufficient clarity concerning the alleged liquidation of the employer and whether termination of the employees' right of residence had occurred in accordance with the provisions of ESTA. Notably, the court considered the personal circumstances of the residents and the fact that the court had insufficient information before it about the availability of alternative accommodation.
[65]A similar point was made in par 30.6 of appellant's submissions to the Constitutional Court, in *Gundwana v Steko* http://www.constitutionalcourt.org.za/uhtbin/cgisirsi/x/0/0/5?searchdata1=CCT44/10 [date of use 15 March 2012].

However, the constitutional position of the person is the same. The point may also be made that it is the most vulnerable who cannot afford to engage in litigation in order to protect their rights. Therefore, in line with the Constitutional Court's direction for elements of grace and compassion to be infused into the formal structures of the law,[66] it is submitted that consideration ought to be given to formal recognition, in insolvency legislation, of the significance of the section 26, section 28 and other rights of an insolvent and his dependants. Consideration of various aspects of the applicable insolvency law and process, and how they impact upon the position of the home of the insolvent, follow. Considerations relevant to the home will also be mentioned at various points in the text, below.[67]

6.4 Sequestration procedures and consideration of debt relief measures posing alternatives to liquidation of assets

6.4.1 Voluntary surrender

In a voluntary surrender, the debtor must satisfy the court that: he is in fact insolvent, that is, that his liabilities exceed his assets; that he has complied with the procedural requirements, some of which are to give notice of the proceedings to his creditors; that there is sufficient free residue[68] in his estate to cover the costs of sequestration; and that sequestration "will be to the advantage of creditors".[69] Even if all of these requirements are met, the court still has the discretion to refuse the application[70] which it will probably do in a case where there appears to be some ulterior motive for the application, such as an attempt to defeat the claim of a creditor,[71] or where the applicant has not made full and frank disclosure.[72]

[66]See *Port Elizabeth Municipality* par 37.
[67]See 6.6.3, 6.11 and 6.12, below.
[68]See s 2 of the Insolvency Act, referred to in 6.2, above.
[69]See ss 4 and 6 of the Insolvency Act.
[70]See *Ex parte Ford and Two Similar Cases* 2009 (3) SA 376 (WCC); *Ex parte Hayes* 1970 (4) SA 94 (NC); *Ex parte Vallabh* 1935 TPD 93 95.
[71]*Ex parte Van den Berg* 1950 (1) SA 816 (W); *Fesi & another v ABSA Bank Ltd* 2000 (1) SA 499 (C).
[72]*Ex parte Hayes* 1970 (4) SA 94 (NC); *Fesi & another v ABSA Bank Ltd* 2000 (1) SA 499 (C).

As mentioned above,[73] the requirement that sequestration must be to the "advantage of creditors" means that, where a debtor is "too poor" to show that sequestration of his estate will yield a sufficiently high dividend for creditors, his application for voluntary surrender of his estate must be refused. In the result, he will be denied access to the benefits of the debt relief measures provided by the Insolvency Act, such as the stay of civil proceedings against him, being able to retain certain exempt assets and, ultimately, upon rehabilitation, a discharge from liability for pre-sequestration debt. Academic commentators have consistently criticised this aspect of South African insolvency law, pointing out the lack of effective and appropriate debt relief mechanisms available to debtors as alternatives to sequestration.[74] After *Ex parte Ford and two similar cases*,[75] a case in which the court exercised its discretion to refuse applications by three debtors for the voluntary surrender of their estates, Van Heerden and Boraine put forward strong arguments for more appropriate alternative debt relief procedures to be sought, *inter alia*, to avoid a self-perpetuating debt trap.[76]

6.4.2 Compulsory sequestration

A creditor who has a liquidated claim against a debtor for an amount of R100 or more may bring an application for the compulsory sequestration of the debtor's estate.[77] The applicant is required to show that there is reason to believe that sequestration will be to the "advantage of creditors" and either that the debtor is insolvent or, given that it may be difficult for a creditor to prove that the debtor's liabilities exceed his assets, that his

[73] See 6.2, above.
[74] See Van Heerden and Boraine 2009 *PELJ* 57-58; Boraine and Van Heerden 2010 *PELJ* 84; Boraine "Reform of Administration Orders" 215-216; Boraine and Roestoff 2002 *Int Insolv Rev* 1-11; Boraine and Roestoff 2000 *Obiter* 263; Evans 2002 *Int Insolv Rev* 29-31; Boraine and Roestoff 1993 *De Jure* 229; Roestoff and Jacobs 1997 *De Jure* 189; Loubser 1997 *SA Merc LJ* 325; Evans 2001 *SA Merc LJ* 485.
[75] *Ex parte Ford and two similar cases* 2009 (3) SA 376 (WCC), hereafter referred to as "*Ex parte Ford*", discussed at 6.10.4, below.
[76] Van Heerden and Boraine 2009 *PELJ* 58.
[77] See s 9(1) of the Insolvency Act.

debtor has committed an "act of insolvency".[78] The legislature has created eight acts or omissions which constitute "acts of insolvency" for this purpose.[79]

Of particular relevance to issues considered in this chapter[80] is the act of insolvency created by section 8(g) which provides that a debtor commits an act of insolvency if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts.[81] The notice must convey an inability and not mere unwillingness to pay. The test to be applied, to determine whether this act of insolvency has been committed, is whether a reasonable person in the position of the receiver of the document and with the same knowledge of the relevant circumstances would have interpreted the document in question to mean that the debtor cannot pay his debts.[82] Where a debtor applies for an administration order in terms of section 74 of the Magistrates' Courts Act[83] he is obliged to state that he cannot pay any of his debts. It has been held that, in the process, he commits an act of insolvency in terms of section 8(g).[84] On the other hand, it has also been held that if he states that he is unable to pay a debt but it is clear, from the application, or from the circumstances, that he is not *unable* to pay but is simply *unwilling* to do so, then he does *not* commit this act of insolvency.[85]

Another act of insolvency which, it was suggested in *Nedbank Ltd v Andrews and Another*,[86] is committed by a debtor who applies for debt review in terms of the NCA is that which is provided for in section 8(e) of the Insolvency Act. In terms of s 8(e), a

[78]See ss 10, 12 of the Insolvency Act.
[79]See s 8 of the Insolvency Act. A possible result of this is that a debtor's estate may be sequestrated where he has committed an act of insolvency, but where he is factually solvent, ie, where the value of his assets exceeds the extent of his liabilities. See, in this regard, Sharrock *et al Hockly's Insolvency Law* 31; *DP du Plessis Prokureurs v Van Aarde* 1999 (4) SA 1333 (T) 1335.
[80]See 6.10.3, below.
[81]"Any of his debts" means any one of his debts; see *Optima Fertilizers (Pty) Ltd v Turner* 1968 (4) SA 29 (D) 32-33; *Court v Standard Bank; Court v Bester NO and others* 1995 (3) SA 123 (A) 133.
[82]See *Court v Standard Bank; Court v Bester NO and others* 1995 (3) SA 123 (A) 134; *Barlow's (Eastern Province) Ltd v Bouwer* 1950 (4) SA 385 (E).
[83]Administration orders are discussed at 4.4.3.6, above.
[84]*Volkskas Bank ('n Divisie van Absa Bank Bpk) v Pietersen* 1993 (1) SA 312 (C) 316, hereafter referred to as "*Volkskas v Pietersen*".
[85]This is what occurred in *Barlow's (Eastern Province) Ltd v Bouwer* 1950 (4) SA 385 (E), hereafter referred to as "*Barlow's v Bouwer*".
[86]*Nedbank Ltd v Andrews and Another* (240/2011) [2011] ZAECPEHC 29 (10 May 2011), hereafter referred to as "*Nedbank v Andrews*".

debtor commits an act of insolvency "if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts." However, in *Nedbank v Andrews*, although initially the applicant creditor alleged that by applying for debt review, the debtor had committed acts of insolvency in terms of both section 8(e) and 8(g) of the Insolvency Act, when the matter came to court it withdrew these allegations and relied solely upon an allegation of actual insolvency.[87] Thus, the issue was not fully canvassed in the judgment.

Otto and Otto noted that Van Heerden had suggested that an application for debt review in terms of the relevant provisions of the NCA might constitute an act of insolvency in terms of the Insolvency Act. Otto and Otto stated that it remained to be seen what the courts would decide in this respect.[88] Subsequently, in *FirstRand Bank v Evans,*[89] an application for a provisional order of sequestration was granted. It was held that a letter written by the debtor to the bank, the mortgagee of his home, informing it to cancel a debit order as he had applied for debt review under the NCA, amounted to an act of insolvency in terms of section 8(g).[90] This case will be discussed further, below.[91]

A common occurrence is for a creditor who is favourably disposed towards a debtor to bring an application for the compulsory sequestration of the latter's estate at the request, or at least with willingness on the part, of the latter. This situation, where the applicant creditor and the debtor are not "at arm's length" and the applicant is actuated by friendly considerations towards the debtor, is referred to as a "friendly sequestration".[92] Usually, the main motive is to relieve the debtor from harassment by his creditors rather than to exact payment from the debtor for the benefit of his creditors.

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[87] *Nedbank v Andrews* par 3.
[88] Otto and Otto *National Credit Act* 134, with reference to Van Heerden "The Interaction between Debt Review in terms of the National Credit Act 34 of 2005 and Insolvency Law" 153 which is a reference to a paper delivered at the Annual Banking Law Update, hosted by the University of Johannesburg on 23 April 2009.
[89] This case is discussed at 4.5.4, above and 6.10.3, below.
[90] *FirstRand Bank v Evans* pars 12-22. It may be noted that the provisional order of sequestration was granted on 18 March 2011. After argument as to whether the order should be discharged or made final, judgment was reserved on 26 August 2011. According to the respondent's legal representatives, on 12 December 2011, the outcome has not yet been made known to the parties concerned.
[91] See 6.10.3, below.
[92] Sharrock *et al Hockly's Insolvency Law* 40-43; Evans 2001 *SA Merc LJ* 485.

Friendly sequestrations are often instituted in an attempt by the debtor to avoid having to comply with the formalities and meet the higher degree of proof required in the voluntary surrender procedure. More specifically, they are used to try to circumvent the requirement that the court "must be satisfied that sequestration will be to the advantage of creditors".[93] Largely for this reason, friendly sequestrations are viewed with circumspection by the courts.[94] Reported judgments have revealed clear indications of abuse of the sequestration procedure[95] and, particularly, ulterior motives. One such case was *Mthimkulu v Rampersad (BOE Bank Ltd, intervening creditor)*[96] where it transpired that the applicant creditor and the respondents had colluded by arranging for the application for sequestration in an attempt to avert the sale in execution of the respondents' home by the mortgagee.[97]

As in the case of voluntary surrender, even where the requirements for compulsory sequestration have been met, the court has a discretion whether or not to grant a sequestration order.[98] A court should consider all relevant circumstances and determine whether to grant a sequestration order or not, based on the facts and circumstances of the particular case[99] including, for example, where there is strong opposition by some of the creditors to sequestration taking place.[100]

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[93]See, and compare, ss 4, 6, 10 and 12 of the Insolvency Act. See *Epstein v Epstein* 1987 (4) SA 606 (C); *Hillhouse v Stott; Freban Investments v Itzkin; Botha v Botha* 1990 (4) SA 580 (W); *Craggs v Dedekind; Baartman v Baartman and Another; Van Jaarsveld v Roebuck; Van Aardt v Barrett* 1996 (1) SA 935 (C). See Evans 2002 *Int Insol Rev* 13 17-19.
[94]*Hillhouse v Stott; Freban Investments v Itzkin; Botha v Botha* 1990 (4) SA 580 (W); *Craggs v Dedekind; Baartman v Baartman and Another; Van Jaarsveld v Roebuck; Van Aardt v Barrett* 1996 (1) SA 935 (C).
[95]See Evans 2001 *SA Merc LJ* 485; Evans 2002 *Int Insol Rev* 13.
[96]*Mthimkulu v Rampersad (BOE Bank Ltd, intervening creditor)* [2000] 3 All SA 512 (N), hereafter referred to as "*Mthimkulu v Rampersad*".
[97]*Mthimkulu v Rampersad* 514-515.
[98]*Julie Whyte Dresses (Pty) Ltd v Whitehead* 1970 (3) SA 218 (D); see Sharrock *et al Hockly's Insolvency Law* 51; Bertelsmann *et al Mars* 141-144.
[99]*Amod v Khan* 1947 (2) SA 432 (N).
[100]*Theron v Scholtz* 1923 JDR 144. See Bertelsmann *et al Mars* 139, particularly cases cited at n 390 and n 391.

6.4.3 Alternatives to the liquidation of assets

For many years, insolvency academics have pointed out that South Africa needs an effective, easily accessible mechanism to serve as an alternative for consumer debtors to the sequestration process provided by the Insolvency Act.[101] As seen in Chapter 4, besides compromise, at common law, available debt relief mechanisms include administration in terms of section 74 of the Magistrates' Courts Act (in terms of which the total amount of debt is limited to R50 000 and *in futuro* debts are excluded), and debt review and debt restructuring under the NCA (which covers only obligations arising from credit agreements).[102] In both of these systems, a debtor is required to pay the debt in full without any measure of discharge being granted as is available upon rehabilitation after the sequestration process has run its course. Commentators, notably, Boraine, Roestoff and Evans, perceive this as unfair treatment of "poorer debtors" who are unable to show that sequestration would be to the "advantage of creditors".[103] They emphasise the need for a consumer debt relief measure which balances the interests of both debtors and creditors as well as society generally by, *inter alia*, allowing the rearrangement of debts so that they are payable over a reasonable, limited period. Further, at the end of it, a measure of discharge from liability is called for in accordance with a policy of providing an "honest" consumer debtor with a "fresh start". Such a feature is universally accepted as appropriate for an effective consumer debt relief system.[104]

[101] See, for example, Boraine and Roestoff 1993 *De Jure* 229; Evans 2001 *SA Merc LJ* 485; Boraine 2003 *De Jure* 217; Calitz 2007 *Obiter* 414; Boraine and Roestoff 2002 *Int Insolv Rev* 1.
[102] See 4.4.3.6, and 4.5, above.
[103] See Boraine and Roestoff 2000 *Obiter* 263; Roestoff *'n Kritiese Evaluasie* 357; Evans 2001 *SA Merc LJ* 504-505, 508; Boraine "Reform of Administration Orders" 195, 215; Boraine and Roestoff 2002 *Int Insolv Rev* 11; Van Heerden and Boraine 2009 *PELJ* 161; Evans 2010 *SA Merc LJ* 483; Evans 2011 *PELJ* 39 52; Coetzee "Personal bankruptcy and alternative measures". See, also, 6.2, above.
[104] See, in this regard, INSOL International *Consumer Debt Report II* 9-11, 15, 20-21; INSOL International *Consumer Debt Report* 2001; McKenzie Skene 2011 *Int Insolv Rev*29; McKenzie Skene 2005 *Int Insolv Rev* 1 14; van Apeldoorn 2008 *Int Insolv Rev* 57; Calitz 2007 *Obiter* 414; Van Heerden and Boraine 2009 *PELJ* 58.

In Chapter 4,[105] mention was made of the South African Law Reform Commission's proposal, in the Draft Insolvency Bill published as part of its report, in 2000, of the insertion of a new section 74X in the Magistrates' Courts Act to provide for a pre-liquidation composition procedure. This was never enacted. The most recent initiative is an unofficial working draft of a proposed Insolvency and Business Recovery Bill.[106] It contains section 118, a variation on the South African Law Reform Commission's proposed section 74X. The proposed section 118 provides for a pre-liquidation composition procedure which, once a majority in number and a two-thirds majority in value of the concurrent creditors have accepted it and the court has certified their acceptance, will be binding on all creditors who appeared at the meeting or who had been notified of it. In terms of the provision, "a composition may not be accepted if a creditor demonstrates to the satisfaction of the magistrate that it accords a benefit to one creditor over another creditor to which he or she would not have been entitled on liquidation of the debtor's estate."[107] In other words, the concurrent creditors must enjoy the same *pari passu* ranking in terms of the composition which they would have received if the estate had been sequestrated. Further, the rights of a secured or a preferent creditor will not be affected by the composition unless he has consented to it in writing.[108]

It is submitted that this proposed pre-liquidation process, appropriately remodelled and refined, may well provide a way out for over-indebted persons who seek an alternative to the voluntary surrender of their estate and an opportunity to avert the forced sale of their home. This process potentially provides such an alternative in terms of which the debtor could also benefit not only from the restructuring of debt, but also, ultimately, by receiving a measure of discharge from liability. It is also anticipated that the proposed section 118 procedure would pose a realistic alternative to the compulsory sequestration, or liquidation, of a debtor's estate by affording the debtor an opportunity

[105]See 4.4.3.6, above.
[106]See 1.6, above.
[107]See s 118(16) of the unofficial working draft of a proposed Insolvency and Business Recovery Bill. In the working document, the term "liquidation" is used in place of "sequestration", as it is currently referred to in the Insolvency Act.
[108]See s 118(17) of the unofficial working draft of a proposed Insolvency and Business Recovery Bill.

to fulfil his obligations to creditors through a type of restructured debt repayment plan. It is also anticipated that it would probably be an attractive proposition for a mortgagee of the debtor's home because, confident that its claim cannot be compromised without its explicit consent, it may be less inclined to pursue the forced sale of the home.

6.5 Estate property

In terms of section 20(1)(a) of the Insolvency Act, the effect of a sequestration order is to divest the insolvent of his estate and to vest it in the Master of the High Court and, thereafter, in the trustee once the latter has been appointed.[109] The estate remains vested in the trustee until the discharge of the sequestration order by the court or the acceptance by creditors of an offer of composition made by the insolvent, if it provides for the insolvent's property to be restored to him, or an order for rehabilitation of the insolvent.[110] In terms of section 20(2) of the Insolvency Act, the insolvent estate includes:

> (a) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under writ of attachment; [and]
> (b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section twenty-three.

In section 2 of the Insolvency Act, "property" is defined to include "movable or immovable property wherever situate within the Republic". In an article focusing mainly on issues relating to an insolvent debtor's duty of support towards his children, Stander and Horsten point out that it is in terms of section 20(2) of the Insolvency Act that an insolvent debtor's home may be realised to cover his debts. In view of the lack of any provision seemingly consistent with section 26(1) or section 26(3) of the Constitution, they submit that in this respect section 20(2) is strikingly at odds with section 26 of the Constitution. They analyse how the sequestration of the estate of a parent may infringe

[109] Sharrock *et al Hockly's Insolvency Law* 63.
[110] Granted in terms of s 124(1) of the Insolvency Act.

children's section 28 rights[111] and that the principle of "advantage of creditors" in insolvency law may be in conflict with children's constitutional rights.[112]

6.6 Excluded and exempt property

6.6.1 Exclusions and exemptions currently applicable in insolvency

In common with foreign jurisdictions,[113] South African insolvency law provides for certain assets to be either excluded or exempted from the insolvent estate.[114] However, being a "creditor-orientated" insolvency system, the exclusions or exemptions are limited.[115] Provisions of the Insolvency Act as well as other statutes, such as the Pensions Act 24 of 1956 and the Long-term Insurance Act 2 of 1998, have the effect of specifically exempting certain assets from vesting in the trustee. An insolvent person's home is neither excluded nor exempted from the insolvent estate. Nor is an inheritance excluded from the insolvent estate[116] or exempt from sale by the trustee. Therefore, a "family home" which has been left to an heir must also be realised as part of the assets of the insolvent person's estate.[117]

The effect of section 23 of the Insolvency Act is specifically to exclude or exempt certain property from the insolvent estate. This includes: any pension to which the insolvent may be entitled for services rendered by him;[118] any compensation for any loss or

[111]Stander and Horsten 2008 *TSAR* 214-216.
[112]Stander and Horsten 2008 *TSAR* 203, 207.
[113]See McKenzie Skene 2011 *Int Insolv Rev* 29-55; See also Evans *Critical Analysis* Chapters 5 and 6. It may be noted that exemptions provided for in the Insolvency Act differ from those provided for in the individual debt enforcement process, as discussed in 4.4.3.4 and 4.4.4.4, above.
[114]As Evans has stated, there is a distinction between property which is excluded from the insolvent estate and therefore never forms part of it and, on the other hand, exempt property which, strictly speaking, falls into the insolvent estate but is then exempted for particular reasons. See Evans 2008 *De Jure* 255 257; Bertelsmann *et al Mars* 192 n 1; Evans *Critical Analysis* 9.1.
[115]See Evans 2008 *De Jure* 255-272.
[116]*Vorster v Steyn NO en andere* 1981 (2) SA 831 (O); *Badenhorst v Bekker NO en andere* 1994 (2) SA 155 (N); *Wessels NO v De Jager en 'n ander NNO* 2000 (4) SA 924 (SCA); *Du Plessis v Pienaar NO & others* 2003 (1) SA 671 (SCA).
[117]*Badenhorst v Bekker NO en andere* 1994 (2) SA 155 (N).
[118]S 23(7) of the Insolvency Act. Other statutes also protect pension moneys. These include ss 3 and 37B of the Pension Funds Act 24 of 1956; s 79 of the Railways and Harbours Service Act 28 of 1912, s 2 of

damage suffered by reason of any defamation or personal injury;[119] and remuneration or reward for work done or for professional services rendered by the insolvent after the sequestration of the estate.[120] The exemption of the insolvent's earnings is subject to the trustee being entitled to any moneys received by the insolvent in the course of his or her profession, occupation, or employment which in the opinion of the Master of the High Court exceed that which is necessary for the support of the insolvent and his dependants.[121] Thus, the insolvent's earnings after sequestration vest in the insolent himself. However, once the Master has expressed an opinion that a certain amount exceeds that which is necessary for the support of the insolvent and his dependants, the insolvent is divested of such excess portion and it vests in the trustee, for distribution among the creditors in accordance with the provisions of the Insolvency Act.[122] Any asset purchased with exempt or excluded property does not form part of the insolvent estate.[123] It is common practice for the insolvent, upon application for rehabilitation, to apply also for an order declaring such an asset to be his property.[124]

In terms of section 82(6) of the Insolvency Act, an insolvent person's "wearing apparel and bedding … and the whole or such part of his household furniture, and tools and other essential means of subsistence as the creditors … may determine" is exempted from the sale of the insolvent's movable property which may be retained for own use. The insolvent may renounce this protection, in respect of particular assets, for the benefit of the creditors of his insolvent estate.[125] It may be noted that section 82(6) does not explicitly exempt from sale a motor vehicle owned by the insolvent which is used for

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the Statutory Pensions Protection Act 21 of 1962, s 14(3) of the Aged Persons Act 29 of 1979 and s 20(5) of the Social Assistance Act 13 of 2004.

[119]S 23(8) of the Insolvency Act.

[120]S 23(9) of the Insolvency Act. In terms of s 23(3), "an insolvent may follow any profession or occupation or enter into any employment", but may not, during the sequestration of his or estate without the consent in writing of the trustee of the insolvent estate, either carry on, or be employed in any capacity or have any direct or indirect interest in, the business of a trader who is a general dealer or manufacturer.

[121]S 23(5) of the Insolvency Act. In appropriate circumstances, the employer may be obliged to pay over the excess to the trustee.

[122]*Ex parte Van Rensburg* 1946 OPD 64 70; *Miller v Janks* 1944 TPD 127 130;

[123]*Ex parte Fowler* 1937 TPD 353. See Sharrock *et al Hockly's Insolvency Law* 69-70.

[124]Sharrock *et al Hockly's Insolvency Law* 201.

[125]*Ex parte Anthony en 'n ander en ses soortgelyke aansoeke* 2000 (4) SA 116 (C) 125. Evans 2010 *SA Merc LJ* 476 submits that legislation should be enacted to prevent a debtor from waiving his right to exempt or excluded property as this is in conflict with the "fresh start" policy.

business purposes and no court has ever regarded such a motor vehicle as a "tool" or "essential means of subsistence" in their interpretation and application of this section. Evans criticises this as well as the failure to provide for any protection for the insolvent's dwelling place as being *lacunae* in South African insolvency law policy.[126] Stander and Horsten state that it is unclear whether section 82(6) potentially allows for an amount of money for the maintenance of the insolvent's children and dependants, the common law concept of which, as they explain, includes, *inter alia*, their accommodation. Stander and Horsten suggest that section 82(6) ought to be construed in such a way and should be amended so as expressly to provide for this.[127]

6.6.2 Reform initiatives

The South African Law Reform Commission,[128] in a report on its review of the law of insolvency, completed in February 2000,[129] noted that section 39 of the Supreme Court Act and section 67 of the Magistrates' Courts Act contain more categories of exempt property than does section 82(6) of the Insolvency Act. It also noted that they provide the court with the discretion, in exceptional circumstances, to increase the amounts of the value of property exempt from execution. The Commission stated:[130]

> [a]lthough it could be argued that the phrase "other essential means of subsistence" gives s… 82(6) a wider application, …the phrase lacks certainty and gives no clear guidance about what property may be retained [by the insolvent]. If it is accepted that certain basic property is essential for a basic minimum standard of living, the inconsistency between property exempt from execution and property exempt from sale in terms of s 82(6) cannot be justified.

[126]See Evans 2008 *De Jure* 262-263. See, also, Evans *Critical Analysis* 423; Evans "Does an insolvent debtor have a right to adequate housing?".
[127]Stander and Horsten 2008 *TSAR* 209-210, 220. The authors submit that such a construction would accord with ss 23(12) and 79 of the Insolvency Act which, in effect, provide for the trustee, with the Master's consent, to give to the insolvent, before the second meeting of creditors, an allowance in the form of money or goods from the insolvent estate, for the support of himself and his dependants. They submit that s 82(6) applies after the second meeting of creditors.
[128]In this thesis, also referred to as "the Commission".
[129]See the *Report on the Review of the Law of Insolvency* Project 63 February 2000 *Explanatory Memorandum* (Vol 1), hereafter referred to as "the Explanatory Memorandum", and *Draft Insolvency Bill* (Vol 2), hereafter referred to as "the Draft Insolvency Bill".
[130]See the Explanatory Memorandum par 11.4.

It is submitted that, as far as possible, the types of assets exempted from execution in the individual debt enforcement process and those excluded or exempted from the insolvent estate in the insolvency process, should be the same. Evans submits that harmonisation in this respect is essential as he anticipates that "property that is not excluded from debt collection in the pre-sequestration collection procedure will probably be foreclosed on and sold prior to sequestration." He comments that such property will then be valueless "in the context of exemption law within the sequestration process."[131]

In order to create certainty and to give clear guidance about what property is excluded from the insolvent estate, so that it would not depend on the discretion of the liquidator,[132] the Commission recommended an expansion of section 82(6).[133] Clause 11(6) of the Draft Insolvency Bill reflects the changes recommended by the Commission. It provides for the exclusion from a person's insolvent estate of: the necessary beds, bedding and wearing apparel of the insolvent and his family; the necessary furniture and household utensils of the insolvent up to the value of R2 000; food and drink sufficient for the needs of the insolvent and his family for a month; and such arms and ammunition as the insolvent requires as part of his equipment. The Minister will have the power to amend[134] these amounts from time to time.[135]

Another innovation is that the liquidator, if authorised by the Master or by resolution of a meeting of creditors of the estate, will have the power to make available to the insolvent assets of the insolvent estate the value of which exceed these amounts.[136] The purpose is to provide more flexibility, especially given the very low values set in clause

[131]Evans 2010 *SA Merc LJ* 477. Evans criticises the Commission for not distinguishing between excluded assets and exempt assets. On this distinction, see Evans *Critical Analysis* 9.1; Evans 2008 *De Jure* 257. See, further, 6.6.1, above. It may be noted, as Stander and Horsten 2008 *TSAR* 211 point out, that in German law there is harmonisation of exclusion of assets in both the ordinary civil process and the insolvency process.
[132]In should be noted that, in terms of the Draft Insolvency Bill, the term "liquidator" will replace the term "trustee" which is used, in the current Insolvency Act.
[133]See the Explanatory Memorandum par 11.5 and Draft Insolvency Bill cl 11(6)(a).
[134]By notice in the *Government Gazette*.
[135]See cl 11(7) of the Draft Insolvency Bill.
[136]See cl 62(4) of the Draft Insolvency Bill. However, cl 42(9) of the Draft Insolvency Bill provides for a court to set aside, upon application to it, a directive of this sort that infringes the rights of creditors.

11(6)(a),[137] in order effectively to deal with the variety of circumstances which present themselves in administering different insolvent estates.[138] According to the Commission's recommendations, a liquidator who disagrees with a resolution by a meeting of creditors in relation to making available to the insolvent assets which belong to the insolvent estate, may refer the matter to the Master in the event of which whose decision will be subject to review by the high court.[139]

As Evans points out, and as mentioned in Chapter 2, above, allowing a debtor to keep a part of his estate apparently originated in the *beneficium competentiae*, in Roman law, on the basis of a policy that the insolvent and his dependants should not be deprived of basic life necessities.[140] However, Evans explains how the requirements of modern society, socio-political developments in most societies, and human rights requirements have necessitated a broadening of the classes of assets that should be excluded or exempted from insolvent estates.[141] In spite of this, however, the maximum values set in clause 11(6)(a) are unreasonably low. Further, the Commission's proposed new provision, expanding on section 82(6), is open to criticism for not allowing the retention by the insolvent of a motor vehicle as an essential means of transport on the basis that this did not enjoy the support of commentators.[142] The Commission reported that it had received comments which included that: it would "outrage creditors"; it was "unjustified"; it was "unacceptable"; it would reduce the dividend available to concurrent creditors; it would be difficult to draw the line between inexpensive and expensive vehicles; the solvent spouse would usually be in possession of a vehicle;[143] and the provision of a vehicle at the cost of the estate would be an unjustified luxury.[144] Evans submits that the Commission's stance in this regard is indicative of an "approach to assets in the

[137]For criticism of these low values, see Evans 2010 *SA Merc LJ* 477.
[138]See the Explanatory Memorandum par 11.5.
[139]See cl 62(5) and cl 106 of the Draft Insolvency Bill. Evans 2010 *SA Merc LJ* 478 submits that cl 62(4) and cl 62(5) should have been included in clause 11 of the Draft Insolvency Bill, just as the current section 82(6) was transferred into clause 11.
[140]See Evans 2011 *PELJ* 40; Evans *Critical Analysis* 17. See, also 2.2.3, above.
[141]Evans 2011 *PELJ* 40.
[142]The Explanatory Memorandum par 11.6 mentions "creditors". It is submitted that this should read "commentators".
[143]For criticisms of the Commission's approach, in this regard, see Evans 2010 *SA Merc LJ* 477-478.
[144]See the Explanatory Memorandum par 11.6.

insolvent estate, and in respect of exemption law, [which] is totally devoid of any policy consideration."[145]

6.6.3 Considerations relevant to the insolvent's home

The response to the notion of exclusion from the insolvent estate or exemption from sale by the trustee of a motor vehicle which might be an essential means of transport or of earning a living for an insolvent person, gives some idea of the response which a debate around the possible exemption of the insolvent's home might elicit. It may easily be understood what prompted counsel to pose the question, in argument in the Cape Provincial Division in *Jaftha v Schoeman*, in relation to exemptions from execution in the individual debt enforcement process: "Why stop the sheriff from taking the bed but not the bedroom?"[146] A similar question is pertinent in relation to exclusions and exemptions in insolvency: the insolvent is permitted to keep beds for himself and his family, without any consideration being given to whether he will have a shelter in which to place, and to sleep in, them. The irony in this, it is submitted, is inescapable.

Admittedly, the exemption of a person's motor vehicle, as opposed to his home, involves different considerations in insolvency. However, given the relative values, usually, of a person's motor vehicle and his home,[147] one may anticipate that creditors would be averse to any exemption being granted in respect of a person's home. A motor vehicle may be vital in any endeavour by the insolvent to support himself and his dependants and to earn sufficient income to make any meaningful contribution towards satisfying his outstanding debts. In the same vein, although the insolvent's home may be the most valuable asset in the estate, it may be vital to his and his dependants' very existence.[148] As Stander and Horsten point out, in a situation where the insolvent has a duty of support towards his children and other dependants, such support would include

[145]Evans 2010 *SA Merc LJ* 478.
[146]See Ellis "Court wrestles with sales in execution question" *The Mercury* South Africa (3 June 2004) http://www.lrc.org.za/lrc-in-the-news/535-2004-06-03-court-wrestles-with-sales-in-execution-question-the-mercury [date of use 15 March 2012].
[147]Although it may be recognised that some types of motor vehicle have a value that exceeds that of the average person's home and, certainly, the value of what would be viewed as "adequate housing".
[148]See discussion of the right to life, in 3.3.5, above.

the provision of accommodation[149] and, if the insolvent is not in a financial position to provide such support, then the burden will fall on the state. Bearing this in mind, the authors emphasise that it is essential that the insolvent should as soon as possible become economically productive once again.[150] They submit that the Insolvency Act should include a specific provision that a fair and reasonable amount of maintenance must be paid out of the estate by the trustee.[151]

This consideration tends to weigh in favour of allowing some sort of exemption for the home, or at least allowing funds to go towards accommodation of the insolvent and his dependants. However, the main controversy exists where the home of the insolvent has been mortgaged in favour of a creditor. The interests of the mortgagee weigh heavily against the notion of the exemption of the insolvent's home, or a limited portion of the proceeds of its sale, from the insolvent estate, especially in light of the adverse effects which it would have on the economy, generally, if real security rights are not upheld.[152] This may justify different treatment of the insolvent's home depending on whether or not it has been mortgaged as security for the payment of a debt. A possibility might be to allow an exemption of a portion of any equity which a debtor holds in his mortgaged home. Consideration could also be given to allowing a moratorium on the realisation of the home by the trustee, rather than a total exclusion of the home or a portion of the proceeds of its sale.[153]

Exemptions are generally based on policies formulated to reflect the result of weighing up the competing interests of the debtor, the creditors, and society.[154] Exemptions may be based on one or more of the following policies, or designed to fulfil one of the following purposes:[155] to provide the debtor with property necessary for his survival and

[149]Stander and Horsten 2008 *TSAR* 209, 220, referred to at 6.3.2, above.
[150]Stander and Horsten 2008 *TSAR* 207, 220.
[151]Stander and Horsten 2008 *TSAR* 220, 221.
[152]As explained, for instance, in *Standard Bank v Saunderson* pars 1-3. See Boraine, Kruger and Evans "Policy Considerations" 694.
[153]See Evans 2008 *De Jure* 270-271.
[154]See Evans "A brief "; Evans "Does an insolvent debtor have a right to adequate housing?"; Evans *Critical Analysis* 9ff; Van Heerden, Boraine and Steyn "Perspectives" 230ff; Keay 2001 *Comm L World Rev* 206 208.
[155]See Boraine, Kruger and Evans "Policy Considerations" 663-666.

maintenance;[156] to protect the debtor's family from the adverse consequences of impoverishment; to preserve the debtor's dignity; to enable the debtor to rehabilitate himself financially,[157] sometimes referred to as providing the debtor with a "fresh start";[158] to earn income in the future and to make a positive contribution to society; and to avoid the state, or society, from having to bear the burden of providing for the debtor and his family with minimal financial support.[159]

In relation to the last-mentioned policy, it may be noted that, in effect, part of the burden shifts to the creditors because whatever is exempted from the insolvent estate, shrinks the assets available for realisation for the satisfaction of the insolvent person's debts.[160] On the other hand, however, the nature and level of exemptions permitted will logically have a bearing on the generosity of the level of any discharge that the insolvent ultimately obtains.[161] Boraine, Kruger, and Evans explain that exemptions within the context of the law of insolvency must be viewed as the result of a "compact" to which the debtor, his creditors and society are all parties. The diverse values and norms of different societies, which may vary according to time and place, also impact on the notion of discharge and exempt property. The authors state:[162]

> The relief of the discharge will usually not come free and will be based on the debtor making a contribution, not only from the realization of his or her assets but also from his or her future earnings, as can reasonably be made by him or her without reducing him or her and his or her family to undue and socially unacceptable poverty and without depriving him or her of the incentive to succeed in obtaining a fresh start.

Evans has argued convincingly that, in South Africa, insufficient attention has been directed to formulating coherent exemptions policy, both in the individual debt

[156]Stander and Horsten 2008 *TSAR* 207.
[157]Evans 2008 *De Jure* 257; Stander and Horsten 2008 *TSAR* 208.
[158]It is the same notion that forms the basis of permitting an insolvent a discharge from a portion of his debt; see Van Heerden, Boraine and Steyn "Perspectives" 231. See also Stander and Horsten 2008 *TSAR* 207; Evans 2008 *De Jure* 257. See also McKenzie Skene 2005 *Int Insolv Rev* 1-26.
[159]Resnick 1978 *Rutgers L R* 621; Evans 2008 *De Jure* 257; Stander and Horsten 2008 *TSAR* 207 (with reference, *inter alia*, to *Singer NO v Weiss* 1992 (4) SA 362 (T) 367C), 208ff.
[160]McKenzie Skene 2011 *Int Insolv Rev* 29-55; Rajak 2011 *Int Insol Rev* 1-28; Boraine, Kruger and Evans "Policy Considerations" 637.
[161]See Boraine, Kruger and Evans "Policy Considerations" 662, 666.
[162]Boraine, Kruger and Evans "Policy Considerations" 666.

enforcement and insolvency processes.[163] *Grootboom* was decided, and the constitutionality of the forced sale of a debtor's home first became an issue in the individual debt enforcement process, in *Jaftha v Schoeman* and subsequent cases, only after the publication of the South African Law Reform Commission's report on the review of the law of insolvency, in February 2000. Thus, the content of the report is not necessarily an indication that the door is closed for consideration of some sort of exemption or protection for the insolvent's home. On the contrary, the right to have access to adequate housing may yet become a significant constitutional imperative in insolvency law, as it has in other spheres of South African law.

Of course, there are differences in relation to the competing interests that must be weighed up in the individual debt enforcement process and in the sequestration process. In the latter, it is not only the interests of the applicant creditor, or the mortgagee of the home, that must be balanced with those of the debtor but the interests of the general body of creditors. Sequestration may also be regarded as the "last resort", so to speak, for a creditor who seeks satisfaction of a debt. It could be argued that there would be no less restrictive alternative means of satisfying the debt and, therefore, that any infringement of the constitutional rights of the debtor and his dependants would be justifiable. This point was also made by Stander and Horsten.[164] However, it is submitted that one should not lose sight of the fact that, even in a situation where a debtor is technically insolvent, consumer debt relief measures such as administration under section 74 of the Magistrates' Courts Act, or debt review and debt restructuring in terms of the NCA, may present a potential solution to the problem. This might be the case in circumstances where the debtor has a regular income or other means whereby he will be able to service his debt over a longer period.

On the other hand, in circumstances where the insolvent debtor is very poor, with insufficient income, very different factors may be present such as, for instance, his

[163]Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?"; Evans 2010 *SA Merc LJ* 466-468, 483; Evans 2008 *De Jure* 257, 271; Evans *Critical Analysis* 483. See, also, Boraine, Kruger and Evans "Policy Considerations" 663ff.
[164]See Stander and Horsten 2008 *TSAR* 215.

inability to see to the subsistence needs of, and otherwise to maintain, his children and other dependants. This could lead to homelessness, as in *Jaftha v Schoeman*. In such a case, where the insolvent will not be in the financial position to maintain those to whom he owes a duty of support, the burden will fall on the state and, therefore, ultimately on society, as discussed in preceding chapters. It is submitted that one cannot simply ignore, in insolvency law, section 26 of the Constitution, children's rights protected by section 28 of the Constitution and the balancing of interests, which section 36 requires. It is submitted that, to satisfy constitutional imperatives, judicial oversight specifically directed at the housing situation and needs of the insolvent and his family ought to occur during the insolvency process.

Ordinarily, in the sequestration process, judicial oversight takes place only at the point at which a court considers whether to grant the sequestration order. At this stage, the court is more concerned with whether sequestration would be to the advantage of creditors than how it would affect the debtor's and his family's rights of access to adequate housing.[165] At the application stage, a court would probably be able to evaluate with ease whether, in the circumstances, sequestration might constitute an abuse of process. However, it is submitted that, at this stage, not all factors relevant to the effect which sequestration would have on the section 26 and section 28 rights of the insolvent and his family would necessarily be known by, or accessible to, the court. The current position is that, if an insolvent and his family will be rendered homeless by the realisation of their home, their only course of action is to "hold over" until an application is brought, either by the trustee or by the new owner of the property, in terms of PIE for their eviction.[166] This is precisely what happened in *ABSA v Murray*.[167] After the respondents' joint estate was sequestrated,[168] ABSA, the mortgagee of the home, "bought in" at the auction sale[169] held in terms of the Insolvency Act. It subsequently sold the home to a third party. The insolvent spouses and their family remained in their home for almost a year until ABSA, who wished to give possession to the new owner,

[165]This point was also made by Evans in "Does an insolvent debtor have a right to adequate housing?".
[166]The position is discussed at 3.3.1.4 (b), above.
[167]*ABSA v Murray* is discussed at 3.3.1.4, and 6.3.2, above.
[168]On sequestration, see 6.2 and 6.4, above.
[169]On buying in, see 4 3.3, above.

brought an application in terms of section 4 of PIE for their eviction. In the circumstances, the court granted the eviction order but considered it just and equitable to delay the execution of the eviction order for six weeks in order to give the insolvent an opportunity to make alternative arrangements for the family's accommodation.

Thus, as the facts and decision in *ABSA v Murray* indicate, the effect of the applicable provisions of PIE is to provide a measure of protection to an insolvent who has sufficient knowledge of the law and his constitutional rights or who has access to sound legal advice. He must also have the type of disposition which equips him to be prepared to "dig his heels in" by "holding over" against any pressure which might be brought to bear on him to vacate his home, until a court application is brought in terms of PIE for the eviction of him and his dependants. However, it is submitted that this level of protection, if one may call it that, is insufficient and unsatisfactory. The reality, as Mokgoro J noted in *Jaftha v Schoeman*, is that not everyone has the wherewithal to insist on his rights or to avail himself of statutory defences and remedies.[170] As submitted in preceding chapters in relation to the individual debt enforcement process, this impacts on the level of access to justice available to ordinary persons.[171] It is submitted that the insolvent and his family should not be forced to remain in a precarious position for a protracted period. Further, with the purpose of yielding optimal advantage for all concerned, and to obviate any deterioration in condition of the property, it would be preferable for the housing situation of the insolvent and his family to be addressed at the earliest possible stage of the insolvency process.

6.7 Vesting of the property of a spouse

Where spouses are married in community of property, the joint estate is sequestrated. Thus, any home jointly owned by the spouses forms part of the insolvent joint estate and must be sold by the trustee to meet the claims of its creditors. A spouse may own property separately from the joint estate. However, because the spouses are jointly and

[170]See *Jaftha v Schoeman* pars 19, 54; *Gundwana v Steko* par 50.
[171]See 1.1, 3.3.5 and 5.5.4.7.

severally liable for the debts of their joint estate, where the proceeds of the sale of assets of the joint estate are insufficient to meet the claims against it, such separate property may be sold by the trustee to satisfy the claims of creditors of the insolvent joint estate.[172]

Where spouses are married out of community of property,[173] and the estate of one of them is sequestrated, in terms of section 21(1) of the Insolvency Act, all of the property of the solvent spouse also vests in the Master and then the trustee of the insolvent estate, as if it were property of the sequestrated estate.[174] Section 21(13) of the Insolvency Act contains a wide definition of "spouse" which extends the reach of section 21 to a man and a woman who are living together as husband and wife although they are not legally married.[175] Since the enactment of the Civil Union Act 17 of 2006, the definition of "spouse" in the Insolvency Act has by implication been amended to include persons of the same gender who have entered into a civil union.[176]

The Appellate Division held that the effect of section 21(1) is to vest in the trustee ownership of the solvent spouse's property.[177] Section 21(2) and section 21(4) provide grounds upon which the solvent spouse may obtain the release of his or her property, one such ground being that he or she holds such property by a title valid as against the insolvent's creditors.[178] The solvent spouse bears the onus of proving this on a balance

[172] *Badenhorst v Bekker NO en andere* 1994 (2) SA 155 (N); *Du Plessis v Pienaar NO and others* 2003 (1) SA 664 (SCA). Evans 2010 *SA Merc LJ* 470-471 criticises the position and suggests that legislative amendments should counter the unsatisfactory consequences, under the current law, for spouses married in community of property. See, also, Evans 2003 *SA Merc LJ* 228;
[173] Having entered into an antenuptial contract.
[174] On s 21 of the Insolvency Act, and related issues, see Evans 2010 *SA Merc LJ* 481-482; Evans 2010 *SAPL* 689 689-701; Evans *Critical Analysis* Chapter 10, and references cited there; Bertelsmann *et al Mars* Chapter 11; Evans 2004 *Stell LR* 193; Evans 1998 *Stell LR 359;* Evans 1996 *THRHR* 613 and 1997 *THRHR* 71.
[175] See s 21(13) of the Insolvency Act.
[176] See s 13(2)(a)-(b) of the Civil Union Act 17 of 2006. See, also, Evans 2010 *SA Merc LJ* 473-474.
[177] In *De Villiers NO v Delta Cables (Pty) Ltd* 1992 (1) SA 9 (A) 16.
[178] See s 21(2)(c) of the Insolvency Act; s 22 of the Matrimonial Property Act 88 of 1984. For two cases involving application for release of immovable property, although not the homes of the spouses, and entailing the application of s 21 of the Insolvency Act and s 22 of the Matrimonial Property Act 88 of 1984, see *Snyman v Rheeder NO* 1989 (4) SA 496 (T); *Beddy NO v van der Westhuizen* 1999 (3) SA 913 (SCA). See, further, Evans *Critical Analysis* 330-331, 338, 340-354; Evans 2004 *Stell LR* 193; Evans 1998 *Stell LR* 359; Evans 1996 *THRHR* 613 and 1997 *THRHR* 71.

of probabilities. Unreleased assets of the solvent spouse may be sold ultimately by the trustee to satisfy the claims of the creditors of the insolvent estate.[179] It is possible, in terms of section 21(10), for a solvent spouse to obtain an order postponing the vesting of his or her property in terms of section 21(1). This order may be obtained either at the time the sequestration order is granted or thereafter. However, this provision applies only where the spouse is a public trader or if it appears to the court that he or she is likely to suffer serious prejudice through the immediate vesting of the property in the Master or the trustee. In addition, the court must be satisfied that the solvent spouse is willing and able to make arrangements to safeguard the interest of the insolvent estate, including protection against the alienation or fraudulent abandonment of assets by the solvent spouse, or malicious or accidental damage to, or theft of, them.[180]

The main object of section 21 is to prevent the collusive transfer of assets by a debtor to a spouse in order to avoid payment of debts.[181] However, one of the effects of its application is that, even where the sequestration is of the estate of an honest debtor, it imposes an additional burden on a spouse who is married to the insolvent out of community of property. This occurs through the vesting of the solvent spouse's assets – this would include a home registered in the name of the solvent spouse – in the trustee of the insolvent estate and imposing an onus of proof on the spouse in order for him or her to obtain their release. The criticism may be levelled that, instead of burdening the spouse in this situation, one might anticipate the law extending some measure of protection to the spouse, the family and other dependants. Certainly, the position contrasts with legislative provisions found in legal systems in some overseas jurisdictions which afford some form of protection for the home of the spouse and family of an insolvent person.[182] Section 21 has been the object of much criticism on the basis of its draconian effect.[183] However, when its constitutional validity was challenged in

[179]See s 21(5) of the Insolvency Act. See, also, Evans *Critical Analysis* 354-361.
[180]See *Ex parte Vogt* 1936 SWA 39; *Van Schalkwyk v Die Meester* 1975 (2) SA 508 (N).
[181]Sharrock *et al Hockly's Insolvency Law* 71-72; Evans 2010 *SAPL* 700.
[182]Some of these are discussed in Chapter 7, below.
[183]For background on the criticisms, see the Explanatory Memorandum par 22A.1. Criticisms by academic commentators include Joubert 1992 *TSAR* 699; Evans 1996 *THRHR* 613 and 1997 *THRHR* 71. Since the decision in *Harksen v Lane NO* 1998 (1) SA 300 (CC), academics have continued to criticise s 21; see, for example, Jansen van Rensburg and Stander 1998 *TSAR* 334; Boraine and van der Linde 1998 *TSAR*

Harksen v Lane NO,[184] on the basis of an alleged unjustified infringement of the solvent spouse's rights to equality and property rights, the Constitutional Court held that it was not unconstitutional. In spite of this, the South African Law Reform Commission recommended that section 21 should not be re-enacted in any new insolvency statute[185] and, instead, it proposed a provision in the form of clause 22A of the Draft Insolvency Bill.[186]

Clause 22A(1) was proposed to empower a liquidator[187] who suspects that a disposition of property by the insolvent to an "associate"(which includes by definition[188] a spouse[189]) may be liable to be set aside under the applicable insolvency legislation,[190] to instruct the sheriff to attach such property. In terms of clause 22A(2), if the liquidator instructs the sheriff to release the property, then the latter must do so. Clause 22A(3) obliges the liquidator to instruct the sheriff to release property as soon as it is evident that its attachment is not required to safeguard the interests of the estate in the setting aside of a disposition of property. As Evans points out, an aspect which may be viewed as an improvement on section 21 is that, in terms of clause 22A, dispossession of the property would be temporary, as opposed also to entailing a loss of ownership, as is presently the position in terms of section 21. Further, the property of the solvent spouse – this would include a home registered in the name of the spouse – would not form part of the insolvent estate until the liquidator had succeeded in having the disposition set aside by the court. Also, the fact that clause 22A would apply to "associates", a wider range of persons having a specific type of relationship or association with the insolvent, would mean that it would not discriminate specifically against spouses.[191]

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621 and Boraine and van der Linde 1999 *TSAR* 38. See, also, Evans 2000 *SA Merc LJ* 109; Evans, Loubser and van der Linde 1999 *SA Merc LJ* 210 and other journal articles cited in this section.

[184] *Harksen v Lane NO* 1998 (1) SA 300 (CC).

[185] See the Explanatory Memorandum par 22A.1-22A.12. See further Evans 2010 *SA Merc LJ* 482; Evans *Critical Analysis* 361-362, 389-412.

[186] See Evans 2010 *SA Merc LJ* 482; Evans *Critical Analysis* 451-452.

[187] This was the term proposed to replace the term "trustee".

[188] An "associate" is defined to include, *inter alia*, a spouse of the insolvent; see s 1 of the Draft Insolvency Bill.

[189] A spouse is widely defined, as it is in s 21(13) of the Insolvency Act; see s 1 of the Draft Insolvency Bill.

[190] See clauses 18-21 of the Draft Insolvency Bill in relation to suggested provisions regarding dispositions which may be set aside as dispositions without value, voidable preferences and collusive dealings.

[191] Evans 2010 *SA Merc LJ* 482; Evans *Critical Analysis* 451-452.

However, Evans submits that clause 22A may also be viewed as more drastic than section 21 in that the liquidator would have seemingly "unfettered powers to dispossess an associate of his or her property" while the latter would have no rights to its release, as is presently the position by virtue of section 21(2) and section 21(4). Further, no provision is made for the postponement of vesting such as occurs in the current section 21(10). Evans also points out that clause 22A makes no provision for the protection of the solvent spouse's separate creditors, as does the current section 21(5). He submits that section 22A "may fail constitutional scrutiny".[192] He also expresses concern that, in light of the proposed clause 22A, "it is doubtful whether policies in respect of issues such as housing and rights of the child, old, ill and disabled will even be considered."[193]

It may be noted that section 25 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill[194] contains the same, although slightly differently arranged, provisions as clause 22A of the South African Law Reform Commission's Draft Insolvency Bill of 2000. It is hoped that, in light of the published comments and criticisms, notably by Evans, that the proposals in this regard will be reconsidered. It is also submitted that, when the content of these proposed provisions is being reconsidered, specific attention ought to be directed at their interrelatedness with other areas of law including, but not confined to, insolvency and consumer debt law. Consideration also needs to be given to the impact that they might have on the section 26 and section 28 rights of the insolvent, his family and other dependants. As Evans has argued consistently, any new insolvency legislation which is enacted should reflect properly formulated policies which conform to constitutional imperatives and respond to the needs and values of modern society.[195] They should also promote the spirit, purport and objects of the Constitution which would entail considered reflection on pertinent issues, some of which are presented in this and preceding chapters. It is submitted that, if appropriate legislative amendments are not brought about, we may well find that the

[192]Evans 2010 *SA Merc LJ* 482.
[193]Evans *Critical Analysis* 429; Boraine, Kruger and Evans "Policy Considerations" 696.
[194]See 4.4.3.6, above.
[195]See, generally, Evans *Critical Analysis*.

Constitutional Court will be called upon to revisit its decision in *Harksen v Lane* that section 21 is not unconstitutional – this time, with an unjustifiable infringement of section 26 of the Constitution as the basis for the challenge.

6.8 Realisation of estate assets

The trustee is under a duty to realise the estate assets for the benefit of creditors and must do so in the manner, and upon the conditions, directed by creditors at the second meeting of creditors. If, by the close of the second meeting, the creditors have not given any directions, the trustee must sell the property by public auction or public tender.[196] This applies also to immovable property held as security.[197] Where immovable property which is subject to a mortgage bond is also subject to the right of a lessee under the *huur gaat voor koop* rule, the trustee must first attempt to sell the property subject to the lease. If the proceeds of the sale would be sufficient to satisfy the claim of the mortgagee, the property must be sold subject to the lease. If the property cannot be sold for a price sufficient to satisfy the mortgagee's claim, it may be sold free of the lease.[198] Instead of realising the property, the trustee may, if the creditors authorise it, abandon the property to the secured creditor, as payment in kind to discharge his claim against the insolvent estate,[199] or take the property over at a value placed on it by the creditor when his claim was proved.[200]

The trustee is also obliged to realise any assets of the solvent spouse which vested in him, and which he has not released.[201] However, he must do so in accordance with the provisions of section 21 of the Insolvency Act. In terms of section 21(3) he may only realise assets which "ostensibly belonged" to the solvent spouse on six weeks' notice to

[196]S 82(1) of the Insolvency Act. See Sharrock *et al Hockly's Insolvency Law* 160.
[197]Sharrock *et al Hockly's Insolvency Law* 165.
[198]*Timm v Kay & Another* 1954 (4) SA 585 (T); see Sharrock *et al Hockly's Insolvency Law* 165.
[199]*United Building Society Ltd & Another NO v Du Plessis* 1990 (3) SA 75 (W) 80 81; see Sharrock *et al Hockly's Insolvency Law* 166.
[200]See s 83(11) of the Insolvency Act. In the latter situation, the trustee must take the property over within three months of his appointment, or the date on which the claim was proved, whichever is the later. See Sharrock *et al Hockly's Insolvency Law* 166.
[201]Either in terms of s 21(2) or s 21(4) of the Insolvency Act.

the latter of his intention to do so. "Ostensibly belonged"[202] includes property registered in the name of the solvent spouse and which has not been released by the trustee.[203] The spouse of an insolvent may not acquire an estate asset unless the acquisition is confirmed by the court.[204] Thus a spouse would have to obtain court approval if, in order to remain in their home, she wished to purchase it from the insolvent estate using her own money.

It is submitted that consideration should be given to introducing a statutory provision explicitly allowing a court to postpone the realisation of an insolvent debtor's home in appropriate circumstances. This would be, for example, where a period of grace might enable a family member to purchase or refinance the property or where a delay will allow the insolvent to make suitable accommodation arrangements for himself and his family, especially taking into account their personal circumstances including their age and state of health.[205]

6.9 Rehabilitation and discharge from pre-sequestration debts

The main objective of sequestration, as stated above,[206] is to achieve the orderly and equitable distribution of an insolvent debtor's assets. Therefore, as Van Heerden and Boraine explain, the "legal machinery that comes into operation" upon sequestration of an insolvent debtor's estate is designed to ensure that all of the debtor's assets "are liquidated and distributed amongst the creditors in accordance with a predetermined (and fair) order of preference."[207] While the overriding policy behind the Insolvency Act is geared towards achieving the greatest advantage for creditors, the sequestration of a debtor's estate also brings some benefits, albeit indirect, for the debtor. This is because after the legal machinery has done its work, that is, after liquidation, administration, and distribution of the proceeds of the sale of the assets in the insolvent estate by the

[202]Which is not defined in the Insolvency Act.
[203]*Constandinou v Lipkie NO* 1958 (2) SA 122 (O); see also Sharrock *et al Hockly's Insolvency Law* 166.
[204]S 82(7) of the Insolvency Act. See Sharrock *et al Hockly's Insolvency Law* 161.
[205]See Evans 2008 *De Jure* 270-271.
[206]See 6.2, above.
[207]Van Heerden and Boraine 2009 *PELJ* 43.

trustee, rehabilitation puts an end to the sequestration of his estate, upon which the debtor regains his solvent status and he is discharged from unsatisfied pre-sequestration debts.[208] Therefore, in this sense, sequestration in terms of the Insolvency Act may be regarded as a consumer debt relief mechanism.[209]

Rehabilitation may occur automatically after the lapse of ten years since the date of sequestration[210] or earlier by an order of the high court upon application by the insolvent in terms of the Insolvency Act.[211] The discharge from pre-sequestration debt, which is an effect of rehabilitation, distinguishes the insolvency process from other debt relief processes which are available to debtors in South Africa such as administration in terms of section 74 of the Magistrates' Courts Act and debt review and debt restructuring in terms of the NCA. In view of the discharge from liability for pre-sequestration debt which a declaration of insolvency ultimately affords a debtor, it may be understood why a heavily over-indebted person might prefer his estate to be sequestrated in terms of the Insolvency Act rather than applying for debt review and debt restructuring under the NCA. However, in such a situation, the debtor may also be viewed as trying to avoid the responsibility of fulfilling his obligations and satisfying his debts. Creditors might well be better off if sequestration did not occur but that the debtor's obligations were restructured in terms of the NCA. This issue was considered in *Ex parte Ford*, which will be discussed below.[212]

On the other hand, it has already been mentioned how, in certain situations, a mortgagee might prefer to obtain an order for the sequestration of the debtor's estate in order to avoid the requirements of, and restrictions imposed by, the NCA for, or in, enforcement of the terms of the mortgage bond.[213] For example, in *FirstRand Bank v Evans*, which will be discussed below,[214] the mortgagee of the debtor's home sought an order for the sequestration of his estate in spite of the fact that the debtor had applied

[208]See Sharrock et al *Hockly's Insolvency Law* 192ff.
[209]Van Heerden and Boraine 2009 *PELJ* 43.
[210]S 127A(1) of the Insolvency Act; see, also, Sharrock *et al Hockly's Insolvency Law* 192.
[211]See s 124 of the Insolvency Act.
[212]See 6.10.4, below.
[213]See 4.5.4, above.
[214]See 6.10.3, below. The case is also mentioned at 4.7.3, above.

for debt review and had obtained a debt restructuring order issued under the NCA. The creditor alleged that the monthly payments due, according to the debt restructuring order, did not even cover the interest payable, according to the terms of their original agreement. On the other hand, the debtor was strongly opposed to sequestration and insisted that he should be able to continue paying monthly payments in terms of the debt restructuring order. He preferred to do this in spite of the fact that it meant that he would not obtain any discharge from liability but would have to satisfy the debt in full, with additional interest ultimately having to be paid, given the longer repayment terms and reduced monthly instalments. Thus, considering the various debt relief options available, interesting issues may be observed as arising from the interaction between the statutory provisions which provide for, and regulate, insolvency, on the one hand, and debt relief and debt restructuring, on the other.

6.10 Interaction between the Insolvency Act and the NCA

6.10.1 Background

In preceding chapters, some consideration was given to the extent to which, in specific circumstances, the provisions of the NCA might provide relief for a mortgagor where, upon his default, the mortgagee seeks judgment and a court order declaring the mortgaged home of the debtor specially executable. The question raised concerned the extent to which a debtor could rely on debt review and debt restructuring to avoid the forced sale of his home. It was submitted, in light of the lack of clarity surrounding the application of certain sections of the NCA, that it would have minimal impact in this sphere, in practice.[215] A similar question may be posed in relation to the provisions of the NCA and the insolvency process. To what extent might recourse to debt review and debt restructuring and, possibly, the declaration of invalidity of certain obligations arising out of reckless lending, thwart an application for the sequestration of a debtor's estate

[215]See 4.5.5 and 5.5.5, above.

thus effectively preventing the sale of the debtor's home as part of the ensuing liquidation process?[216]

It may be noted that section 2(7) of the NCA provides that, except as specifically set out in, or necessarily implied by, the NCA, its provisions are not to be construed as limiting, amending, repealing, or otherwise altering any provision of any other Act. There is no specific reference to the Insolvency Act, in the NCA's Schedule 1, which sets out rules regarding conflicting legislation.[217] Thus, it may be concluded that the legislative intention was not that the NCA would prevail in the event of any conflict between the NCA and the Insolvency Act. From a practical perspective, bearing in mind that the NCA applies only to credit agreements and that a debtor might very well also have debts which do not fall under the NCA, there are limitations to the potential scope for the provisions of the NCA to prevail over the provisions of the Insolvency Act.[218] Further, the estate of a debtor who is under administration in terms of section 74 of the Magistrates' Courts Act, may be sequestrated in terms of the Insolvency Act.[219] Thus, there seems to be no reason, in principle, why the position would be any different in relation to the estate of a debtor who is subject to debt review, or who has had his debt restructured, in terms of the NCA.[220] The position has been clarified in the judgments, in *Investec v Mutemeri* and *Naidoo v ABSA Bank Ltd*. Cases that are more recent are *Nedbank v Andrews* and *FirstRand Bank v Evans*.[221] As may be seen from the judgments, the effect of the provisions of the NCA has extensive implications for the debtor as far as the vulnerability of his estate to sequestration is concerned.

[216]For a comprehensive airing, and analysis, of issues surrounding the interaction between the NCA and the Insolvency Act, see Van Heerden and Boraine 2009 *PELJ* 22; Boraine and Van Heerden 2010 *PELJ* 84.
[217]The only reference, in the NCA, to the Insolvency Act, is in Schedule 2, in relation to the amendment to s 84 of the Insolvency Act to cater for changes occasioned by the repeal of the Credit Agreements Act 75 of 1980 and the enactment of the NCA. See Van Heerden and Boraine 2009 *PELJ* 36.
[218]See Van Heerden and Boraine 2009 *PELJ* 38-39.
[219]This was pointed out by Van Heerden and Boraine 2009 *PELJ* 37-38. See s 74R of the Magistrates' Courts Act 32 of 1944.
[220]Van Heerden and Boraine 2009 *PELJ* 39-40. Cf remarks by Otto and Otto *National Credit Act* 104.
[221]Discussed at 4.7.3 and 6.4.2, above.

6.10.2 Debt review does not preclude sequestration: Investec v Mutemeri

In *Investec v Mutemeri*, the respondents had applied for debt review in terms of the NCA. Their debt counsellor found them to be over-indebted and on 15 May 2009 launched an application to the magistrate's court for restructuring of their debt in terms of sections 86 and 87 of the NCA.[222] The matter was enrolled for hearing on 11 August 2010, almost fifteen months later. The delay was due to the backlog of debt restructuring applications brought in terms of the NCA. While the respondents were waiting for the court date, the applicants, alleging that the former had committed various acts of insolvency in terms of section 8(g) of the Insolvency Act and, by inference, that their liabilities exceeded their assets, brought an application for the compulsory sequestration of their joint estate.[223] The application for sequestration was set down for hearing in the high court on 25 August 2009, almost a year before the debt restructuring hearing was scheduled to be heard in the magistrate's court. The respondents opposed the application for sequestration of their estate. They did not dispute that they were indebted to the two applicant creditors in respect of a number of credit agreements,[224] including mortgage bonds passed over their immovable properties. However, they contended that sequestration amounted to the "enforcement" of a debt and that, in the circumstances, the creditors were barred by section 88(3) of the NCA[225] from applying for the sequestration of their estate while they awaited the court date for their debt restructuring hearing.

In terms of section 88(3) of the NCA, a credit provider may not exercise or enforce by litigation or any other judicial process any right or security under that agreement once such credit provider has received a notice from a debt counsellor of an application for debt review. The court, *per* Trengove AJ, observed that a sequestrating creditor's motive in applying for the sequestration of its debtor is often to obtain payment of its

[222] *Investec v Mutemeri* par 2.
[223] The court found that the respondents, having been married in Zimbabwe, impliedly admitted that they were married in community of property; see *Investec v Mutemeri* par 7.
[224] Although there was some dispute about the total amount outstanding; see *Investec v Mutemeri* pars 8-10.
[225] The respondents relied, in their defence, on ss 130(1) and 88(3) of the NCA, discussed at 4.5.2 and 4.5.4, above. See *Investec v Mutemeri* pars 2, 28.

debt.[226] However, the court stated that whether an application for sequestration amounts to an application "for an order to enforce a credit agreement"[227] depends not on the applicant creditor's underlying motive but on the nature of the relief.[228] The court concluded[229] that "the purpose and effect [of an application for sequestration] are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally."[230] Therefore, in the circumstances, the court held that, by applying for compulsory sequestration of the respondents' estate, the creditors were not trying to enforce the credit agreements[231] and thus the application for sequestration was not barred by section 88(3) of the NCA.[232] The respondents had stated under oath, in their application for debt review in terms of section 86 of the NCA, that they had assets of only R4 million and liabilities of R17,8 million. Considering this, the court concluded that they were "hopelessly insolvent".[233] Having found that the requirements of section 10 of the Insolvency Act had been met, the court issued an order for the provisional sequestration of the respondents' estate.[234]

Boraine and Van Heerden agreed with the finding of the court that sequestration does not amount to the enforcement of a debt, not only for the reasons given in the judgment, but also, *inter alia*,[235] on the basis that a successful application for compulsory sequestration "does not result in a civil judgment and does not convert the credit provider into a judgment creditor."[236] The authors submitted that sequestration should be viewed as a mechanism, *sui generis*, which sets a collective procedure in motion aimed at administering an insolvent estate on behalf of the insolvent's creditors in order

[226] *Investec v Mutemeri* par 27, with reference to *Estate Logie v Priest* 1926 AD 312 319.
[227] Within the meaning of s 130(1) of the NCA, discussed at 4.5.2, above.
[228] *Investec v Mutemeri* par 28.
[229] With reference to *Investec v Mutemeri* pars 29-30, *Collett v Priest* 1931 AD 290 and *Prudential Shippers SA Ltd v Tempest Clothing Co (Pty) Ltd and Others* 1976 (2) SA 856 (W).
[230] *Investec v Mutemeri* par 31.
[231] And is thus not subject to the requirements of s 130(1) of the NCA; see *Investec v Mutemeri* par 31.
[232] *Investec v Mutemeri* par 34.
[233] *Investec v Mutemeri* pars 11-12.
[234] *Investec v Mutemeri* par 43.
[235] See additional reasons discussed by Boraine and Van Heerden 2010 *PELJ* 84 109-111.
[236] Boraine and Van Heerden 2010 *PELJ* 109.

to achieve an equitable distribution of the insolvent's assets.[237] It may be noted that the approach of the court in *Investec v Mutemeri* accords with earlier reported decisions[238] and academic opinions expressed elsewhere.[239] The Supreme Court of Appeal approved the reasoning behind the decision in *Naidoo v ABSA*. In *FirstRand Bank v Evans*, the court applied the same rationale and found that the NCA did not preclude a creditor from bringing an application for the sequestration of the debtor's estate.[240] The court, *per* Wallis J, pointed out that this conclusion avoids what would otherwise be an anomalous situation if the NCA precluded a credit provider from applying for the sequestration of the debtor while other creditors, who were not subject to the NCA, could do so.[241] However, the court went further, in *FirstRand Bank v Evans*, by finding that the debtor had committed an act of insolvency in terms of section 8(g) of the Insolvency Act through the process of debt review and debt rearrangement in terms of the NCA. This, and another issue, being the discretion of the court to grant or refuse an application for sequestration, which emerge from the judgment, merit consideration.

6.10.3 Application for debt review as an act of insolvency: FirstRand Bank v Evans

6.10.3.1 Facts and issues

FirstRand Bank v Evans concerned an application for the provisional sequestration of the estate of Evans. The bank alleged that he was indebted to it in an amount in excess of R2 million, obtained as a loan secured by two mortgage bonds passed over his home, as well as an amount in the region of R800 000, obtained as a commercial loan secured by a mortgage bond passed over another immovable property, a sectional title unit. FirstRand Bank relied on the commission by Evans of an act of insolvency in terms of section 8(g) of the Insolvency Act by giving written notice of an inability to pay his debts and, alternatively, that he was factually insolvent. According to the judgment,

[237] Boraine and Van Heerden 2010 *PELJ* 84, 111.
[238] See *WP Koöperatief Bpk v Louw* 1995 (4) SA 4 (O); *Samsudin v De Villiers Berrange NO* [2006] SCA 79 (RSA) par 19 citing with approval *Ex Parte B Z Stegmann* 1902 TS 40 47.
[239] See Otto and Otto *National Credit Act* 103-104; Van Heerden and Boraine 2009 *PELJ* 39-41; Sharrock *et al Hockly's Insolvency Law* 5.
[240] *FirstRand Bank v Evans* pars 23-25.
[241] *FirstRand Bank v Evans* par 25.

Evans had applied for debt review in terms of section 86 of the NCA, on 29 January 2009, and the bank was advised of this.[242] He addressed a letter to the bank, on 17 April 2009, informing it that: its records should show that he was under debt review; the mortgage bond repayment was being renegotiated and would be administered through the courts; and he was terminating the debit order against his bank account for the monthly instalment in respect of the commercial loan. The bank relied on this letter as constituting an act of insolvency.

On 18 May 2009, FirstRand Bank issued notice that it was terminating the debt review in terms of section 86(10) of the NCA.[243] On 16 July 2009, it issued summons against Evans for payment of an amount slightly in excess of R2 million, payment of which was secured by the two mortgage bonds over his home. The bank obtained default judgment and, presumably, an order declaring executable the immovable property constituting the home of Evans,[244] on 18 August 2009. Evans first heard of this when, on 12 March 2010, the sheriff served a notice of attachment at his residence informing him that a sale in execution of his home would take place on 28 May 2010.[245] It transpired that the summons had been served at the incorrect address. On 8 April 2010, the bank initiated the application for the sequestration of Evans' estate, based on both the judgment and an alleged amount of R841 940 owing in respect of their loan agreement. The court noted that the sequestration application made no mention of the attachment order or the sale in execution.[246]

Evans opposed the application for the sequestration of his estate. He furnished further information to the court, including the following. An application for the rearrangement of Evans' debt had been issued in the Durban Magistrate's Court on 3 July 2009 and an

[242] *FirstRand Bank v Evans* par 3.
[243] It should be borne in mind that this occurred prior to the decision of the Supreme Court of Appeal, in *Collett v FirstRand Bank*, discussed at 4.5.4, above, in which the effect of termination of debt review was settled.
[244] This is not specifically stated in the judgment.
[245] *FirstRand Bank v Evans* par 4.
[246] *FirstRand Bank v Evans* par 5.

order was made on 24 July 2009.[247] Evans provided details of regular monthly payments, from 28 August 2009 to 29 April 2010, in compliance with the debt rearrangement order, in respect of the two mortgage bonds and the loan agreement. In a letter to the bank's attorneys, Evans' attorneys had stated: "We cannot understand your client's persistence in prosecuting its claim against our client. In this regard we also refer to the ill-conceived sequestration application …".[248] Thereafter, Evans' attorneys had launched an urgent application to stay the sale in execution and to seek rescission of judgment and they filed an opposing affidavit in the sequestration application. The bank, in a replying affidavit, contended that the NCA was not a bar to an application for sequestration of the estate of the debtor and that, in any event, it had terminated the debt review. The bank also made the point that the amounts payable to it in terms of the debt rearrangement order were insufficient to service the loans as the amount of interest, due monthly, exceeded by about R4 000 the amount payable in terms of the order. The court noted that discrepancies in the figures presented by Evans, in relation to his income and expenditure, were impossible to reconcile.[249]

In October 2010, Evans informed the bank that he had sold the sectional title unit for an amount of R800 000 in excess of the value attributed to it by the bank.[250] By the time that the sequestration application was heard in February 2011, the default judgment had been rescinded by consent,[251] the sectional title property had been transferred to the purchaser, the mortgage bond passed over it having been cancelled, and the proceeds of the sale – an amount of R1 260 208,64 – had been paid to the bank. The proceeds had fully discharged the amount which had been owed to the bank in respect of the commercial loan agreement and the excess had been credited to Evans' loan

[247]This is the way in which it is expressed in the judgment, at par 6. It is not clear, it is submitted, what is meant when it is stated that an application for the rearrangement of debt was "issued" in the magistrate's court. Perhaps this means that it had taken from 29 January 2009 until 3 July 2009 for the debt review application to be enrolled in the magistrate's court? In relation to the debt rearrangement order, see also pars 10, 33, 34, 36, and 37. It may be noted, although the judgment is not clear on the details concerning it, that the court doubted the existence and validity of the debt rearrangement order. This point is discussed further, below.
[248]*FirstRand Bank v Evans* par 6.
[249]*FirstRand Bank v Evans* par 7.
[250]*FirstRand Bank v Evans* par 8.
[251]*FirstRand Bank v Evans* pars 6, 9.

indebtedness which was secured by the two mortgage bonds over his home. Although there was some dispute concerning the amount which ought to have been credited to his account, FirstRand Bank did not challenge Evans' claim that, in the circumstances, he could repay the interest and capital within less than the sixteen years that remained of the original 20-year term of the mortgage bond.[252] In spite of this, FirstRand Bank persisted in its application for the sequestration of his estate. It was argued on behalf of Evans that the NCA precluded such an application. Applying the reasoning in the decisions in *Investec v Mutemeri* and *Naidoo v ABSA*, the court rejected this argument. It was also contended on behalf of Evans that his letter did not constitute an act of insolvency but that, failing the acceptance of this argument by the court, it should exercise its discretion in favour of Evans to refuse to grant the order.[253]

6.10.3.2 The decision

The court, *per* Wallis J, stated at the outset that the purpose of a debtor applying for debt review in terms of section 86(1) of the NCA is always to obtain a declaration that he is over-indebted. Therefore, the court reasoned, "a debtor who informs his creditor that he has applied for, or is under, debt review is necessarily informing the creditor that he is over-indebted and unable to pay his debts."[254] The court considered the lapse of a period of almost a year between the date on which the letter was sent to the creditor and the date on which the application for sequestration was brought. It decided that the appropriate time for determining whether the reasonable person in the position of the creditor would have construed the letter as a notice of inability to pay, was when the letter was received. This was because "the question is what it means to the recipient at the time of its receipt."[255]

Wallis J viewed the most pertinent fact known to the bank at the time when it received the letter to be that Evans "was significantly in default of his obligation under both the

[252] *FirstRand Bank v Evans* par 10.
[253] *FirstRand Bank v Evans* par 11.
[254] *FirstRand Bank v Evans* par 13.
[255] *FirstRand Bank v Evans* par 15, with reference to *Optima Fertilizers (Pty) Ltd v Turner* 1968 (4) SA 29 (D), Meskin *Insolvency Law* par 2.1.2.7, and *Chenille Industries v Vorster* 1953 (2) SA 691 (O) 696 D-E.

bonds and the loan agreement." He reasoned that the bank, clearly familiar with the provisions of the NCA, would have construed the letter as unequivocally conveying to it that he was unable to repay the amounts borrowed in accordance with his contractual undertakings.[256] The court regarded such a construction as having been reinforced by the fact that Evans was in arrears with his payments and was cancelling a debit order by means of which he was supposed to be meeting his obligations arising from the loan agreement. The court concluded that Evans was "unequivocally conveying to … [the bank] that he was at that time unable to pay his debts".[257] Wallis J took into account the fact that the position is the same in relation to applications for administration orders in terms of section 74 of the Magistrates' Courts Act.[258] He stated that an application for debt review under the NCA, as opposed to any other type of request for debt rearrangement, did not change the fact that the letter was a notice of inability to pay debts.[259]

The main contention put forward on behalf of Evans was that the NCA precluded an application by FirstRand Bank for the sequestration of Evans' estate.[260] Counsel for Evans submitted that the effect of a debt rearrangement order is to alter the debtor's contractual obligation to the creditor, so that Evans was obliged to pay only a reduced sum, every month, in discharge of his indebtedness in terms of the mortgage bonds, and not the amount originally agreed upon.[261] However, the court did not regard a debt rearrangement order as altering the contractual obligation between the parties but as merely precluding the creditor from pursuing its contractual rights for as long as the debtor complies with the debt rearrangement order. Wallis J pointed out that, if the debtor does not comply with the debt rearrangement order, the creditor is not restricted to claiming remedies on the basis of "an amended contract". Instead, the bar, or "moratorium",[262] on exercising or enforcing by litigation or other judicial process any

[256] *FirstRand Bank v Evans* par 16.
[257] *FirstRand Bank v Evans* par 18.
[258] *FirstRand Bank v Evans* par 21, with reference to *Madari v Cassim* 1950 (2) SA 35 (D).
[259] *FirstRand Bank v Evans* par 22.
[260] See *FirstRand Bank v Evans* pars 23-25.
[261] *FirstRand Bank v Evans* pars 34, 35.
[262] *FirstRand Bank v Evans* par 35.

right or security under the credit agreement, is removed and the creditor is entitled to pursue in full its contractual remedies according to the terms of their original agreement.

However, the court stated that, once it is recognised that an application for sequestration does not constitute the enforcement of a credit agreement, it must follow that any moratorium to claiming payment under the credit agreement is not a bar to the grant of a sequestration order. According to this reasoning, the fact that a debt rearrangement order has been issued by the magistrate's court does not necessarily affect the situation.[263] An important consideration, in the view of Wallis J, was that, to hold "that the NCA operates to preclude credit providers from sequestrating the estates of their debtors, but does not prevent other creditors from doing so", would give rise to the anomalous position that credit providers would be placed in "a class of creditor excluded from invoking the mechanisms of the Insolvency Act".[264]

In the circumstances, the court decided that all of the requirements, contained in the Insolvency Act for the granting of a provisional sequestration order, had been met. In this regard, it stated that the bank had a liquidated claim against Evans for more than R100, Evans had committed an act of insolvency in terms of section 8(g) and sequestration would be to the advantage of creditors as the realisation of Evans' assets would result in a not negligible dividend for creditors. The court stated that there were also matters that could properly be investigated by a trustee, including, in view of discrepancies in the figures furnished by Evans, the source and amount of his income, the identity of his employer (whom the court suspected might be his 17 year old son), and the nature of his current business activities. All that remained, therefore, was for the court to consider whether it ought to exercise its discretion against granting a provisional sequestration order.[265]

Wallis J stated that he was unable to find much authority on how this discretion should be exercised. He noted that this might be an indication of how unusual it is for courts to

[263] *FirstRand Bank v Evans* par 35.
[264] *FirstRand Bank v Evans* par 25. Boraine and Van Heerden 2010 *PELJ* 118 also identified this anomaly.
[265] *FirstRand Bank v Evans* par 26.

exercise their discretion in favour of a debtor once all of the requirements had been established on a *prima facie* basis. He regarded the position as being that, in the absence of special, or unusual, circumstances, which the respondent must establish, the court should ordinarily grant the provisional sequestration order. In this regard, Evans relied on: the lapse of almost a year between the date on which the letter was sent and the date on which the application for sequestration was brought; his compliance with the debt rearrangement order between August 2009 and April 2010 in the course of which he reduced his indebtedness to the bank by R200 000; and the improvement in his overall financial position by reason of the sale of one of the mortgaged properties.

The court dismissed the argument that the lapse of time was material to the proper use of its discretion because it did not regard it as a clear case of an improvement in the debtor's financial position which would render the act of insolvency "stale".[266] On the contrary, the court expressed the view that it was clear, and "hardly surprising", why the bank brought the application for sequestration when it did. As the court saw it, the bank was confronted by the prospect of protracted litigation in respect of the default judgment which it had obtained against Evans. Further, Evans' indebtedness to it was mounting, with the payments which he was making in terms of the debt rearrangement order not even covering the interest charged in terms of the original agreement. It had therefore chosen to have recourse to sequestration proceedings. The court was also dismissive of Evans' anticipation of discharging his indebtedness to the bank as "overly optimistic"[267] and based on "a highly speculative assumption" about the improvement of his financial position.[268] The court was also apparently sceptical about whether Evans had engaged in full and frank disclosure to it about his financial circumstances.[269] Finally, on this point, Wallis J quoted the *dictum* of Innes CJ in *De Waard v Andrew &Thienhaus Limited*,[270] which included the statement: "Now, when a man commits an

[266] *FirstRand Bank v Evans* pars 30, 32.
[267] *FirstRand Bank v Evans* par 31.
[268] *FirstRand Bank v Evans* par 30.
[269] *FirstRand Bank v Evans* par 31.
[270] *De Waard v Andrew & Thienhaus Limited* 1907 TS 727.

act of insolvency he must expect his estate to be sequestrated. The matter is not sprung on him … ".[271]

However, Wallis J did accept that, in a clear case, where the debts have been rearranged by way of an order in terms of section 87 of the NCA and where it is apparent that this will result in the debts being discharged within a reasonable time, this would constitute a powerful reason for the court to exercise its discretion against the grant of a sequestration order.[272] In the circumstances, however, the court did not regard the matter before it as being such "a clear case" because it doubted the existence and validity of the debt rearrangement order.[273] Another factor that weighed against the exercise of the court's discretion in favour of Evans was that, in its view, the debt rearrangement order purported to extend his indebtedness to the bank far beyond the terms of the original agreements.[274] Wallis J also considered the submission made on behalf of Evans that he was in possession of sufficient income to pay his outstanding indebtedness to the bank in the ordinary course, by way of monthly instalments on a loan on conventional terms. Wallis J remarked that, if this was indeed the position, then there should be no reason why Evans could not either apply for reinstatement of his loan from the bank or obtain a loan from another financial institution. Wallis J suspected that he had not done this because his financial position was not as good as had been portrayed by counsel on his behalf. In the result, the court declined to exercise its discretion in favour of Evans, the respondent, and it granted an order for the provisional sequestration of his estate.[275]

[271] *FirstRand Bank v Evans* par 33, with reference to *De Waard v Andrew & Thienhaus Limited* 1907 TS 727 733.
[272] *FirstRand Bank v Evans* par 36.
[273] *FirstRand Bank v Evans* pars 35, 36. This aspect of the decision is discussed at 4.3, below.
[274] *FirstRand Bank v Evans* pars 38, 39.
[275] *FirstRand Bank v Evans* par 42.

6.10.3.3 Comments

The fact that the mortgaged property was Evans' home was never raised as an issue,[276] presumably because, apparently, he was sufficiently wealthy to afford alternative accommodation once the realisation of his home took place in the sequestration process. Nevertheless, it is submitted that, in principle, the fact that sequestration would result in the loss of his home ought to have been considered. Indeed, this judgment provides an ideal example of the lack of any consideration given to the home of a debtor in the course of sequestration proceedings.

Although it is correct that sequestration proceedings do not constitute enforcement of a debt, as was held in *Investec v Mutemeri* and *Naidoo v ABSA*, the court, in *FirstRand Bank v Evans*, extended the rationale behind those decisions to a novel situation, or sphere, hitherto not addressed by the courts. This is the situation where an application for debt review in terms of the NCA constitutes an act of insolvency for the purposes of the Insolvency Act. Further, the position was different, in *Investec v Mutemeri* and *Naidoo v ABSA*, in that those cases concerned situations where the debtor had applied for debt review, but not where a debt rearrangement order had already been issued by the magistrate's court.

In *FirstRand Bank v Evans*, the bank claimed that they had terminated the debt review in terms of section 86(10) of the NCA. On the other hand, Evans claimed that a debt rearrangement order had been issued by the magistrate's court and that he had complied with its terms by making regular payments to the bank in accordance with it. Wallis J doubted the existence and validity of the debt rearrangement order but adopted the approach that, in any event, the existence of a debt rearrangement order did not affect the situation because the NCA did not preclude an application for sequestration of the debtor's estate.[277] Unfortunately, it is submitted, the judgment does not make it clear

[276] Although, it may be noted, this fact was mentioned in counsel for the respondent's heads of argument (a copy of which is on file with the author), presented on the return day. The hearing took place on 26 August 2011.
[277] *FirstRand Bank v Evans* par 35.

what the reason might have been for its existence and validity being open to doubt[278] nor what the issue surrounding "the provisional debt re-arrangement order", as the court referred to it,[279] entailed. How it came about that a rule *nisi* was issued by the magistrate's court is not explained. Nor is the reference by the court to "the impact of the order for a stay of operation of the debt re-arrangement order".[280] It is submitted that clarity on the facts surrounding this issue would have been useful in order better to understand the court's justification for not exercising its discretion in favour of the debtor, in the circumstances, to dismiss the application for the sequestration order.

Wallis J referred to "protestations" by Evans' counsel that the effect of the court's approach would be that any debtor who informs his creditors that he has applied for debt review, or that he is in the process of debt review, commits an act of insolvency.[281] In response to this, with reference to the judgment of Caney AJ in *Madari v Cassim*,[282] Wallis J pointed out that a debtor who applied for an administration order in terms of section 74 of the Magistrates' Courts Act was in precisely that situation. However, it may be noted that, in *Madari v Cassim*, the situation was not exactly the same in that the debtor had applied for an administration order but it had not yet been granted. Therefore, when the creditor applied for the sequestration of the debtor's estate, the latter's obligations had not yet been restructured by a court order. Further, in *Madari v Cassim*, it was common cause that the respondent had committed an act of insolvency in terms of section 8(g) of the Insolvency Act by applying for an administration order in terms of section 74 of the Magistrates' Courts Act. In *Madari v Cassim*, the court discharged the provisional order of sequestration on the basis that advantage to creditors had not been shown, but also stated:[283]

[278] *FirstRand Bank v Evans* par 37.
[279] *FirstRand Bank v Evans* par 34. Reference was also made to it at pars 27 (containing a reference to "the interim debt arrangement order"), 30 (containing a reference to payments having been made "purportedly in terms of a debt re-arrangement order"), 33 (containing a reference to the "alleged debt re-arrangement"), and 37 (a reference to "the status of the debt re-arrangement order … [being] highly questionable").
[280] *FirstRand Bank v Evans* par 37.
[281] *FirstRand Bank v Evans* par 21.
[282] *Madari v Cassim* 1950 (2) SA 35 (D), hereafter referred to as "*Madari v Cassim*".
[283] *Madari v Cassim* 39.

> Even if I felt that there were reason *prima facie* to believe that sequestration would be to the advantage of creditors, I would not be disposed in this case to confirm the provisional order, but to exercise a discretion against doing so. I consider that where a debtor has applied for an administration order in the circumstances in which the respondent has, this is a special consideration disentitling the petitioner to his order, within the contemplation of what Broome J said at p 165 in *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz* (1940 NPD 163). In my opinion debtors such as the respondent, and in his circumstances, should not be deterred from using the machinery provided by sec 74 of the Magistrates' Courts Act, and creditors should, in general, show good reason for superseding applications under that section or otherwise allow their debtor at any rate an opportunity of being heard on his application if he has filed one with the clerk of the court.

The decision in *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz*, referred to in the passage quoted above, followed precedent established in *De Waard v Andrew & Thienhaus Limited*, which was also referred to by Wallis J.[284] However, it should be noted that the decision in *Madari v Cassim*, as indicated in the passage quoted above, qualified the statements made, in both of those cases, in relation to the entitlement of an applicant creditor to a sequestration order, in the circumstances. It is submitted that it ought also to be borne in mind that, in *Madari v Cassim*, despite the lack of complete candour on the part of the debtor in that, in his application for an administration order, he had failed to disclose two of his debts, the court indicated that it nevertheless would *not* have granted a sequestration order.[285] This is in contradistinction to the approach of Wallis J in *FirstRand Bank v Evans*.

It is submitted that Evans' substantial reduction of his indebtedness to the bank, by applying the proceeds of the sale of the mortgaged sectional title property to it, could have been regarded as "a special consideration disentitling the petitioning creditor to his order", as contemplated by Broome J in *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz*. This is referred to in the passage quoted from the judgment in *Madari v Cassim*. It is therefore submitted that it would have been appropriate, in the circumstances, to refuse to grant the sequestration order and, in light of his improved financial circumstances and the reduction of his indebtedness to the bank, to give

[284]See *Port Shepstone Fresh Meat and Fish Co (Pty) Ltd v Schultz* 1940 NPD 163 165. See, also, *FirstRand Bank v Evans* par 33.
[285]See *Madari v Cassim* 36.

Evans an opportunity to fulfil his obligations. This would also have been in keeping with the policy of consumer protection that is reflected in the NCA.

Otto and Otto stated that "[t]he exact influence of insolvency law on the National Credit Act, and vice versa, is something that still has to be worked out by the courts."[286] Indeed, the recent judgments seem to suggest that this is precisely what the courts are busy doing. Otto and Otto noted that Van Heerden had suggested that an application for debt review, in terms of the relevant provisions of the NCA, might constitute an act of insolvency in terms of the Insolvency Act.[287] Otto and Otto pointed out that, on the other hand, it could be argued that the "well-intentioned legislative initiative" reflected in the NCA's unique procedure, including debt review and rearrangement, would be frustrated if sequestration might "*ipso iure* follow upon an application for debt review". In other words, it could be argued that the NCA "as *lex specifica* should enjoy preference over the Insolvency Act … and insolvency law in this particular instance."[288] However, they left the question open, stating that it remained to be seen what the courts would decide in this respect. In *FirstRand Bank v Evans*, clearly, the court held that a letter by a debtor to the creditor conveying the fact of his application for debt review, in particular circumstances, constitutes an act of insolvency in terms of section 8(g) of the Insolvency Act.[289] Further, it seems that, as initially argued in *Nedbank v Andrews*, a proposal for debt rearrangement by the debtor in terms the NCA could amount to commission of an act of insolvency in terms of section 8(e) of the Insolvency Act.

It is submitted that the current position, especially in light of *FirstRand Bank v Evans*, undermines the effectiveness of the entire consumer debt relief system introduced by

[286]Otto and Otto *National Credit Act* 134.
[287]Otto and Otto *National Credit Act* 134, with reference to Van Heerden "The interaction between debt review in terms of the National Credit Act 34 of 2005 and insolvency law" in *Annual Banking Law Update* 23 April 2009 University of Johannesburg 153.
[288]Otto and Otto *National Credit Act* 134.
[289]However, it remains to be seen whether this decision will be followed. As mentioned above, it may be noted that, according to information obtained by the author from legal representatives of Evans, on 12 December 2011, judgment had not yet been delivered indicating whether the provisional order that had been granted by Wallis J, in *FirstRand Bank v Evans*, had been confirmed or discharged.

the NCA.[290] It may thwart debtors' *bona fide* and genuine efforts to access the formal statutory debt relief mechanisms and tend to encourage abuse of process by creditors who opt to sequestrate the debtors' estates in order to circumvent the NCA's requirements for the enforcement of debts arising out of credit agreements.[291] It is further submitted that a clear decision is required in relation to whether a creditor may obtain an order for the sequestration of the estate of a debtor who is making regular payments in compliance with a debt rearrangement order in terms of the NCA. While this may indeed be the position, as the NCA does not specifically preclude it, clarity is nevertheless required on how a court ought to exercise its discretion whether to grant or dismiss an application for a sequestration order in such circumstances. As far as the exercise of the court's discretion is concerned, Van Heerden and Boraine suggested that a court could, in an application for sequestration, determine that "a debt restructuring order should be maintained as it appears to be more advantageous than sequestration."[292]

The Supreme Court of Appeal stated in *Collett v FirstRand Bank*,[293] a case decided after *FirstRand Bank v Evans*, that an application by a debtor for debt review, to be declared over-indebted and to have debts arising from credit agreements rescheduled, are "novel concepts" introduced by the NCA with the purpose "to assist not only consumers who are overindebted, but also those who find themselves in 'strained' circumstances."[294] It is submitted that the effect of the decision in *FirstRand Bank v Evans* was to counteract such assistance which, in the circumstances, the debtor had sought and had already received. To have a situation where a debtor is making regular payments in accordance with a debt rearrangement order issued in terms of section 87 of the NCA, and yet his estate is nevertheless sequestrated by a creditor whose claim arises out of an obligation which is subject to the debt rearrangement order, leaves the

[290] A similar view was expressed by Kupiso 2011 *De Rebus* (November) 26. See, also, remarks by Otto and Otto *National Credit Act* 134.
[291] See Boraine and Van Heerden 2010 *PELJ* 117. See, also, 6.10.5, below.
[292] Van Heerden and Boraine 2009 *PELJ* 55.
[293] This case is discussed at 4.5.4, above.
[294] *Collett v FirstRand Bank* par 9. This passage was emphasised by counsel for Evans, in argument on the return day, on 26 August 2011. (Respondent's heads of argument on file with author.)

debtor in an anomalously vulnerable position. It is submitted that this could not have been what the legislature intended and reflects a *lacuna* in the provisions of the NCA.[295]

In the circumstances, it is submitted that statutory amendments should be brought about to provide for an explicit, workable relationship between the debt review process and sequestration. Consideration should be given to the suggestions made by Maghembe for amendment to relevant provisions of the NCA to preclude a creditor from bringing an application for the sequestration of the debtor's estate in specific circumstances.[296] However, it is submitted that even more extensive, legislative intervention is called for. It is submitted that *FirstRand Bank v Evans* indicates the need, on a practical level, for solutions to be found to combat or at least reduce credit grantors' and, more specifically, in the context of a debtor's mortgaged home, a mortgagee's opposition, or resistance, to debt review and debt restructuring as consumer debt relief measures that pose alternatives to sequestration.[297]

From the judgment in *FirstRand Bank v Evans*, it appears that the bank's main concern was the fact that the monthly payment due to it in terms of the debt restructuring order did not even cover interest which would have been due according to their original agreement.[298] Where this is indeed the case, one may appreciate why a mortgagee might prefer to proceed with the sequestration of the debtor's estate in order to have the assets, including hypothecated property, liquidated and the debt satisfied out of the proceeds of its sale.[299] It is submitted that, where a debt restructuring order covers a mortgage debt in respect of the debtor's home, it is imperative, from a practical perspective, that the restructured monthly mortgage instalment should constitute "reasonable alternative means for the mortgagee to obtain satisfaction of the debt", as

[295] See, also, remarks in this regard by Otto and Otto *National Credit Act* 134.
[296] After *Naidoo v ABSA*, Maghembe 2011 *PELJ* 178-179 suggested specific amendments to ss 88(3) and 129 of the NCA. See also Kupiso 2011 *De Rebus* (November) 26 who, at 27, seems to suggest, in light of the effect of the judgment, in *FirstRand Bank v Evans*, that amendments might be brought about.
[297] See, in this regard, Roestoff *et al* 2009 *PELJ* 247 298.
[298] *FirstRand Bank v Evans* par 7.
[299] Boraine and Van Heerden 2010 *PELJ* 120 cite this as one of the situations where they would anticipate that a creditor might wish to apply for the sequestration of a debtor's estate after a debt rearrangement order has been issued.

envisaged in *Gundwana v Steko*. Otherwise, the mortgagee will simply resort to an application for sequestration of the debtor's estate, as recently established precedent has confirmed it is entitled to do. This leaves the homeowner debtor in a vulnerable position despite having availed himself of the formal consumer debt relief measures afforded by the NCA.[300]

6.10.4 Applications for voluntary surrender and the NCA

Another significant case which featured the exercise of the court's discretion to grant or to refuse a sequestration order, but this time in relation to the voluntary surrender procedure, is *Ex parte Ford*. In this case, the Western Cape High Court, *per* Binns-Ward AJ, refused three unopposed applications for voluntary surrender. In each case, the applicant's debts arose mostly out of credit agreements[301] and the cumulative size of the debt was strikingly disproportionate to his or her income. Binns-Ward AJ considered the allegation by each applicant that he or she had "become insolvent by misfortune and due to circumstances beyond [their] control, without fraud or dishonesty on [their] part". In the absence of any other explanation for the extension of such high amounts of credit to them, Binns-Ward AJ concluded, in the circumstances, that there were "[g]rounds for cogent suspicion of at least some degree of reckless credit extension".[302] Bearing in mind that the NCA provides relief in the form of the setting aside of obligations arising out of reckless lending, the court considered referring the applicants to a debt counsellor in terms of section 85 of the NCA.[303]

The applicants were opposed to the application of the provisions of the NCA in their situations. Counsel for the applicants contended that section 85 was not applicable in proceedings for voluntary surrender because the court was not "adjudicating upon a

[300] A similar observation may be made in relation to administration, under s 74 of the Magistrates' Courts Act, although it may be borne in mind that, from a practical perspective, administration orders will be of limited application, in the context of protection of a debtor's home from forced sale, in view of the maximum debt limit of R50 000.
[301] Arising out of credit card debt, loans on overdraft, or otherwise; see *Ex parte Ford* par 2.
[302] *Ex parte Ford* par 3.
[303] *Ex parte Ford* pars 4-9.

credit agreement".[304] However, the court rejected this argument, finding that section 85 is cast in very wide terms in that a court could invoke it "in any court proceedings".[305] Further, in each application for voluntary surrender, the court "considered" a credit agreement in the sense that a credit agreement was taken into account as a relevant matter.[306] Thus, Binns-Ward AJ found that section 85 could, theoretically, be relied upon by the court to refer the matters to a debt counsellor. However, each of the applicants indicated in a supplementary affidavit that they were unwilling to seek debt counselling as they anticipated that, if they were subjected to debt restructuring, after seven years of servicing their existing debt, they would still be heavily indebted at the end of such period.

In view of the applicants' resistance to being referred for debt counselling, Binns-Ward AJ decided not to resort to section 85 of the NCA, but to leave it open to them to approach a debt counsellor on their own initiative. However, the court also decided not to grant their applications for voluntary surrender in view of their reluctance to subject themselves to administration under the NCA for the benefit of themselves and those creditors who had extended credit to them responsibly.[307] The court did not regard the applicants as being entitled to choose the form of relief most convenient to them but, on the contrary, viewed it as the court's duty to exercise its discretion by properly considering and giving due effect to the policy, reflected in the NCA, that favoured responsible credit grantors and encouraged full satisfaction of debts.[308] Binns-Ward AJ perceived a certain measure of "consonance between the objects of the relevant provisions of the NCA and the Insolvency Act … [in the aim] 'not to deprive creditors of their claims but merely to regulate the manner and extent of payment'."[309] The court concluded that, on the incomplete facts disclosed in the applications, the machinery of

[304] *Ex parte Ford* par 11.
[305] *Ex parte Ford* par 12.
[306] *Ex parte Ford* par 13.
[307] As distinct from the creditors who extended credit recklessly and might therefore, if the NCA were to be applied, be prevented from enforcing their obligations. See *Ex parte Ford* par 17.
[308] *Ex parte Ford* pars 19-20.
[309] With reference to *Nel NO v Body Corporate of the Seaways Building* 1996 (1) SA 131 (SCA) 138E.

the NCA seemed to be the more appropriate mechanism to be used in the circumstances.[310]

Thus, the approach adopted in *Ex parte Ford* was that, in an application for voluntary surrender, it is open to the court to resort to section 85 of the NCA.[311] In a case where a debtor owns a mortgaged home, the sequestration of his estate would invariably result in the realisation of his home by the trustee. On the other hand, debt review and, ultimately, debt restructuring would most likely result in the reduction of mortgage repayment instalments over an extended payment period so that the debtor might remain in his home. Where appropriate, it could also provide a "breathing space" for an over-indebted debtor thus providing him with an opportunity to sell his home on the open market and to make alternative accommodation arrangements in the interim. Admittedly, this course of action would pose a potential solution only in circumstances where the debtor has a regular income and the resources to maintain regular payments to service his debt.[312] However, from *Ex parte Ford* it is evident that when the legislature enacted the NCA, it did not articulate, nor apparently even consider, the nature or extent of the interface between the provisions of the NCA and the voluntary surrender procedure available to debtors under the Insolvency Act.

The "pro-creditor" approach of the court, in *Ex parte Ford*, would thwart any attempt by a debtor to avoid the payment of his debts by applying for voluntary surrender in circumstances where it would be possible for him to satisfy the debt in full over a period.[313] But, as pointed out by Van Heerden and Boraine, it should also be borne in mind that payment in full over a longer period does not necessarily constitute "advantage of creditors". It is conceivable that, depending on the particular circumstances, creditors may be better off receiving a dividend sooner, rather than later, and "cutting their losses" occasioned by the discharge which the debtor will receive

[310] *Ex parte Ford* par 21.
[311] Given that, in sequestration proceedings, there will always be an allegation of over-indebtedness, presumably this requirement will invariably be met. See Van Heerden and Boraine 2009 *PELJ* 51.
[312] See *Standard Bank v Hales* 2009 (3) SA 315 (D), discussed at 5.5.4.2, above; Van Heerden and Boraine 2009 *PELJ* 58.
[313] See Van Heerden and Boraine 2009 *PELJ* 53.

upon his rehabilitation.[314] It would seem that the debtor does not necessarily have a choice in the matter. Creditors might have more of a chance of their preferences being taken into account as they may intervene in sequestration proceedings – either in an application for voluntary surrender or for compulsory sequestration – if they believe the provisions of the NCA would better serve their interests.[315] It would appear that consideration of the provisions of the NCA might form part of the court's decision whether sequestration is to the advantage of creditors.[316] In sequestration proceedings, a court might even refer the matter to a debt counsellor in terms of section 85 of the NCA in order to be able to make an informed decision whether sequestration would be to the advantage of creditors.[317] A court might order that a debt restructuring, or debt rearrangement, order be maintained if it appears to be more advantageous to creditors than sequestration would be.[318]

Another common occurrence is that over-indebted debtors who own mortgaged immovable property apply for the voluntary surrender of their estates based on inflated valuations for their properties. As Bertelsmann J remarked in *Ex parte Ogunlaja and five other matters*,[319] it appeared that values were being inflated by sworn valuators in order to make it appear that sequestration would yield sufficient advantage to creditors. As the court stated, if this impression is correct, then it is clear that the process of voluntary surrender is being abused. Bertelsmann J emphasised that courts should be vigilant in relation to such abuses because, "as much as the troubled economic times might engender sympathy for debtors whose financial burden has become too much to bear, the insolvency law protects the interests of creditors at least to the extent that a minimum advantage must be ensured for the concurrent creditor … ".[320] Each of the six applications for voluntary surrender was dismissed for lack of proof that sequestration

[314] See Van Heerden and Boraine 2009 *PELJ* 51-52.
[315] Van Heerden and Boraine 2009 *PELJ* 52-53, 54; Boraine and Van Heerden 2010 *PELJ* 91, 113.
[316] Van Heerden and Boraine 2009 *PELJ* 56. See also Boraine and Van Heerden 2010 *PELJ* 115-116.
[317] Van Heerden and Boraine 2009 *PELJ* 55; Boraine and Van Heerden 2010 *PELJ* 117-118.
[318] Van Heerden and Boraine 2009 *PELJ* 55.
[319] *Ex parte Ogunlaja and five other matters* (GNP case no 53146/09; unreported judgment delivered in January 2010), on file with author, hereafter referred to as "*Ex parte Ogunlaja*", par 35.
[320] *Ex parte Ogunlaja* par 36.

would be to the advantage of creditors.[321] In each application, the valuation relied upon was in respect of a residential property.[322] Although no reference is made to the fact in the judgment, one may wonder if, in view of their over-indebtedness, the applicants' motive was to give up their homes, and thus rid themselves of their mortgage obligations, through the voluntary surrender process. If so, the requirement of advantage of creditors would have thwarted their attempts and they would have had to endeavour to resort to some other debt relief mechanism available.

In *Smit v ABSA Bank Ltd, Smit v ABSA Bank Ltd*,[323] the applicant spouses sought the acceptance of the voluntary surrender of their separate estates which comprised their only asset – their mortgaged home. According to the papers, sequestration of Mr Smit's estate would yield a dividend of 16,33 cents in the rand and sequestration of Mrs Smit's estate would yield a dividend of 10,84 cents in the rand. They relied on a forced sale valuation of their home of R900 000 and a mortgage bond balance of R744 864.[324] The mortgagee, ABSA Bank, sought leave to oppose the applications, pointing out that, according to its internal valuation, the market value of the property was R850 000 and the balance outstanding on the mortgage bond was R873 540,22. According to the bank's calculations, sequestration would not yield any dividend at all.[325] The court pointed out that the applicants' valuation was defective and did not comply with the requirements laid down in the case law. It also suspected that there might be additional assets the existence of which the applicants had not disclosed.[326] In the circumstances, the court bore in mind that there had been five postponements in the matter and that the applicants' attorney did not amend the papers, despite having been informed that they did not comply with the requirements. The court viewed the applicants' persistence in bringing the applications as vexatious. It granted the bank leave to intervene and, in

[321] *Ex parte Ogunlaja* par 33.
[322] *Ex parte Ogunlaja* par 20. The first application, by Ogunlaja, involved two immovable properties; see par 19.
[323] *Smit v ABSA Bank Ltd, Smit v ABSA Bank Ltd* (24086/10, 24088/10) [2011] ZAGPPHC 208 (8 November 2011), hereafter referred to as "*Smit v ABSA*".
[324] *Smit v ABSA* par 4.
[325] *Smit v ABSA* par 5.
[326] *Smit v ABSA* par 6.

view of the fact that the bank did not ask for a costs order on the attorney and client scale, dismissed the application for voluntary surrender with costs.[327]

6.10.5 Abuse of process

In the previous chapter, it was mentioned that the position, in the individual debt enforcement process, is that execution against the home should not be permitted where there has been an abuse of process.[328] This statement, which was first made by Mokgoro J in *Jaftha v Schoeman*, has been reiterated in numerous judgments. It is a reason for the requirement of judicial oversight. Generally, abuse of process is regarded as occurring where a person uses a court or legal process for a purpose or to achieve a result other than that for which it was designed or intended.[329] It is also referred to as an abuse of process where the result of a particular process is unfair, iniquitous or unconscionable.[330] It was submitted, in the previous chapter,[331] that Bertelsmann J, in *FirstRand Bank v Folscher*, extended this conception of "an abuse of process" to the situation where a judgment creditor seeks to execute against the debtor's home in circumstances where he could obtain satisfaction of the debt by alternative means.[332] It may be observed that references to abuse of process also abound in relation to the insolvency process,[333] especially in view of the fact that, in addition to the court's statutory discretion to grant or refuse a sequestration order,[334] it has inherent jurisdiction to prevent abuse of its process.[335]

A common occurrence has been the use of the compulsory sequestration process, in "friendly sequestrations", in an attempt "to pull the wool over the court's eyes", so to speak. This has occurred where debtors wanted their estates to be sequestrated, in

[327] *Smit v ABSA* pars 7-9. The court further directed that the attorney was not entitled to charge any fee or recover any expenses from the applicants.
[328] See 5.2.3, 5.5.2.2, 5.6.4.2 (d) and 5.6.8, above.
[329] See *Beinash v Wixley*, referred to at 5.6.4.2 (d), above.
[330] See, for example, *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D).
[331] See 5.6.4.2 (d), above.
[332] *FirstRand Bank v Folscher* par 40.
[333] See, for example, Evans 2001 *SA Merc LJ* 485 and Evans 2002 *Int Insol Review* 13.
[334] See ss 6, 10 and 12 of the Insolvency Act.
[335] See Meskin *Insolvency Law* 2.1.5 and 2.1.8.

order to be relieved of harassment by creditors in circumstances where they knew that they would not be able satisfactorily to establish that sequestration would be to the "advantage of creditors".[336] A "friendly sequestration" is not *per se* an abuse of process, as long as the requirements for a compulsory sequestration are satisfied. However, an abuse has been identified where an application is brought by a creditor in a "friendly sequestration" where the motive is not to liquidate the debtor's assets, in order to achieve the payment of debts, but to prevent or forestall an imminent sale in execution of the debtor's property. This occurred, for example, in *Mthimkhulu v Rampersad*, in an effort to prevent the sale in execution of the debtors' home at the instance of the mortgagee.[337]

Another form of abuse of process identified by the courts occurs in the inflation of valuations of assets, in applications for voluntary surrender, in an attempt to create the impression that, after sequestration, there would be sufficient free residue for distribution to creditors to constitute advantage to creditors. In *Ex parte Ogunlaja*, and in *Smit v ABSA*, the courts dismissed the applications for voluntary surrender on the basis of defective valuations.[338] In effect, therefore, the debtors could not gain access to the insolvency system and could not derive the benefit of any discharge from liability which would have been the consequence of rehabilitation after the sequestration process had run its course. If the mortgagees were to execute against the mortgaged properties,[339] in the individual debt enforcement process, and the proceeds of their sale in execution did not satisfy the mortgage bond debt, the debtors would remain liable for the shortfall. The result, as has been highlighted by numerous commentators, is that if a debtor is

[336]See Evans 2001 *SA Merc LJ* 485 and Evans 2002 *Int Insol Review* 13; Meskin *Insolvency Law* 2.1.5 and references cited there.
[337]See 6.4.2, above. See, also Meskin *Insolvency Law* 2.1.5.
[338]See 6.10.4, above.
[339] Without wishing to speculate, it would appear that the mortgagee might indeed have obtained a writ of execution against Mr Ogunlaja, the first applicant in *Ex parte Ogunlaja*. According to notices published in the *Government Gazette*, a sale in execution of a residence belonging to Ogunlaja was advertised to be held on 27 August 2009 and again on 25 March 2010. See Legal Notice 32465 in *GG* of 7 August 2009 page 107 and Legal Notice 32984 in *GG* of 5 March 2010 page 83. The unsuccessful application for voluntary surrender was brought by Ogunlaja in January 2010, that is, between the two advertised dates for the sales in execution.

"too poor" to be declared insolvent, he often finds himself in a debt trap with little prospect of any escape.[340]

In *Ex parte Ford*, no abuse of process was alleged or identified. However, the court was of the view that to allow sequestration might produce an unfair result for those creditors who had acted responsibly in extending credit to the debtors seeking to surrender their estates, in circumstances where there were indications that other creditors might have been guilty of reckless lending.[341] The court also regarded the consumer debt relief processes provided for in the NCA as the more appropriate route, in the circumstances, in light of the need for debtors to take responsibility for the debts which they had incurred.[342] Thus, the court adopted what may be regarded as a creditor-orientated approach in rejecting their applications for voluntary surrender and refusing to grant sequestration orders.[343] The court indicated that the NCA's debt relief processes should first be considered.[344]

Considering matters in which a creditor seeks the sequestration of the debtor's estate but the debtor opposes the application because he would prefer to opt for consumer debt relief measures provided by the NCA, it may be noted that the authors, in Meskin *Insolvency Law*, point out that, in *Estate Logie v Priest*, [345] Solomon JA stated that:[346]

> it is perfectly legitimate for a creditor to take insolvency proceedings against a debtor for the purpose of obtaining payment of his debt. In truth that is the motive by which persons as a rule are actuated in claiming sequestration orders.

The authors also refer to *Vincemus Investments (Pty) Ltd v Laher (ABSA Bank Ltd as intervening creditor)*,[347] in which it was stated:[348]

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[340]See 6.2 and 6.4.1, above.
[341]*Ex parte Ford* par 20.
[342]*Ex parte Ford* par 21.
[343]See Van Heerden and Boraine 2009 *PELJ* 53.
[344]See 6.10.4, above.
[345]*Estate Logie v Priest* 1926 AD 312.
[346]*Estate Logie v Priest* 1926 AD 312 319, referred to in Meskin *Insolvency Law*2.1.
[347]*Vincemus Investments (Pty) Ltd v Laher (ABSA Bank Ltd as intervening creditor)* [2008] JOL 22629 (C).
[348]Meskin *Insolvency Law* 2.1 n 1 quoting from *Vincemus Investments (Pty) Ltd v Laher (ABSA Bank Ltd as intervening creditor)* [2008] JOL 22629 (C) par 10.

> absent any proof of an abuse of the court's process, it is perfectly legitimate for a creditor to institute sequestration proceedings against a debtor for the purpose of obtaining payment of an unpaid debt ….

They point out further, however, that in *Investec v Mutemeri*, Trengove AJ stated that:[349]

> while the creditor's underlying motive may be to obtain payment of his debt, an application for sequestration in fact does not constitute proceedings for the recovery of a debt, but rather "[i]ts purpose and effect are merely to bring about a convergence of the claims in an insolvent estate to ensure that it is wound up in an orderly fashion and that creditors are treated equally…. The order for the sequestration of the debtor's estate is thus not an order for the enforcement of the sequestrating creditor's claim."

Therefore, the position appears to be that, although an application for the sequestration of a debtor's estate does not constitute proceedings to enforce the debt, a creditor is entitled, in the absence of an abuse of process, to apply for the sequestration of the debtor's estate where the underlying motive or purpose is to enforce the debt. Strictly speaking, therefore, where a creditor applies for the sequestration of a debtor's estate in circumstances where, *prima facie*, the requirements for sequestration are able to be established, this does not necessarily constitute an "abuse of process". However, it is submitted that, where a creditor does this in order to circumvent the requirements of the NCA, or to avoid being bound by a restructuring order issued by the magistrate's court in terms of the NCA, the court should refuse to grant the sequestration order on the basis that it would tend to frustrate the legislative purpose behind the NCA.[350] An argument could also be made out, employing a similar conception of an "abuse of process" as that which was adopted, in the individual debt enforcement process, by the court in *FirstRand Bank v Folscher*. This would be that it is iniquitous that, in consequence of the sequestration of the estate of a homeowner consumer debtor, he will lose his home while the creditor could obtain satisfaction of the debt by the alternative means provided by a debt restructuring order issued in terms of the NCA.[351]

[349] Meskin *Insolvency Law* 2.1, quoting from *Investec v Mutemeri* par 31.
[350] See, also, comments by Otto and Otto *National Credit Act* 134, quoted at 6.10.3.3, above.
[351] See *FirstRand Bank v Folscher* par 40, discussed at 5.6.4.2 (d), above.

6.10.6 The need for alignment between sequestration and other debt relief mechanisms

Of concern, it is submitted, is the lack of alignment, in a coherent system and procedure, between the different consumer debt relief mechanisms available in South Africa. Further, as things stand, our system, including provision for sequestration of insolvent estates in terms of the Insolvency Act and for debt review and debt restructuring measures in terms of the NCA, does not conform to internationally recognised principles and recommendations in relation to rehabilitation procedures as alternatives to procedures involving the liquidation of a debtor's assets.[352] It may be noted that internationally, a more debtor-orientated approach is advocated.[353] In Chapter 7, some of the debt relief mechanisms and, especially those which assist a debtor in protecting his home from forced sale, will be canvassed. Significantly, in the formulation of principles that underlie the resolution of consumer debt problems, the INSOL International *Consumer Debt Report II* states:[354]

> … [F]or effective help to be made available to the consumer debtor, it should not be structured solely by way of discharge through bankruptcy proceedings, which will be mainly court-driven procedures requiring the involvement of a [*sic*] insolvency representative or administrator. …
>
> Help should also be directed at both finding a solution for the adverse financial situation and, as far as possible, preventing the debtor from getting into debt again. This may also require an out-of-court or extra-judicial approach and the involvement of a debt counsellor, a consumer advisory bureau or a social worker.

As part of the "first principle" established in the INSOL International *Consumer Debt Report II*, it is recommended that a debtor should be free to choose between a liquidation procedure and a rehabilitation procedure.[355] A rehabilitation procedure is defined as one which "is designed to give the consumer debtor time to recover from temporary or more permanent liquidity difficulties and provide a way, through debt counseling or debt-restructuring, to reorganize his financial affairs." It is also

[352]See INSOL International *Consumer Debt Report II* 1-24.
[353]See INSOL International *Consumer Debt Report II*, referred to at 6.10.6, above; INSOL International *Consumer Debt Report* 2001; Evans 2010 *CILSA* 337; Van Heerden and Boraine 2009 *PELJ* 53; Calitz 2007 *Obiter* 397; Roestoff and Renke 2005 *Obiter* 561 and Roestoff and Renke 2006 *Obiter* 98.
[354]INSOL International *Consumer Debt Report II* 10-11.
[355]INSOL International *Consumer Debt Report II* 16.

recommended that, upon the successful completion of the procedure, "the debtor will obtain discharge or prepare a rehabilitation plan, composition or scheme of arrangement which is typically required to be approved by a majority of the creditors … and … by the court."[356] Forming part of the "first principle" is also the recommendation that:[357]

> Creditors should be prohibited from pursuing the debtor during the insolvency process. If this were otherwise, creditors who chose not to be bound by the process would prevail over those utilizing the collective mechanism.
>
> In addition the law should take into account the issues that are generally provided for in any insolvency law. In this respect reference is made to provisions regarding the handling of encumbered assets and the position of secured creditors, treatment of contracts … and the priority of distribution.

It is submitted that by "insolvency process", referred to in this "first principle", is meant the consumer debt relief process which includes both liquidation and rehabilitation procedures. It would appear that, as illustrated by cases such as *Investec v Mutemeri*, *Naidoo v ABSA*, *FirstRand Bank v Evans* and *Ex parte Ford*, the South African consumer debt relief mechanisms do not conform to these recommendations in at least the following respects.

- According to *FirstRand Bank v Evans* and *Ex parte Ford*, a debtor is not free to choose between the liquidation process provided for by sequestration in terms of the Insolvency Act and the "rehabilitation procedure" posed by debt review and debt restructuring provided for by the NCA.
- There is no discharge available to the debtor who undergoes the NCA's "rehabilitation procedure".
- In light of *Investec v Mutemeri*, *Naidoo v ABSA* and *FirstRand Bank v Evans*, a creditor who chooses not to be bound by the NCA's process is entitled, in effect, to "pursue" the debtor during such process by applying for, and obtaining, an order for the sequestration of the debtor's estate. The effect is that the creditor who insists on sequestration "prevail[s] over those utilizing the collective mechanism" provided for by the NCA.

[356] INSOL International *Consumer Debt Report II* 12.
[357] INSOL International *Consumer Debt Report II* 17.

- In the "rehabilitation procedure" afforded by the NCA, when a magistrate's court issues a debt restructuring order, it has the power, in effect, to override or overlook "provisions regarding the handling of encumbered assets and the position of secured creditors, treatment of contracts … and the priority of distribution". This is because it can restructure obligations between the debtor and even a secured creditor, such as a mortgagee of the debtor's home, without the secured creditor's specific agreement on the restructured terms.[358] The resultant restructured payment terms may be unsatisfactory, or even untenable, from the perspective of the mortgagee.

As mentioned above,[359] for years, academic commentators have called for an appropriately effective, easily accessible, consumer debt relief mechanism as an alternative to the sequestration, or liquidation, process currently available in terms of the Insolvency Act.[360] They have expressed the desirability of a legislative and administrative framework that facilitates "single portal access" to the consumer debt relief system.[361] It is submitted that the judgments in *Ex parte Ford*, *Investec v Mutemeri*, *Naidoo v ABSA*, and *FirstRand Bank v Evans* illustrate, and tend to confirm, such a need. It is within this context that it is submitted that a suitably revised and modified version of the pre-liquidation procedure, proposed as section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, discussed above,[362] holds the potential to be the alternative debt relief mechanism envisaged by commentators.[363]

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[358]This is referred to, in American parlance, as "cram down"; see 7.2.3, below.
[359]See 6.4.3, above.
[360]See, also, 6.2 and 6.4.3, above. For ease of reference, the following citations are repeated from 6.4.3. See Boraine and Roestoff 1993 *De Jure* 229; Evans 2001 *SA Merc LJ* 485 508; Boraine 2003 *De Jure* 217; Calitz 2007 *Obiter* 414; Boraine and Roestoff 2002 *Int Insolv Rev* 1, 11; Van Heerden and Boraine 2009 *PELJ* 58, 161; Evans 2010 *SA Merc LJ* 483; Evans 2011 *PELJ* 39 52; Coetzee "Personal bankruptcy and alternative measures".
[361]See Calitz 2007 *Obiter* 414, with reference to Boraine 2003 *De Jure* 217. See also, for example, Boraine and Roestoff 2000 *Obiter* 267; Van Heerden and Boraine 2009 *PELJ* 59.
[362]See 1.6, 4.4.3.6 and 6.4.3, above.
[363] See Evans 2001 *SA Merc LJ* 505-506, 508, in relation to the proposed s 74X. Coetzee's submissions, in "Personal bankruptcy and alternative measures", echoed sentiments expressed, in relation to the proposed s 74X, by Boraine 2003 *De Jure* 230; Boraine "Reform of Administration Orders" 197.

It is submitted that a revised version of the proposed section 118 may provide a solution for over-indebted homeowners who wish to avert the forced sale of their homes and who have at least some regular income which they may apply towards restructured debts over a longer period than that for which the parties originally contracted. In terms of the proposed section 118, the claims of secured and preferent creditors remain unaffected unless they consent in writing to an amendment of their obligations. However, a debtor may have his debts to concurrent creditors restructured and made payable by lower regular instalments over a longer period. It is submitted this aspect of the proposed provision would tend to counter the nature and level of opposition to debt restructuring, especially by a mortgagee of the debtor's home, as was encountered in *FirstRand Bank v Evans*, as long as the terms of the restructuring orders are feasible.

An advantage of the proposed section 118 is that it would apply in respect of all types of debts and not only those arising from credit agreements, as is the position under the NCA. This would rule out the anomaly, alluded to by Boraine and Van Heerden and by Wallis J in *FirstRand Bank v Evans*, which would arise if it were to be held that a credit provider is barred from applying for the sequestration of a debtor's estate after the latter has applied for debt review in terms of the NCA.[364] It would also be more useful than an administration order issued in terms of section 74 of the Magistrates' Courts Act, with its limited application to cases where the total debt does not exceed an amount of R50 000 and its exclusion of *in futuro* debts.[365] Further, in terms of the proposed section 118, where the composition procedure has been successfully completed, at the end of the repayment period, the debtor stands to benefit by a measure of discharge from liability. This aspect would address criticisms by commentators and bring our system more in line with internationally recognised consumer debt relief policies.[366]

The fact that the section 118 pre-liquidation composition procedure is located in proposed insolvency legislation has the advantage that an appropriately modified provision could allow the court to determine, within the framework of a single insolvency

[364]See Boraine and Van Heerden 2010 *PELJ* 118; *FirstRand Bank v Evans* par 25.
[365]See Boraine 2003 *De Jure* 217.
[366]See INSOL International *Consumer Debt Report II* 12; Boraine 2003 *De Jure* 217.

statute, whether a repayment plan or a liquidation process is more appropriate, depending on the particular circumstances of the case. Provision could also be made for simple, streamlined conversion, where appropriate, between the two processes. The need for this might arise, for instance, where the debtor fails to comply with the terms of the repayment plan. Thus, the interface and the relationship between the repayment plan, or "pre-liquidation composition" procedure, and the liquidation procedure could be explicitly stated in the single insolvency statute in which they would both operate.

It may be noted that the pre-liquidation composition procedure, originally proposed as a new section 74X of the Magistrates' Courts Act, incorporated a subsection 16 in terms of which, where a debtor's offer of composition was rejected by creditors, the debtor could opt to have his estate liquidated in terms of the Insolvency Act.[367] This part of the provision does not appear in section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, presumably in light of criticisms levelled at the potential of section 74X for encouraging an abuse of the process by debtors.[368] It is submitted that the omitted text, suitably modified to counter this potential effect, might be considered for re-incorporation in the proposed section 118 to provide for convenient mobility between the composition and liquidation procedures at the instance of either the debtor or a creditor, where circumstances require it. Further, currently, section 118(23) provides that, between the date of determination of a date for a hearing and the conclusion of the hearing, the creditors may not institute any action against the debtor, or apply for the liquidation of the debtor's estate, without the permission of the court. Section 118(19) provides for the revocation of the composition by the court in certain circumstances, such as where the debtor has failed to comply with its obligations. Presumably, in such circumstances, the estate of the debtor may thereafter be liquidated. However, these are details for specific consideration in the formulation of a new, appropriately devised and worded provision in the applicable insolvency legislation.

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[367]See the proposed s 74X(16) of the Magistrates' Courts Act, contained in the *Report on the Review of the Law of Insolvency*, of February 2000. See also par 124.1 of the *Explanatory Memorandum* to the *Draft Insolvency Bill* of February 2000. The Commission's report refers to Roestoff and Jacobs 1997 *De Jure* 189.

[368]See Boraine and Roestoff 2002 *Int Insolv Rev* 9.

6.11 Implications for insolvency law of recent developments in the individual debt enforcement process

There have been no reform initiatives in insolvency law in relation to the home of the insolvent. The South African Law Reform Commission's report on its review of the law of insolvency, completed in February 2000, did not contain any proposal for protection of any sort for the home of an insolvent, nor for that matter was there even any reference to it.[369] Further, despite the developments which have taken place in the individual debt enforcement process, from the delivery of judgment in *Jaftha v Schoeman* onwards, the most recent unofficial working draft of a proposed Insolvency and Business Recovery Bill, compiled in 2010, makes no provision for any changes in the treatment of the insolvent's home in the liquidation process.[370] It is submitted that this is surprising because, as in relation to execution in the individual debt enforcement process, the realisation of an insolvent's home by the trustee during the sequestration process may, in certain circumstances, constitute unjustifiable infringement of the insolvent's, his family's and dependants' section 26, section 28 and other rights.[371]

In every application for sequestration, whether or not the issue is raised by the insolvent, his spouse or partner or their dependants, their rights to have access to adequate housing and the relevant rights and interests of any children[372] ought to be specifically addressed by the court.[373] The purpose of the required judicial scrutiny would be to ascertain whether there is any abuse of process and whether realisation of the insolvent's home by the trustee will be an unjustifiable infringement of his and his

[369]See Roestoff *'n Kritiese Evaluasie* 370-371, 394-395, referred to by Evans "Does an insolvent debtor have a right to adequate housing?". See, also, Boraine and Roestoff 2002 *Int Insolv Rev* 10, for a reference to the need to consider the position with respect to the family home.
[370]See 1.6, above. As already mentioned at 6.4.3, the unofficial working draft of a proposed Insolvency and Business Recovery Bill uses the term "liquidation" in place of "sequestration", as it is currently referred to in the Insolvency Act.
[371]See 3.3.1 and 3.3.3, above. This part of the text is based largely on, and has developed out of research done subsequently to, Steyn '"Safe as Houses?"'. See, also, Evans "Does an insolvent debtor have a right to adequate housing?".
[372]This point is also made by Evans "Does an insolvent debtor have a right to adequate housing?".
[373]This is also discussed at 6.3.2, above.

family members' rights. More specifically, the purpose would be to prevent them from being rendered homeless in consequence of sequestration. Such a requirement would conform to constitutional imperatives and bring the position into line with that in the individual debt enforcement process. In *Jaftha v Schoeman*, the Constitutional Court stated that execution against a person's home should take place only as a last resort[374] and, in *Gundwana v Steko*, it stated that, where reasonable alternative means exist to obtain satisfaction of the debt, execution should not be permitted.[375] With this in mind, it is submitted that, likewise, even where the debtor is factually insolvent, realisation of his home should occur only as a last resort, where no reasonable alternative exists.

Evans has proposed that measures should be put in place for the housing position of the debtor, and his dependants who share his home, to be considered prior to an application for sequestration.[376] This would be preferable, especially in light of the fact that sequestration might not be to the advantage of creditors if the home, often the most valuable asset, were to be placed beyond the reach of creditors and, therefore, the sequestration order should not even be granted. It is agreed that consideration of the section 26 and section 28 rights of the debtor and his family should occur as early in the process as possible. However, it is submitted that, often, not all relevant circumstances are known, at the application stage, but are only revealed once the trustee has been appointed and he has commenced his duties. It is therefore important that the evaluation by the court should not be completed until all relevant factors have been ascertained but, obviously, that it should occur before the home is realised by the trustee for the benefit of creditors.

Taking all relevant circumstances into account, the court should evaluate the position to decide whether the trustee may go ahead with the immediate realisation of the home of the insolvent. By "relevant circumstances" is meant circumstances of the same kind as those referred to in judgments concerning execution against a person's home in the

[374] *Jaftha v Schoeman* par 59.
[375] *Gundwana v Steko* par 53.
[376] Evans "Does an insolvent debtor have a right to adequate housing?".

individual debt enforcement process,[377] taking into account, where appropriate, any differences which exist in the purposes served by the ordinary civil process, as opposed to the insolvency process. The various affected parties' interests, including, where appropriate, the legitimate interests of society, generally, should be balanced with a view to ensuring that an insolvent's home is sold only in circumstances where the infringement of rights is justified in terms of section 36 of the Constitution. As in the individual debt enforcement process, it is judicial oversight which is required and, therefore, neither the Master nor the trustee may determine whether, or when, an insolvent's home may be realised by the trustee of an insolvent estate.

During the balancing process in the insolvency context, it is important to acknowledge the differences in the weighting of the interests of secured, preferent and concurrent creditors, respectively, in relation to the interests of the insolvent and his dependants. It is anticipated that there may be circumstances in which, after evaluation of a mortgagee's security interests, where the insolvent is not indigent, but has access to at least some resources and, perhaps, some equity in his home, the sale of the home may be justifiable *vis-à-vis* the mortgagee. However, consideration of the factors which are relevant in the "balancing process" may yield a different result in relation to unsecured creditors. Bearing in mind the principles and guidelines set out in *Jaftha v Schoeman*, *Gundwana v Steko*, and other judgments, such as *ABSA v Ntsane*[378] and *FirstRand Bank v Maleke*,[379] it may not be justifiable to sell the home and deprive the insolvent of the equity which he holds in the property, for the benefit of unsecured creditors because there is no counter-balancing real right of a mortgagee, in the hypothecated home, to include in the complex matrix of factors. It is submitted that, if the required limitation analysis is properly carried out, it could yield a result that would entail that, once the home is sold, any proceeds or, possibly, depending on the particular circumstances, a portion of them, which would ordinarily have fallen into the free residue and would have been distributed to preferent and concurrent creditors, ought instead to be retained or,

[377]Such as referred to in *Jaftha v Schoeman*, *Nedbank v Mortinson*, *Gundwana v Steko* and *FirstRand Bank v Folscher*, discussed in Chapter 5.
[378]Discussed at 5.5.2, above.
[379]Discussed at 5.5.4.3, above.

more accurately, returned, to the insolvent. Thus, it may not be feasible, on a practical level, always to achieve a wholly satisfactory solution.

Commentators have suggested that treatment of an insolvent debtor's home should be reconsidered in light of the recognition of fundamental rights protected by the Constitution and more recent developments, in relation to a debtor's home, in the individual debt enforcement process.[380] One suggestion is that specific legislative provisions should allow the court to postpone the realisation of the insolvent's home, where appropriate, in order for the insolvent to make suitable alternative accommodation arrangements for himself and his dependants, especially in cases concerning children, particularly those with special needs, the elderly and the infirm.[381] A delay in the realisation of the home by the trustee of an insolvent estate might also provide the insolvent with a period of grace within which to reach a mutually satisfactory statutory composition with his creditors or to make arrangements to refinance the home or even for a family member to purchase it from the insolvent estate.[382]

Further, in the interests of legal certainty, it may pose a solution to exempt, by specific statutory enactment, homes of low value which have not been mortgaged in favour of any creditor.[383] In *Jaftha v Schoeman,* the Constitutional Court gave the notion of a "blanket exemption" for the debtor's home a wide berth. However, it is submitted that it may merit more careful consideration, especially in light of subsequent developments. Academic commentators have suggested an exemption from forced sale, in both the individual debt enforcement and the insolvency process, of a "low value" home and,

[380]See Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?"; Evans *Critical Analysis* 474-475; Els 2011 *De Rebus* (October) 23; Boraine, Kruger and Evans "Policy Considerations" 694-696; Van Heerden and Boraine 2006 *De Jure* 347ff; Van Heerden, Boraine and Steyn "Perspectives" 261ff.
[381]It may be noted that these suggestions are based largely on the statutory protection of the sort provided for in England and Wales, discussed at 7.5, below. See, also, Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?";Boraine, Kruger and Evans "Policy Considerations" 694; Van Heerden, Boraine and Steyn "Perspectives" 262; Evans *Critical Analysis* 474-475; Evans 2008 *De Jure* 270-271.
[382]For instance, in *Badenhorst v Bekker NO en andere* 1994 (2) SA 155 (N), the insolvent spouses' home was purchased by the wife's father, from the insolvent estate, for them to continue to live in it.
[383]Boraine, Kruger and Evans "Policy Considerations" 694.

particularly, one in which a state subsidy was provided for its acquisition.[384] Evans advocates that it should become entrenched policy completely to exclude low value homes from the reach of creditors in general and he goes further to suggest that the passing of mortgage bonds over low value homes, in order to access capital, should be prohibited.[385] It should be noted that, if this change in the law is considered, then the proposed amendment to section 10A and 10B of the Housing Act[386] would also need to be revisited. It is submitted that exemptions, or the nature and level of protection provided, should, as far as is practical and possible, be mirrored in the individual debt enforcement and insolvency procedures.[387]

In the circumstances, it is submitted that legislative intervention is required to provide, in all applications for the sequestration of a debtor's estate, for judicial consideration of "all the relevant circumstances" pertaining to the home of the insolvent. It is hoped that, in any new insolvency statute, clear policies will be formulated and applied in determining the nature and level of exemptions to be permitted in order to uphold the constitutional rights, including housing and children's rights, of the insolvent and his family. Logically, any exemption of the home or of any of the proceeds of its sale would impact on, and could be justifiable on the basis of, the ultimate level of discharge for the insolvent.[388]

The inadequacies of statutory consumer debt relief measures currently available in South Africa, in the form of an administration order in terms of section 74 of the Magistrates' Courts Act and debt review and debt restructuring in terms of the NCA, as

[384]Van Heerden and Boraine 2006 *De Jure* 352 argued for exemption from execution of state-subsidised houses. Evans "Does an insolvent debtor have a right to adequate housing?" also argues for exemption of low value, including state-subsidised, homes. Steyn 2007 *Law Dem Dev* 118-119 did not regard an exemption as a "ready solution" to the problem and submitted that a thorough enquiry would first need to be conducted.
[385]See discussion at 6.6.3, above, and Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?". See, also, earlier comments by Evans *Critical Analysis* 423-424, 474; Evans 2008 *De Jure* 270. Cf *Standard Bank v Bekker* par 23, with reference to *Jaftha v Schoeman* par 58, discussed at 5.6.6, above.
[386]See 4.2.2, above.
[387]See Evans 2010 *SA Merc LJ* 477 and further discussion of this aspect at 6.6.2, above. See, also, pertinent remarks by Van Heerden and Boraine 2006 *De Jure* 349; Van Heerden, Boraine and Steyn "Perspectives" 265.
[388]See Boraine, Kruger and Evans "Policy Considerations" 666, also referred to at 6.6.3, above; Evans 2008 *De Jure* 255; McKenzie Skene 2011 *Int Insolv Rev*29; McKenzie Skene 2005 *Int Insolv Rev* 1 14; van Apeldoorn 2008 *Int Insolv Rev* 57; Rajak 2011 *Int Insolv Rev* 1-28.

alternatives to sequestration, have been discussed above.[389] It is submitted that they do not pose a solution for both creditors and debtors as reasonable alternative methods of achieving satisfaction of the debts of an over-indebted homeowner who wishes to avoid the forced sale of his home. Legislative amendments should also be directed at establishing effective debt relief mechanisms as alternatives to the sequestration (or liquidation) process to constitute reasonable means by which a debtor can satisfy his obligations without necessarily losing his home, in appropriate cases. Once viable alternatives to sequestration are made available to parties, this could result in the forced sale of a debtor's home occurring truly only as a last resort.

6.12 Conclusion

It is submitted that the realisation by the trustee of the insolvent estate of the home of an insolvent debtor, during the sequestration process in terms of the Insolvency Act, may, in certain circumstances, constitute an unjustifiable infringement of the insolvent's and his family's or dependants' section 26, section 28 and other rights. However, in insolvency cases, at no stage of the process is a court required, as in the individual debt enforcement process, specifically to address whether, taking relevant circumstances into account, realisation of the home of the debtor would constitute an unjustifiable infringement of constitutional rights. Neither is any statutory provision made for protection of these rights, where necessary.[390] Further, the automatic vesting of the solvent spouse's property, in terms of section 21 of the Insolvency Act, and its possible realisation for the ultimate benefit of the creditors of the insolvent estate, may unjustifiably infringe the section 26 and section 28 rights of affected members of the insolvent's family.[391] It is anticipated that it is only a matter of time before an insolvent or his family members bring a constitutional challenge to the validity of provisions in the Insolvency Act which allow their home to be realised without due consideration of their rights.

[389] See 4.4.3.6 and 4.5.5 above.
[390] See 6.3 and 6.4, above.
[391] See 6.7, above.

As things stand, in the absence of specific legislative provisions applicable to the treatment of an insolvent person's home, it is possible that a court could exercise its discretion to dismiss an application for a sequestration order[392] in order to protect the section 26 and section 28 rights of an insolvent and his dependants. A court also has the power, in terms of section 172(1)(b) of the Constitution, to make any order that is just and equitable.[393] Theoretically, in the case of a mortgaged home, or where other debts arise from credit agreements, if there is an allegation of over-indebtedness, a court could resort to section 85 of the NCA. This would be with a view to having its debt relief provisions applied to ameliorate the position of an over-indebted person and to permit him and his family to remain in their home while complying with a debt rearrangement order.[394] However, neither an application for debt review nor the issuing of a debt rearrangement order in terms of the NCA precludes a creditor from applying for sequestration of the debtor's estate. Further, the apparently creditor-orientated approach adopted by courts in cases such as *Ex parte Ford*, *Investec v Mutemeri* and *FirstRand Bank v Evans*, in the course of exercising their discretion whether to order sequestration, casts doubt on whether courts will tend towards assisting financially distressed homeowners in this way.[395]

The NCA's debt relief mechanisms have the potential to avert the forced sale of a debtor's home in appropriate circumstances where the debtor has a regular income which will allow him to service his debt over a longer period. However, lack of alignment between the provisions of the Insolvency Act and the NCA, as evidenced by *Ex parte Ford*, *Investec v Mutemeri*, *Naidoo v ABSA* and *FirstRand Bank v Evans*, detract from the NCA's usefulness as a protective measure in this respect.[396] The effect of the NCA, as illustrated by *FirstRand Bank v Evans*, which leaves open the possibility of a creditor obtaining an order for the sequestration of the debtor's estate even though the latter has applied for debt review, or has obtained a debt rearrangement order in terms of the NCA, leaves the homeowner debtor in a vulnerable position. The effect is to undermine

[392] See 6.4.1 and 6.4.2, above.
[393] See 3.3.1.4 (b) and 3.4, above.
[394] See 6.10.4, above.
[395] See 6.10, above.
[396] See 6.10.5 and 6.10.6, above.

the debt review and debt restructuring process as an effective and satisfactory consumer debt relief mechanism.[397]

In the circumstances, there is an urgent need for statutory amendment, not only to clarify the relationship between the NCA and the Insolvency Act, but also more effectively to balance the interests of creditors, especially secured creditors, and consumer debtors in the debt restructuring process. It would also be desirable for provisions to conform to internationally recognised principles and policies applicable to consumer debt legislative mechanisms and systems. It is submitted that a need is indicated for new legislative provisions posing additional, more workable, alternatives to sequestration.[398] It may be recalled, from Chapter 2, that the Amsterdam Ordinance of 1777, regarded as an important source of South African insolvency law, imposed the very first task of the two commissioners of the *Desolate Boedelkamers* to try to make an arrangement with the creditors, before they called a meeting of creditors at which provisional sequestrators would be appointed.[399] Thus, a policy of administrators of the insolvency process first considering, or even encouraging, debt rearrangement in an endeavour to avert the liquidation of an insolvent estate is firmly embedded in our historical roots.

As discussed in Chapter 5, in relation to the individual debt enforcement process, the Constitutional Court stated in *Jaftha v Schoeman*, that execution against a person's home should occur as a last resort.[400] In *Gundwana v Steko*, the Constitutional Court stated that all reasonable alternatives should be explored before execution against the debtor's home is permitted.[401] Likewise, in insolvency, it is submitted that it would be more in keeping with constitutional imperatives for the realisation of the insolvent debtor's home, which, in terms of applicable insolvency law, is an invariable consequence of sequestration, to be permitted only as a last resort. In other words, a debtor who is willing, and in a position reasonably to endeavour, to satisfy in full a debt

[397] See 6.10, above.
[398] See 6.10.6, above.
[399] See 2.3.3, above.
[400] See 5.2.3, above, with reference to *Jaftha v Schoeman* par 59.
[401] See 5.6.2.3, above, with reference to *Gundwana v Steko* par 53.

which he secured by passing a mortgage bond over his home, should be afforded a reasonable opportunity to do so by resorting to alternative debt relief measures. There is an even stronger argument for such an approach to be adopted where a viable debt rearrangement order has already been issued by a court in terms of the NCA and the debtor is making regular payments in accordance with it. Interpretation and application of the more recent Constitutional Court judgment in *Gundwana v Steko* may act to temper the effect of the decision in *FirstRand Bank v Evans*. It is nevertheless submitted that legislative intervention is required to regulate the relationship between sequestration in terms of the Insolvency Act and other available consumer debt relief mechanisms as well as to ensure that the latter indeed represent methods whereby debts "can be satisfied in a reasonable manner" within the contemplation of the Constitutional Court in *Gundwana v Steko*.[402]

It is submitted that the provision, originally included in the South African Law Reform Commission's proposed section 74X of the Magistrates' Courts Act, in 2000, and the somewhat similar section 118, contained in the unofficial working draft of a proposed Insolvency and Business Recovery Bill, put forward as a pre-liquidation composition procedure, ought to receive thorough consideration. It is submitted that a suitably revised and modified version of this provision holds the potential to become an alternative debt relief mechanism which may provide a solution in this context. In appropriate cases, an over-indebted or factually insolvent homeowner with a regular income could avert the forced sale of his mortgaged home by maintaining instalment repayments, in accordance with the original terms of the mortgage bond, while servicing all other debt to creditors who would have concurrent claims, in insolvency, on the restructured terms of a repayment plan. In this way, it is submitted, the nature and level of opposition to debt restructuring, especially by a mortgagee of the debtor's home, as was encountered in *FirstRand Bank v Evans*, will be minimised as long as the terms of the restructuring orders are reasonable.[403]

[402] See 6.10.6 and 6.11, above.
[403] See 1.6, 4.4.3.6, 4.7.4, 5.6.8, 6.4.3 and 6.10.6, above.

Furthermore, as long as the applicable provisions are included in the national insolvency statute, as is currently proposed, it has the potential to address commentators' criticisms of South Africa's insolvency system by turning it into one which provides "single portal access" to debt relief mechanisms which function in harmony with one another. It is also anticipated that, given the proposed possibility of a measure of discharge for the debtor from liability for debt, once the composition procedure has been successfully completed, this would bring South Africa's system more into line with internationally recognised consumer debt relief principles and policies.[404]

It is submitted that section 21 of the Insolvency Act should be repealed. However, it should not be replaced with a provision such as clause 22A of the Draft Insolvency Bill of 2000, or section 25 of the unofficial working draft of the Insolvency and Business Recovery Bill, compiled in 2010. The position, in relation to the effect of sequestration on the property of the solvent spouse, should be fully interrogated, taking into account constitutional imperatives and applying proper policies appropriate to our modern society, as advocated, notably, by Evans.[405]

In the result, it is submitted that legislative intervention is necessary to regulate treatment of the home of the insolvent and his dependants who share it with him. Statutory provisions should be enacted which would have the effect, where appropriate, of averting the invariable realisation by the trustee of the home of the insolvent for the benefit of the creditors. Legislation should require a court specifically to address the housing position of the insolvent and his family and, where appropriate, to provide a measure of protection for them. In the formulation of appropriate legislation, including, possibly, the introduction of a modified version of the pre-liquidation composition procedure, as discussed above,[406] which should be encouraged and promoted wherever a composition or repayment plan is feasible, the following submissions are made.

[404]See 6.10.6, above.
[405]See 6.7, above.
[406]See 4.4.3.6, 6.4.3, 6.10.6 and 6.11, above.

- A clear conception, and definition, of a debtor's "home", which will be eligible for protection, will have to be devised. The definition should include his "primary residence". Movable structures such as mobile homes, trailers, or "shacks" should also be included in the definition.[407]
- Ideally, before a sequestration order is granted and, thereafter, before the realisation of an insolvent person's home occurs, specific consideration should be required to be given to the position of the home of the insolvent. This would possibly be a convenient point at which it should be determined whether the liquidation process, or the proposed composition process, if this were to be introduced into the insolvency system, should be followed. Where the insolvent has employment or a steady income or other means at his disposal, it would be appropriate to consider the debt review and rearrangement process, under the NCA, or something along the lines of the proposed section 118 pre-liquidation composition process, as a possible course to be adopted.[408]
- A court should be expressly empowered, where it deems it just and equitable, in its discretion to order the postponement of the realisation of the insolvent's home for a limited period. This would be so that the insolvent may make alternative accommodation arrangements for himself and his dependants or arrange for the refinancing of the home. A postponement should be considered where an alternative consumer debt relief process, such as debt rearrangement under the NCA, or one along the lines of the proposed pre-liquidation composition process, is not indicated as being appropriate in the circumstances and, for example, where children or the elderly or persons of poor health are affected.[409]
- Consideration ought to be given to the introduction of an exemption from forced sale of low value and state-subsidised homes. Alternatively, where appropriate, a capped amount of the proceeds of the sale of such a home might be exempted,[410] either out of any equity held by the debtor, to be applied towards the acquisition of alternative accommodation, or to be transferred to the state as

[407] See 5.6.8 and 5.7, above.
[408] See 6.4, 6.10.6 and 6.11, above.
[409] See 6.3 and 6.11, above.
[410] See 6.6.3 and 6.11, above.

reimbursement of any subsidy investment originally made. In the latter regard, the proposed amendment to section 10A and 10B of the Housing Act would need to be reconsidered.[411]

- Consideration might also be given to reserving a portion of the equity even in moderately valued homes of insolvent persons.[412]
- Provision should be made for a court order to include, where appropriate, a direction that an indigent insolvent debtor and his family should be provided with emergency, or temporary, state or municipal housing pending more permanent accommodation arrangements being made.[413]

In the interim, in the absence of dedicated legislation regulating the position, it is submitted that, in every insolvency matter, a court should specifically address issues surrounding the housing rights of the insolvent and his dependants as well as any children's rights. Where appropriate, an order which is just and equitable should be made in terms of section 172(1)(b) of the Constitution.[414]

[411]See 4.2 and 4.7.1, above. It is submitted that, where a mortgagee has a real right of security over a previously subsidised home, the amount of the subsidy should first be reimbursed to the state before the mortgagee's claim against the insolvent estate is paid.
[412]See 6.6.1, 6.6.3 and 6.11, above.
[413]See 3.3.1.4 (c), 6.3.2 and 6.6.3, above.
[414]See 3.3.1.4 (b) and 3.4, above.

CHAPTER 7

TREATMENT OF A DEBTOR'S HOME IN FOREIGN JURISDICTIONS

> What has been will be again,
> what has been done will be done again;
> there is nothing new under the sun.
>
> *Ecclesiastes* 1:9
> *The Bible* (New International Version 1984)

7.1 Introduction

Consideration of the treatment of the home of the debtor both inside and outside of insolvency, in other jurisdictions, may prove useful as guidance may be drawn from experiences abroad. Comparative research reveals differences in treatment of a debtor's home in various jurisdictions. In systems which do provide protection for the home against the claims of creditors, there are differences in the method in, and extent to, which this occurs. Traditionally, broadly speaking, two approaches have been identified. In some jurisdictions, formal statutory "homestead exemptions", the monetary limits of which are often capped, apply both in the individual debt enforcement process and in the event of the debtor's insolvency. In others, there is no formal "home exemption", as such, but statutory provisions regulating, *inter alia*, the civil process, family law, insolvency law or the recognition of human rights afford a measure of protection. This occurs, for example, by the imposition of certain procedural requirements before the home may be sold, protecting the interest in the home of a spouse or partner of the debtor from creditors' claims or postponing the forced sale of the family home, in certain circumstances.

In a comparative study of exempt assets, after noting the differences, in various jurisdictions, in treatment of the debtor's home, McKenzie Skene submits that the exemption of a debtor's home from an insolvent estate may be one area where

harmonisation amongst jurisdictions is "simply not possible".[1] However, as Rajak observed, in light of his comparative research into bankruptcy regimes, while "local culture has influenced the shape of the particular institutions" and "[s]uperficially they may seem poles apart, … below the surface they sometimes resemble each other quite closely."[2] McKenzie Skene recognises basic commonalities of purpose. She draws attention to the INSOL International *Consumer Debt Report* of 2001, in relation to the need to give special attention to problems connected with housing.[3] She also points out that the UNCITRAL Legislative Guide on Insolvency Law suggests that, when identifying exclusions of assets from the estate of a natural person, "consideration might need to be given to applicable human rights obligations, including international treaty obligations, which are intended to protect the debtor and relevant family members and may affect the exclusions that should be made." Bearing these in mind, McKenzie Skene submits that it may be possible to create model provisions or general legislative principles for "the debtor's home (in relation to level of exemption where an exemption exists and level of protection to be afforded to the debtor/family where there is no exemption)".[4]

The INSOL International *Consumer Debt Report II*, published in November 2011, states:[5]

> Many countries … seek … to prevent the sale of the … [home] in order to keep the family together or[,] at least, [to] offer them, during a certain period, the opportunity to develop alternatives. The court should then balance the interests of the creditors, the conduct of the spouses in the period before the insolvency, the financial position of the both spouses, the needs of the children and all other circumstances. … Generally a waiting period (of one year) is taken into account, unless the circumstances of the case are exceptional or the interests of the creditors outweigh all other considerations. The first year is generally the most difficult period, during which the family is offered the opportunity to adapt to the

[1]McKenzie Skene 2011 *Int Insolv Rev* 29, 35-36.
[2]See Rajak "Culture of Bankruptcy" 25.
[3]McKenzie Skene 2011 *Int Insolv Rev* 50-51, with reference to the INSOL International *Consumer Debt Report* of 2001 16 http://www.insol.org/pdf/consdebt.pdf [date of use 15 March 2012]. The INSOL International *Consumer Debt Report II*, of 2011, discussed at 6.10.6, above, was published, in hard copy only, in November 2011.
[4]McKenzie Skene 2011 *Int Insolv Rev* 54.
[5]INSOL International *Consumer Debt Report II* 5-6.

new situation. In the legislation of many countries a natural person is offered various possibilities to keep the family home.

The purpose of this chapter is to analyse and compare the position in certain jurisdictions in which treatment of a debtor's home is regulated by legislation. This will be done with a view to drawing guidance for consideration of the possible introduction, in South Africa, of provisions, mechanisms, or practices employed elsewhere, appropriately modified to address inadequacies in our legal system. Mindful of essential differences between our system and others and, as Rajak observed, the influence of "local culture" in shaping institutions,[6] the purpose of this chapter is to consider aspects which reflect distinctions and parallels as well as international policies and trends, in order to draw on comparative experience and wisdom. This chapter is not intended to contain a comprehensive analysis of the legal position in each of the chosen jurisdictions, but merely to highlight aspects which may be relevant in the South African context. As a result, the position in some of the jurisdictions is canvassed in more detail than in others.

This chapter will cover the position in the United States of America and in Canada, each of which has a long tradition of protection of the debtor's home against creditors through a formal "homestead exemption". It will also include brief discussion of a statutory exemption in New Zealand which, interestingly, is due for repeal. This chapter will also deal with the position in England and Wales as well as in Scotland which, traditionally, have fallen into the second category, mentioned above, in which protection of the family home against creditors' claims has developed through the enactment of provisions in various statutes, without the application of a formal home exemption. Attention will be given to recent developments, in England and Wales, Scotland and Ireland, and will include current proposals for legislative reform in Scotland and in Ireland. The current position in Europe will be touched on very briefly.

[6]See Rajak "Culture of Bankruptcy" 25.

7.2 The United States of America

7.2.1 General and historical background

The statutory homestead exemption of the United States of America is said to date back to 1839, when Texas offered free land grants and homestead exemption.[7] The purposes were, mainly: to attract settlers; to provide a home for a settler and his family and some means to support them, if the settler suffered economic losses, to prevent his family from becoming a burden on the public; and to retain, in pioneers, the sense of freedom and independence which was deemed necessary to uphold the democratic institutions.[8] Other states followed suit, partly to deter residents from leaving and moving to Texas, but also to protect families from becoming destitute. By the mid-nineteenth century, the "homestead exemption movement" became politically charged and associated with broader social ideals, such as land reform, abolitionism, and temperance, the latter movement, for example, supporting homestead exemptions as they viewed creditors as encouraging alcoholism among male breadwinners.[9] On the other hand, critics regarded homestead exemptions as encouraging families to defraud creditors, drying up credit markets,[10] undermining economic self-sufficiency by encouraging dependence on the state, and giving wives undue influence over the financial dealings of their husbands.[11]

In 1862, the "free homestead law" was enacted, entitling every adult citizen to 160 acres of unappropriated public lands[12] for a nominal fee of between $5 and $10. After five

[7]See Morantz 2006 *L Hist Rev* 1, 8, with reference, *inter alia*, to Goodman 1993 *J Am Hist* 470, 477. See also Ferriell and Janger *Understanding Bankruptcy* 102 n 358 and references cited there.
[8]See Fox 2006 *Legal Studies* 201, 222-223, with reference to *Vernon's Interpretative Commentary to the Texas Constitution* 1993 art XVI, ss 49-50.
[9]See Morantz 2006 *L Hist Rev* 9-10, with reference, *inter alia*, to Goodman 1993 *J Am Hist* 477, 478-9.
[10]Along similar lines, it is submitted, as Mokgoro J's concept of a "poverty trap", in *Jaftha v Schoeman*.
[11]Notably, the laws of some states prohibited the alienation or mortgage of the homestead by the head of the family, unless the wife joined in the deed; see Spofford "Homestead and exemption laws" 547.
[12]Valued by the government at $1.25 per acre. Alternatively, a citizen was entitled to 80 acres valued at $2.50 per acre.

years of actual residence on the land, the settler obtained valid title, called a "patent",[13] with the proviso that the land would not be "liable for any debts of the settler contracted before the issuing of the patent for his homestead". It was explained thus:[14]

> The spirit of most of the laws aimed at guarding the home from alienation through the improvidence or misfortune of the head of the family, and it …[was] held to be the interest of the state, [*sic*] as a matter of public policy, to secure to each citizen so much of independence as is involved in the possession of a homestead.
> …
> The freeholder is the natural supporter of a free government. Tenantry is unfavorable to freedom. The tenant has in fact no country, no hearth, no domestic altar, no household god. It should be the policy of republics to multiply their freeholders.

The United States of America has been cited as an example of a jurisdiction which conferred systematic legal protection on domestic property against third parties on the basis of recognition of the worth of home *per se*.[15] Home ownership was later promoted as part of the "American Dream" and has been supported by successive presidential administrations.[16]

7.2.2 The current homestead exemptions

Federal bankruptcy laws[17] exempt an owner's equity in a homestead up to a maximum value of $21 625.[18] However, states may opt out of the federal homestead exemption and apply their own to a homeowner domiciled in their jurisdiction. In some states, homestead protection is automatic while, in many others, the homeowner must file a

[13]Issued by the general land office of the United States, in Washington. If an individual wished to, he could purchase more land.
[14]Spofford "Homestead and exemption laws" 547 II.153.2, with reference to Revised Statutes ss 2289-2317 http://www.econlib.org/library/YPDBooks/Lalor/llCy544.html [date of use 15 March 2012].
[15]Fox 2006 *Legal Studies* 201, 219, 221, with reference to McKnight 1983 *Sw Hist Q*369 who stated that homestead has come to mean "not only family home but also property that is accorded particular protection because it is the family home".
[16]See Ferguson *Ascent of Money* 246-249, 251-253, 266-268; Boyack 2011 *AmULRev* 1489, 1560; Hochbein 2010 *Cap Univ L Rev* 889.
[17]These are contained in the Bankruptcy Reform Act of 1978, commonly, and hereafter, referred to as the "Bankruptcy Code", which is embodied in Title 11 of the United States Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, commonly referred to as "BAPCPA".
[18]In terms of s 522(b) read with (d)(1) of the Bankruptcy Code. The amount of $21 625 applies in 2011.

claim for homestead exemption, in the particular state, in order to obtain its protection.[19] State homestead exemptions vary widely: some states provide an unlimited dollar value homestead exemption,[20] although they each limit the exemption to a certain (maximum) area of land, while others provide no homestead exemption.[21] Other states offer exemptions which range from $5 000, in Ohio, to $350 000, in Nevada. In many states, although the dollar value of the homestead exemption is too low for a debtor to avoid the forced sale of, and to retain, his home, it may at least permit the debtor to receive a portion of the proceeds of the sale.[22]

Homestead exemptions are usually only available in respect of property which is the principal residence of the debtor or one of his dependants.[23] In most states, the homestead exemption is not restricted to real estate[24] but also includes personal property used for residential purposes, such as a mobile home, a trailer, or a houseboat.[25] State homestead exemptions apply both within, and outside of, bankruptcy. However, generally, consensual liens,[26] such as mortgages, and construction and artisan's liens,[27] cannot be eliminated either inside or outside of bankruptcy, even where they are attached to property subject to an exemption. Therefore, to avoid the sale of the home, the debtor would have to pay to the mortgagee the amount due in terms of the mortgage and, where applicable, the claims of the holders of construction and artisan's liens. Thus, in circumstances where the home is heavily mortgaged, the exemption may be worth very little, if anything, to the debtor. It is also important to remember that the statutory provisions exempt *equity* in the home, up to the specified amount. Therefore, in bankruptcy, in order to avoid his home being sold,

[19]Ferriell and Janger *Understanding Bankruptcy* 102-103.
[20]Examples are Florida, Iowa, Kansas, South Dakota and Texas.
[21]Examples are Delaware, New Jersey, and Pennsylvania. See Fox 2006 *Legal Studies* 220.
[22]Ferriell and Janger *Understanding Bankruptcy* 430-431; Ferguson *Ascent of Money* 252.
[23]Ferriell and Janger *Understanding Bankruptcy* 103, 430.
[24]That is, immovable property.
[25]Ferriell and Janger *Understanding Bankruptcy* 103, 430. Cf *Norris v Thomas* Texas Supreme Court case no 05-0476 http://www.supreme.courts.state.tx.us/historical/2007/feb/050476d.htm [date of use 15 March 2012], in which the majority judges held that a four bedroom, three bathroom, yacht, valued at $400 000, was not a homestead.
[26]See Ferriell and Janger *Understanding Bankruptcy* 354-355.
[27]The homestead exemption also does not apply in respect of outstanding taxes owed in respect of the property; see Ferriell and Janger *Understanding Bankruptcy* 60ff, 67-69.

the debtor would also have to "purchase" any equity which exceeds the amount of the available exemption and which would otherwise be distributed among unsecured creditors.[28] Where the debtor holds insufficient equity in the home for him to retain it and it is sold, an applicable homestead exemption would allow him to receive the proceeds of the sale of the home, up to the limit of the exemption, in order for him to purchase other, more affordable accommodation or to contribute towards payment of rent.[29]

A related aspect of the homestead exemption laws is that restrictions may apply in relation to the use of home equity as security for purposes not directly linked to the acquisition, or improvement, of the property, nor to pay taxes due in respect of it. In most states, the home is exempt from actions to recoup other, unsecured debts.[30] In this respect, mortgages are often referred to as "no recourse" loans, connoting that, when the mortgagor defaults, the lender can only collect the value of the property and cannot seize other property or put a lien on future wages.[31]

Following abuse of the state homestead exemptions,[32] the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 brought about a number of modifications.[33] Now a person qualifies for a particular state's homestead exemption only if he was domiciled in that state for a period of 730 days preceding the bankruptcy filing.[34] Further, although states may opt out of the federal exemptions, the Bankruptcy

[28]Ferriell and Janger *Understanding Bankruptcy* 430-431; Tabb and Brubaker *Bankruptcy Law* 654; Evans *Critical Analysis* 195.
[29]See Ferriell and Janger *Understanding Bankruptcy* 430-431.
[30]Fox 2006 *Legal Studies* 223.
[31]Ferguson *Ascent of Money* 270; Ferriell and Janger *Understanding Bankruptcy* 96; Warren and Westbrook *Debtors and Creditors* 867. See also, in relation to mortgage foreclosure cases and the "anti-deficiency", or "no recourse", provisions in the Fair Debt Collection Practices Act 1977, Bergia 2010 *Rev Litig* 391, 401-404.
[32]See Gross *Failure and forgiveness* 45-49 and references cited there. See Tabb and Brubaker *Bankruptcy Law* 680 on the so-called "millionaire's mansion loophole".
[33]Hereafter referred to as "the BAPCPA". The amendments to the homestead exemption provisions came into effect on 20 April 2005.
[34] See s 522(b)(3)A of the Bankruptcy Code which is intended to prevent debtors from moving from a state with a limited homestead exemption, to one with a more favourable exemption, shortly before filing for bankruptcy, or, where they reside in a state with no limitation on the value of the homestead exemption, from increasing the value of the equity in their homestead just before filing for bankruptcy. See Gross *Failure and forgiveness* 45-49 and references cited there.

Code does impose, in certain circumstances, a restriction on the value of a homestead that a debtor may exempt in bankruptcy notwithstanding the state exemption.[35]

7.2.3 Bankruptcy provisions

Under the Bankruptcy Code, there are mainly two bankruptcy processes available to consumers. Chapter 7 provides for liquidation of the debtor's assets, often referred to as "straight" bankruptcy, and Chapter 13 provides for debt rescheduling, often referred to as "a wage earner's plan" or reorganisation. The filing of a bankruptcy petition creates an estate which is a separate legal entity and which holds and controls all assets owned by the debtor.[36] The content of the bankruptcy estate differs depending on whether it is a Chapter 7 or a Chapter 13 bankruptcy filing.[37] Under Chapter 7, all interests, assets and property, broadly defined,[38] owned by the debtor at the time of commencement of the case, are included in the bankruptcy estate.[39] Under Chapter 13, the bankruptcy estate includes the same assets as under Chapter 7 as well as specified types of property which the debtor acquires after the commencement of the case.[40] Federal and state exemptions of property, including, for example, clothing, bedding, and household items, as well as the homestead exemptions, assist the bankrupt to obtain a "fresh start".[41]

In the Chapter 7 bankruptcy process, which is supervised by the bankruptcy court, the debtor's assets are surrendered to, and sold by, the trustee and the proceeds are distributed amongst the bankrupt's creditors, subject to the debtor's right to retain

[35]See s 522(p), (q) and (o) of the Bankruptcy Code. In 2011, the amount of equity exempted is restricted to $146 450.
[36]See Ferriell and Janger *Understanding Bankruptcy* 223; Evans 2010 *CILSA* 337, 347.
[37]See s 541 of the Bankruptcy Code. See Ferriell and Janger *Understanding Bankruptcy* 224ff; Evans 2010 *CILSA* 348.
[38]See s 541(a)(1) of the Bankruptcy Code. See Gross *Failure and forgiveness* 44.
[39]See s 541(a)(1)-(6) of the Bankruptcy Code.
[40]And before the case is closed, dismissed or converted into a case under Chapters 7 or 11 of the Bankruptcy Code; see s 1306(a)(2) of the Bankruptcy Code. See Ferriell and Janger *Understanding Bankruptcy* 255ff, 645.
[41]For discussion of the exemptions in American law, see Evans *Critical Analysis* 165ff; Evans 2010 *CILSA* 345, 346ff; Gross *Failure and forgiveness* 93.

certain exempt property and the rights of secured creditors.[42] To be eligible to file for a Chapter 7 bankruptcy, a debtor must qualify for relief under a "means test" which, *inter alia*, requires an income below a certain threshold.[43] Ordinarily, debtors who file for a Chapter 7 bankruptcy do not have non-exempt assets, with the result that there is no need for a sale to be held and, in practice, the bankrupt receives a discharge within a short period of time.[44]

The purpose behind a Chapter 13 bankruptcy is not liquidation, but the preservation, of the estate, and the rehabilitation of the debtor by giving him a "fresh start" without necessarily becoming a burden on the state.[45] The debtor generally remains in possession of the property of the estate which, should he successfully complete the payment plan, becomes part of his new estate.[46] Thus, the debtor may re-acquire pre-petition property by committing post-petition earnings to the payment of creditors' claims.[47] On the other hand, however, if the plan fails and the bankruptcy is converted to a Chapter 7 bankruptcy, the property must be surrendered to the trustee for liquidation.[48]

A person is eligible for Chapter 13 relief as long as his unsecured debts are less than US$360 475 and secured debts are less than US$1 081 400.[49] The person must file a petition for Chapter 13 relief with the bankruptcy court of his domicile and it is a requirement that the petitioner must have received credit counselling within 180 days before filing.[50] As soon as the petition is filed, an "automatic stay" is entered which temporarily stops all debt collection actions against the debtor or his property, including

[42]See Ferriell and Janger *Understanding Bankruptcy* 603ff.
[43]See Ferriell and Janger *Understanding Bankruptcy* 604, 607ff.
[44]See Ferriell and Janger *Understanding Bankruptcy* 603; Evans 2010 *CILSA* 340; Gross *Failure and forgiveness* 25. An alternative procedure for consumers with very large debt is Chapter 11.
[45]Evans *Critical Analysis* 162-163, 164-166.
[46]Ferriell and Janger *Understanding Bankruptcy* 223-224, 645, 646.
[47]As Evans 2010 *CILSA* 349 explains, in this way, the debtor "saves" assets which would have been liquidated, in a Chapter 7 bankruptcy, by using property, or post-petition acquisitions, which would have been exempt under Chapter 7.
[48]See Ferriell and Janger *Understanding Bankruptcy* 644; Evans 2010 *CILSA* 349.
[49]See s 109(e) of the Bankruptcy Code. These amounts are adjusted periodically to reflect changes in the consumer price index. See Ferriell and Janger *Understanding Bankruptcy* 642-643.
[50]See ss 109, 111 of the Bankruptcy Code.

a mortgage foreclosure sale.[51] The automatic stay remains in effect until the bankruptcy case is completed. Within 15 days of filing the petition, the debtor must file: schedules of assets and liabilities; a schedule of current income and expenditure; schedules and details of all financial affairs; and a proposed payment plan to pay to the trustee, for the benefit of creditors, a portion of his debts over a period of between three to five years.[52] If the plan is confirmed by the bankruptcy court,[53] the debtor is re-vested with all of the property not disposed of in terms of the payment plan.[54] The debtor must then pay his debts according to the confirmed payment plan.

Many debtors file for Chapter 13 bankruptcy with the specific object of saving their home from a mortgage foreclosure sale.[55] In a Chapter 13 filing, it is possible to obtain "cram down modification" of secured debt. This means that the bankruptcy court may confirm a payment plan which entails the adjustment of the terms of the original agreement without the consent of the secured creditor.[56] However, this does not apply to a mortgage over real estate which is the debtor's principal residence.[57] Therefore, if the debtor wishes to avoid his home being sold in foreclosure, he must continue to make payments in accordance with the original mortgage agreement. If the debtor is already in default with respect to his mortgage obligations, in an explicit exception to the rule that prohibits modification of home mortgages, the Bankruptcy Code allows him to "cure and reinstate" the mortgage at any time prior to a foreclosure sale of the

[51]See s 362 of the Bankruptcy Code. See Ferriell and Janger *Understanding Bankruptcy* 257-258, 275, 356-357. However, if the debtor has no valuable interest in the property and does not need it to reorganise, the court must lift the automatic stay and permit the creditor to foreclose, as if the bankruptcy case had not been filed.
[52]It may be noted that, in practice, the proposed payment plan is generally filed at the time of filing; see Ferriell and Janger *Understanding Bankruptcy* 643.
[53]See s 1325(a) and (b) of the Bankruptcy Code for requirements for confirmation of a plan. See also Ferriell and Janger *Understanding Bankruptcy* 663ff.
[54]See s 1327(b) of the Bankruptcy Code. See also Ferriell and Janger *Understanding Bankruptcy* 694; Evans 2010 *CILSA* 349.
[55]See Ferriell and Janger *Understanding Bankruptcy* 257-258, 656-657; White and Zhu 2010 *J Leg Studs* 33; Morris and Guccion 2011 *ABI L Rev* 1, 18.
[56]See 1325(a)(5) of the Bankruptcy Code.
[57]See s 1322(b)(2) of the Bankruptcy Code; Ferriell and Janger *Understanding Bankruptcy* 654-657, 687-688. It may be noted that, if the residence is personal property, such as a trailer or a motor home, the creditor's claim may be modified.

mortgaged property.[58] Thus, the payment plan should require the debtor to make all regular instalment mortgage payments which will become due after filing the Chapter 13 petition as well as to make additional payments so that arrear mortgage payments will be paid within a reasonable time.[59] In the event that the bankrupt makes all payments timeously and pays any arrear amounts within a reasonable time – something which he is often more able to do once other debt obligations have been modified – he may become eligible to refinance the property after a period of repayment. In this event, he might be able to make additional payments to unsecured creditors.[60]

7.2.4 The recent recessions and related developments

The recent economic crisis and recessions, which necessitated the implementation of measures akin to emergency measures traditionally extended to counter the effects of disasters, war and revolution,[61] brought to the fore the need to address and, in the longer term, to avoid, the adverse consequences of home mortgage foreclosures for homeowners, creditors and society, generally.[62] During 2007 and 2008, as increasing

[58]See s 1322(c)(1) of the Bankruptcy Code. See also Ferriell and Janger *Understanding Bankruptcy* 657 n 112 refer to *In re Cain* 423 F.3d 617 (6th Cir. 2005). S 1322(c)(2) contains another explicit exception to the rule that prohibits modification of home mortgages. It applies when the last payment on the mortgage is due before the end of the payment plan. This might occur, for example, if the debtor files for a Chapter 13 bankruptcy within the last few years of the residential mortgage or where, in terms of the original agreement, there is a "balloon payment" due in the three- to five-year period after the debtor has filed for the Chapter 13 bankruptcy. See Ferriell and Janger *Understanding Bankruptcy* 657.
[59]See Ferriell and Janger *Understanding Bankruptcy* 657; Morris and Guccion 2011 *ABI Law Rev* 19-20.
[60]See Ferriell and Janger *Understanding Bankruptcy* 430-431, 657.
[61]See 2.3.5.2, above.
[62]See Wagner 2010 *Geo J Pov Law & Policy* 423; Carr and Lucas-Smith 2011 *Suffolk U L Rev* 7; Boyack 2011 *AmULRev* 1489; Braucher 2010 *Ariz L Rev* 727; Smith 2011 *J Civ Rights & Ec Dev* 525; Martin "New Housing Program is Aimed at the Unemployed" *New York Times* (7 July 2011) http://www.nytimes.com/2011/07/08/business/new-housing-program-is-aimed-at-the-unemployed.html [date of use 15 March 2012]; Streitfeld "Big Banks Easing Terms on Loans Deemed as Risks" *New York Times* (2 July 2011) http://www.nytimes.com/2011/07/03/business/03loans.html [date of use 15 March 2012]; Streitfeld "Backlog of Cases Gives a Reprieve on Foreclosures" *New York Times* (19 June 2011) http://www.nytimes.com/2011/06/19/business/19foreclosure.html?pagewanted=print [date of use 15 March 2012]; Morgenson "Countrywide to Distribute Settlement to its Clients" *New York Times* (20 July 2011) http://www.nytimes.com/2011/07/21/business/countrywide-to-pay-borrowers-108-million-in-settlement.html?_r=1 [date of use 15 March 2012]; The Associated Press "Wells Fargo Agrees to Pay $85 Million Over Loans" *New York Times* (20 July 2011) http://www.nytimes.com/2011/07/21/business/wells-fargo-to-settle-mortgage-charges-for-85-million.html [date of use 15 March 2012]; Herron "Banks repossessed 1 million homes last year – and 2011 will be worse" *msnbc.com* (13 January 2011) http://www.msnbc.msn.com/id/41051419/ns/business-real_estate/t/banks-repossessed-million-homes-last-year-will-be-worse/ [date of use 15 March 2012].

levels of unemployment raised the rate of mortgage defaults and, in turn, home mortgage foreclosures by lenders,[63] a "downward spiral" ensued as residential areas became filled with empty homes abandoned by defaulting mortgagors or vacated, in foreclosure. As property values sank well below their "boom-time" values and amounts for which homes had been mortgaged exceeded their current values, owners found themselves "underwater", holding "negative equity" in their homes. Increased homelessness following evictions from rented and owned homes in foreclosure placed a strain on the social security system. Homeowner assistance programmes, facilitated by the Mortgage Forgiveness Debt Relief Act of 2007, formed with the main purpose of encouraging lenders not to foreclose but to modify loan terms by agreement,[64] could not stem the tide.[65]

The HOPE for Homeowners Act of 2008[66] sought, for the benefit of "distressed borrowers", to encourage lenders to reduce principal loan balances by 10 percent.[67] However, this programme, in which participation by lenders was voluntary, also was

[63]Carr and Lucas-Smith 2011 *Suffolk U L Rev* 10-11.
[64]The Hope Now Alliance was one such programme. The Mortgage Forgiveness Debt Relief Act of 2007, Pub L 110-142, 121 STAT 1803, enacted on 20 December 2007, provided that debt "forgiven", or cancelled, in the course of mortgage loan modification, or in the course of foreclosure, on a primary residence, during the period from 2007 to 2009, would not be treated as income, for tax purposes. This period was extended, to 2012, by the Emergency Economic Stabilization Act of 2008, discussed below. See Hochbein 2010 *Cap Univ L Rev* 889.
[65]By April 2008, the State Foreclosure Prevention Working Group reported that the rate of home mortgage foreclosures exceeded the capacity of homeowner rescue programmes on account of the complex and slow consultation and administrative processes which had to be followed when seeking refinancing. See Christie "Housing relief efforts slow as pace of foreclosures rise" *CNN Money* (28 April 2008) http://money.cnn.com/2008/04/28/real_estate/Hope_Now_workouts_slow/index.htm?postversion=2008042817 [date of use 15 March 2012].
[66]Passed as part of the Housing and Economic Recovery Act of 2008, Pub L 110-289, 122 Stat 2654, enacted on 30 July 2008, consisting of a legislative package, made up of various statutes, which established a scheme mainly to restore confidence in Fannie Mae and Freddie Mac, the two large suppliers of mortgage funding, by strengthening regulations and injecting capital into them. (For background information on Fannie Mae and Freddie Mac, see Boyack 2011 *AmULRev* 1489.) It also introduced significant regulatory reforms for the provision of housing finance and new requirements, for lenders, in relation to early disclosure of mortgage terms and charges, and new regulations regarding registration and conduct of loan originators.
[67]It authorised the Federal Housing Administration to guarantee up to US$300 billion in new 30-year fixed rate mortgages for subprime borrowers. It also authorised states to refinance subprime loans using mortgage revenue bonds and established the Federal Housing Finance Agency which placed Fannie Mae and Freddie Mac under its conservatorship. See Johnson and Waldrep 2010 *NC Bank Inst* 191, 203-204.

unsuccessful.[68] On 3 October 2008, the Emergency Economic Stabilization Act of 2008,[69] now commonly referred to as "the bailout", was enacted. This created the Troubled Asset Relief Program ("TARP") to enable the United States Treasury to purchase failing bank assets and to encourage mortgagees to take advantage of the HOPE for Homeowners Program, or other available programmes, to keep foreclosures to a minimum.[70] However, this aim was not achieved.[71] In February 2009, President Barack Obama announced the Homeowner Affordability and Stability Plan, including the Home Affordable Modification Program,[72] which, once again, encouraged mortgage servicers' voluntary participation by offering them incentives to modify loans and which, it was envisaged, would assist an anticipated three to four million homeowners to avoid foreclosure. But this, also, has generally not been regarded as a success.[73] The Helping Families Save their Homes Act of 2009[74] was passed without the controversial, proposed "cram down" provisions which would have granted bankruptcy judges the authority, when confirming Chapter 13 payment proposals, to reduce the capital sum or applicable interest rates or to extend the repayment period up to a maximum of 40 years, for home mortgages on primary residences.[75]

[68]There were significantly fewer applications than anticipated, and very few refinanced mortgages were processed, a fact attributed to high fees, high interest rates, reluctance on the part of lenders to reduce the principal sum owing, and a requirement that the federal government should receive 50% of any appreciation in value of the house.
[69]Division A of Pub L 110-343, 122 Stat 3765, enacted on 3 October 2008.
[70]It permitted the Treasury Secretary to apply loan guarantees and credit enhancements in an effort to promote the resort to loan modifications to avert foreclosures.
[71]See Carr and Lucas-Smith 2011 *Suffolk U L Rev* 10.
[72]It provided $75 billion, supplemented by US$200 billion in additional funding, for Fannie Mae and Freddie Mac to purchase, and more easily refinance, mortgages. It encouraged lenders to reduce homeowner's monthly payments to 38% of their gross monthly income and the government would share the cost to further reduce the payment to 31%. The plan also involved potentially forgiving, or deferring, a portion of the borrower's mortgage balance. For details of the Home Affordable Modification Program, see Braucher 2010 *Ariz L Rev* 727; Johnson and Waldrep 2010 *NC Bank Inst* 191, 205-206.
[73]Colesanti 2011 *J Civ Rights & Ec Dev* 483, 489; Crespi 2011 *Santa Clara L Rev* 153, 179-180; Carr and Lucas-Smith 2011 *Suffolk U L Rev* 15ff; Braucher 2010 *Ariz L Rev* 787-788.
[74]111-S 896.
[75]This would have involved an amendment to s 1322(b)(5) of the Bankruptcy Code. Although the House of Representatives voted to pass the bill (HR 1106, with votes recorded as 234 to 191), Senate did not approve the cram down provisions. See Johnson and Waldrep 2010 *NC Bank Inst* 207-208. For arguments in favour of the cram down provisions, see Maynard 2010 *NC Bank Inst* 275; Seidenberg 2009 *ABA Jnl* (August) 55.

Commentators have advanced various proposals to resolve the problem. One proposal included the introduction of "cram down" provisions in Chapter 13 bankruptcy cases to provide for streamlined mortgage principal reduction.[76] Another recent proposal has been to encourage strategic default by homeowners, to force lenders to reduce principal sums which, it was suggested, they would be more likely to choose than foreclosure, in the prevailing economic circumstances.[77] Yet another proposal includes a combination of allowing foreclosure sales only as a last resort, mandatory pre-foreclosure mediation and conciliation as well as overhauling the Home Affordable Stability Program to provide for broad-scale principal reduction for borrowers who are "underwater". Where foreclosure cannot be avoided, the proposal posits avoiding eviction of borrowers by implementing enhanced buy and rent back schemes to allow them to remain in occupation, for a period, as tenants.[78]

Programmes using mediation, or a negotiation process, facilitated by a neutral third party or loss mitigation processes which do not involve any third party have been introduced in some cities, counties and states of the United States of America.[79] For example, in the state of New York, initially arising out of a court having postponed foreclosure proceedings until parties had attempted meaningfully to reach settlement, legislation now provides, in respect of all home mortgages, for a mandatory pre-foreclosure settlement conference to be held within 60 days of proof of service having been filed with the county clerk.[80] It requires the homeowner and the lender to negotiate in good faith with the purpose of settling the matter to avoid foreclosure. The lender is required to have a representative or attorney present at the settlement conference with

[76]See, for example, Posner and Zingales 2009 *Am L & Ec Rev* 575, suggested this in respect of homes located in areas which had experienced a reduction in median house prices of 20% or more, calculated with reference to the reduction in median house prices, on the basis that, if the home was later sold, 50% of the proceeds would go to the lender.
[77]Crespi 2011 *Santa Clara L Rev* 153.
[78]Carr and Lucas-Smith 2011 *Suffolk U L Rev* 22-24; See Smith 2011 *J Civ Rights & Ec Dev* 561-562; Behrend 2010 *NC Bank Inst* 219.
[79]See Kulp "Foreclosure Mediation Program Models" compiled by the American Bar Association http://www.abanet.org/dispute/mediation/resources.html [date of use 15 March 2012]. See also Khader 2010 *Col J L & Soc Probs* 109, 111-112 and references cited there; Ornstein, Yoon and Holahan 2010 *Consumer Fin LQ Rep* 98. For discussion of the advantages of loan modification, for both the lender and the borrower, see Wagner 2010 *Geo J Pov L & Policy* 423.
[80]See s 3408 of the Civil Practice Law and Rules of New York which was signed into law on 15 December 2009. This applies to "one- to four-family" homes.

the authority to fully negotiate and settle the matter. The foreclosure proceedings are stayed until the referee, or judicial hearing officer, determines that the settlement conferences have been concluded, in that they have resulted in loan modification or an appropriate alternative, or because one of the parties has not satisfied the requirements. The referee, or judicial hearing officer, thereafter makes a recommendation to the judge presiding over the foreclosure proceedings.[81]

In the city of Philadelphia, the Residential Mortgage Foreclosure Diversion Program, administered by the courts, requires plaintiffs to meet in person with each defendant, to whom the court allocates a *pro bono* attorney, before a judge will certify a home foreclosure sale.[82] In Florida, a state-wide, compulsory mediation program, instituted through administrative orders issued by the Florida Supreme Court, applied, between December 2009 and December 2011, to regulate the substantive and procedural requirements in all foreclosure cases pertaining to residential mortgages.[83] In Indiana, a local rule was established in Marion County, providing for mandatory pre-foreclosure settlement conferences. Thereafter, an amendment to the Indiana Code granted defendants in residential mortgage foreclosure actions the right to request a settlement conference and, in time, Best Practices Guidelines were developed in this regard.[84] In

[81]A proposed amendment will allow only two postponements on account of the lender having no representative present who is authorised to settle the matter, or failing to negotiate in good faith, or to meet other deadlines, after which the claim will be dismissed. See Bill number S442-2011 http://open.nysenate.gov/legislation/bill/S442-2011 [date of use 15 March 2012]. For critical comment on the legislation applicable to foreclosure cases in New York, see Dillon 2010 *Pace L Rev* 855.

[82]See Joint General Court Regulation No 2008-01, issued by the First Judicial District of Philadelphia and the Court of Common Pleas of Philadelphia County.

[83]The first administrative order, AOSC09-54, was written by Chief Justice Peggy Quince on 28 December 2009. All other circuits followed suit. See Ornstein, Yoon and Holahan 2010 *Consumer Fin L Q Rep* 86; Press 2011 *Nev LJ* 306, 338. It may be noted that the state-wide, managed mediation programme was terminated, by a subsequent administrative order, AOSC11-44, issued by Chief Justice Charles T Canady, on 19 December 2011. The Chief Justice suggested that, henceforth, circuit chief judges should use their statutory powers to adopt appropriate measures, including referral of cases to mediation on a case-by-case basis.

[84]See Marion County (Indianapolis) Local Rule LR49-TR85-231 Marion Circuit and Superior Court Rules 16 http://www.inbar.org/LinkClick.aspx?fileticket=LNe5yUFfNRU%3D&tabid=387 [date of use 15 March 2012] and Indiana Code Chapter 10.5 Foreclosure Prevention Agreements for Residential Mortgageshttp://www.in.gov/legislative/ic/code/title32/ar30/ch10.5.html [date of use 15 March 2012]. For discussion of this legislation, see Ornstein, Yoon and Holahan 2010 *Consumer Fin L Q Rep* 197.

Maine,[85] a mortgage holder filing a foreclosure complaint against an owner-occupied residence is obliged to serve a one-page notice on the homeowner including a warning that failure to answer the complaint will result in foreclosure of the property. A sample answer, and an envelope in which to mail their answer to the court, must be provided with the notice, as well as a description of the mediation programme. Once an answer is filed with the court, all foreclosure proceedings are stayed until the mediation process is complete. The mediation sessions must be attended by the mediator, who is usually a former judge, attorney or bank professional, the homeowner, and a representative of the mortgage holder who has authority to restructure the loan. An initial informational session is held to assist the homeowner by advising him of the procedure, the documents required to be submitted for consideration, and what facts and circumstances would be relevant. Voluntary mediation programmes also operate in a number of other states, in the United States of America.[86]

In a comparable development, the Southern District of New York bankruptcy court facilitated loan modification by making use of its inherent power to order parties to negotiate in good faith in an effort to mitigate loss.[87] Thus, a Loss Mitigation Program was established for which the court has become renowned.[88] The result is that, where appropriate, the homeowner will remain in his home, or parties negotiate a "graceful exit" in terms of which the bankrupt has a specific period to vacate his home or a "short sale" or the creation of a deed in lieu of foreclosure.[89]

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[85]See 14 MRS s 6321-A and Civil Rule 93 Maine Rules of Procedure (1 January 2010) http://www.mainelegislature.org/legis/statutes/14/title14sec6321-A.html [date of use 15 March 2012].

[86]See, for example programmes described in: Schneider and Fleury 2011 *Nev LJ* 368 for details of the voluntary programme run by the Marquette University Law School and the City of Milwaukee; Benson 2010 *CBA Record* (24 October 2010) 36, on Cook County's Programme; and Johnson and Waldrep 2010 *NC Bank Inst* 203-206, on legislation passed in North Carolina.

[87]For academic comment on the opportunities posed for mortgage loan modification in bankruptcy cases, see Porter 2009 *Tex L Rev* 121; Eggum, Porter and Twomey 2008 *Utah L Rev* 1123; Levitin 2009 *Wisc L Rev* 565; Jacoby 2009 *Loy J Pub Interest L* 171.

[88]See Morris and Guccion 2011 *ABI L Rev* 46ff. See also Loss Mitigation Program Procedures http://www.nysb.uscourts.gov/pgh/lossmitigation/LossMitigationProcedures.pdf [date of use 15 March 2012].

[89]See published testimony, on 11 February 2011, of the Hon Robert D Drain of the US Bankruptcy Court for the Southern District of New York before the Senate Judiciary Committee in 2011 *ABI Jnl* (30 March 2010) 10. For the meaning of a "short sale" and a "deed in lieu of foreclosure", see Braucher 2010 *Ariz L Rev* 743.

In July 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act 2010[90] was enacted with the primary stated aim of promoting financial stability.[91] Part of this legislation was designated as "Enumerated Consumer Law", to be administered by the Bureau of Consumer Financial Protection, newly created to regulate standards for residential mortgages. An important new requirement is that a consumer who applies for a loan which will be secured by his principal dwelling must obtain pre-loan counselling from a certified counsellor. The Act has also amended legislation applicable to "real estate settlement procedures", introduced new requirements in relation to mortgage servicers' interaction with consumers and new rules, applicable in the Home Affordable Modification Program, to assist eligible homeowners with loan modifications on their home mortgage debt.[92]

In September 2010, flaws in the foreclosure processes emerged. These included the employment of "robo-signers" who mass-produced documents and affidavits which resulted in the filing of false court documents.[93] Amidst controversy, the four major banks declared a moratorium on foreclosures[94] which resumed only after the institution of reforms in the administration of the foreclosure procedures and the introduction of closer scrutiny by courts of the relevant documents.[95]

In July 2011, the Treasury Department announced a home mortgage relief program in terms of which eligible, unemployed homeowners may defer part or all of their monthly

[90]Pub L 111-203, HR 4173, effective 21 July 2010. For discussion of this legislation, see Pottow "Ability to Pay"; Cook and Musselman 2010 *Consumer Fin L Q Rep* 231; Ropiequet, Naveja and Hirsh 2010 *Consumer Fin L Q Rep* 284.
[91]This it aimed to do through financial regulatory reform by, *inter alia*, improving accountability and transparency in the financial system, ending "bailouts" and protecting consumers from abusive financial services practices, limiting the TARP and reducing the national deficit.
[92]Various provisions anticipate significant structural reforms of Fannie Mae and Freddie Mac and provide for $35 million dollars as additional funding for mortgage relief, neighbourhood stabilisation programs and legal assistance for foreclosure-related issues. For a useful explanation of the Bureau's function and powers, see Ropiequet, Naveja and Hirsh 2010 *Consumer Fin L Q Rep* 285-289.
[93]See Banks 2011 *ABI Jnl* 54; Froehle 2011 *Iowa LR* 1712, 1719.
[94]See DeCosta 2011 *Boston BJ* 23; Greenberg 2010 *Temp L Rev* 253.
[95]Streitfeld "Backlog of Cases Gives a Reprieve on Foreclosures" *New York Times* (19 June 2011) http://www.nytimes.com/2011/06/19/business/19foreclosure.html?_r=1&pagewanted=all [date of use 15 March 2012].

mortgage payments and interest for up to 12 months while they seek employment.[96] An increase in foreclosures was predicted for 2011.[97] However, it seems that, in a number of states, the delays caused by the backlog of foreclosure cases provided a type of reprieve for defaulting homeowners. This was as a result of, *inter alia*, courts requiring pre-foreclosure settlement conferences and increased court scrutiny by the courts of documentation, the existence of sufficiency of proof, and adherence to proper process.[98] There are also indications that lenders frequently take the initiative and pro-actively seek out borrowers, who are not yet in default. Lenders reportedly often prefer to modify the terms of their original agreements, which include adjustable interest rates and delayed "balloon" payments of principal and interest, and sometimes even offer to reduce principal loan amounts in an effort to prevent the borrower defaulting in future and to avoid prospective foreclosure proceedings.[99]

7.2.5 Comment

The existence of a formal homestead exemption does not necessarily assist the debtor as it does not apply to provide protection to a homeowner against the claim of a mortgagee. In the individual debt enforcement process, the substantive and procedural requirements as well as best practice guidelines may all be regarded simply as forming part of the response to the economic crisis, or emergency measures, devised in an effort to prevent economic collapse. Be that as it may, it is submitted that they also serve as an excellent model for proper and appropriate consideration of relevant circumstances before forced sale of a debtor's home is sanctioned by a court.

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[96]The three-month deferment period allowed in an earlier programme was too short. See Martin "New Housing Program is Aimed at the Unemployed" *New York Times* (7 July 2011) http://www.nytimes.com/2011/07/08/business/new-housing-program-is-aimed-at-the-unemployed.html [date of use 15 March 2012].

[97]Herron "Banks repossessed 1 million homes last year – and 2011 will be worse" *msnbc.com* (13 January 2011) http://www.msnbc.msn.com/id/41051419/ns/business-real_estate/t/banks-repossessed-million-homes-last-year-will-be-worse/ [date of use 15 March 2012].

[98]Froehle 2011 *Iowa L R* 1722, 1740; Streitfeld "Backlog of Cases Gives a Reprieve on Foreclosures" *New York Times* (19 June 2011) http://www.nytimes.com/2011/06/19/business/19foreclosure.html?_r=1&pagewanted=all [date of use 15 March 2012].

[99]Streitfeld "Big Banks Easing Terms on Loans Deemed as Risks" *New York Times* (2 July 2011) http://www.nytimes.com/2011/07/03/business/03loans.html [date of use 15 March 2012].

The Chapter 13 bankruptcy payment plan is comparable to South Africa's debt review process. Important differences are that home mortgage obligations are not included in a Chapter 13 payment plan but, to save his home from forced sale, the debtor is required to pay any mortgage arrears and to maintain regular current payments that become due. Therefore, the payment plan must cater for this. In the Chapter 13 bankruptcy process, a court may not modify the terms of the mortgage without the consent of the mortgagee. By contrast, in the South African debt review process, a magistrate's court is empowered to modify the terms of the original mortgage agreement without the consent of the mortgagee.

The recent economic crisis and recessions forced authorities, in the United States of America, to address the adverse consequences of, and to stem the tide in, the alarming rate of home mortgage foreclosures. Legislation was enacted in terms of which mortgage assistance was provided, in various forms, by the state to homeowners. Proposed solutions include allowing foreclosure sales only as a last resort, with mandatory pre-foreclosure mediation and conciliation between debtors and creditors. A number of states introduced practices and programmes including mediation and pre-action negotiation processes. In the state of New York, legislation now provides for a mandatory pre-foreclosure settlement conference to be held. Compulsory mediation requirements also apply in Philadelphia, Indiana, and Maine. In the bankruptcy process, the Southern District of New York bankruptcy court requires mitigation loss conferences between parties to ensure that sale of bankrupt persons' homes occurs only as a last resort and, where sale is unavoidable, that bankrupt persons and their families are not evicted in such a way as to render them homeless.[100]

[100]See 7.2.4, above.

7.3 Canada

7.3.1 General and historical background

The Canadian homestead exemption is stated to have arisen out of necessity, in the western provinces, in that they needed to compete against the United States for immigrants.[101] The modern Canadian home exemption has been described as "an explicit and systematic scheme of legal protection for the home by exempting it – to a greater or lesser extent – from the pool of assets which creditors can access to recoup their losses on default."[102] However, the level of protection varies widely, depending on the province or territory in which the debtor's home is situated,[103] not only on account of statutory differences but, it seems, as a result also of regional differences and approaches to the interpretation of the exemption statutes.[104]

7.3.2 The statutory home exemptions

In most of the provinces and territories, legislative provisions allow exemptions from execution, or seizure by virtue of a writ of execution, of a limited acreage of agricultural land, commonly referred to as "homestead" exemptions, and also of primary residences, but limited as to value. In Ontario, New Brunswick, Nova Scotia, and Prince Edward Island, there is no exemption for land or a primary residence although, in New Brunswick and Prince Edward Island, there is a provision that land that is seized may not be sold unless the debtor "does not produce sufficient personal estate to satisfy the judgment upon which the execution is levied".[105]

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[101]See Telfer "Evolution" 593, 595.
[102]Fox *Conceptualising Home* 310.
[103]See Davies "Federal Exemptions in Bankruptcy"Parliamentary Information and Research Service document PRB 02-28E http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0228-e.pdf [date of use 15 March 2012]; Boraine, Kruger and Evans "Policy Considerations" 681-682; Sarra "Economic Rehabilitation" 45-46 http://www.ic.gc.ca/eic/site/bsf-osb.nsf/vwapj/Economic_Rehabilition.pdf/$file/Economic_Rehabilition.pdf [date of use 15 March 2012].
[104]See Telfer "Evolution" 595.
[105]Boraine, Kruger and Evans "Policy Considerations" 681, with reference to Prince Edward Island *Judgment and Execution Act* RSPEI 1988 c J-2 s 26(2).

In all of the other provinces and territories, some provision is made for exemption of the home.[106] A few notable features will be mentioned specifically. In Manitoba, a house may not be sold unless it has the prescribed value and, if so, that amount must be paid to the judgment debtor before anybody is put in possession of it.[107] Further, in Manitoba, where a mobile home, which is ordinarily used as the judgment debtor's permanent residence, has been seized under a writ of execution, proceedings to sell it may not commence for a year.[108] In Saskatchewan, the exemption includes "a trailer or portable shack" and, if the homestead is larger than 160 acres, specific provision is made that the surplus may be sold subject to any lien or encumbrance.[109] In Saskatchewan, the exemptions apply also to protect from seizure or sale, a home or land which was provided as security in a security agreement[110] except, it should be noted, where such agreement created a "purchase-money security interest" in the home or land, in which

[106]For instance, in Alberta, equity in a principal residence, up to a value of CAN$40 000 (with a co-owner's share reduced proportionately), is exempted, as is up to 160 acres of farm land if the principal residence is situated on it; see Alberta *Civil Enforcement Act* RSA 2000 c C-15. In Manitoba, equity in a principal residence of a non-farmer is exempted, up to a value of CAN$2 500 (reduced to CAN$1 500 for a co-owner), and up to 160 acres of cultivated or grazing land, regardless of whether the primary residence is located on it. The house, stables, barns and fences on the debtor's farm will also be exempt from seizure. See s 13(1) of the Manitoba *Judgments Act* CCSM c J10 and the Manitoba *Executions Act* CCSM c E160, as amended. In Saskatchewan, equity in the house and buildings in which the debtor lives and the lot on which the home is situated, is free from seizure by virtue of a writ of execution, up to a value of CAN$32 000, as is up to 160 acres of land; see Saskatchewan *Farm Security Act* SS 1988-89 c S-17.1 and the Saskatchewan *Exemptions Act* RSS 1978 c E-14. In British Columbia, there is a CAN$12 000 exemption of equity in the principal residence, in Greater Vancouver and Victoria, whereas the rest of the province exempts equity of up to CAN$9 000; see the British Columbia *Court Order Enforcement Act* RSBC 1996 Chapter 78 and the applicable Regulations. In Quebec, "[a]n immovable serving as the principal residence of the debtor is also exempt from seizure where the amount of the claim is less than $10,000, except where … the claim is secured by a prior claim or legal or conventional hypothec on the immovable other than a legal hypothec securing a claim arising out of a judgment"; see article 553.2 (1) of the Quebec *Code of Civil Procedure*. In Newfoundland and Labrador, there is a CAN$10 000 exemption for the principal residence of the debtor, as well as an exemption for an interest in land; see the Newfoundland and Labrador *Judgment Enforcement Act* SNL1996 Chapter J-1.1, as amended, and applicable Regulations. In Yukon and in the Northwest Territories, the exemption is for an equity value of up to CAN$3 000; see the Yukon *Exemptions Act* Chapter 80 and the Northwest Territories *Exemptions Act* SNWT 2010 c4. In Nunavut, the exempt amount has been designated by regulation at CAN$35 000; see the Nunavut amendments to the *Exemptions Act* and s 1 of the Exemptions Regulations to the *Exemptions Act* R-006-2006, registered with the Registrar of Regulations on 26 May 2006.

[107]See s 13(4) of the Manitoba *Judgments Act*.

[108]See s 36 of the Manitoba *Executions Act*.

[109]See Saskatchewan *Farm Security Act* SS 1988-89 c S-17.1 and the Saskatchewan *Exemptions Act* RSS 1978 c E-14.

[110]See s 3(1) of the Saskatchewan *Exemptions Act* RSS 1978 c E-14. Buckwold 1999 *Osg Hall LJ* 303 states that Saskatchewan may be regarded as an exception.

case the exemption is ineffective.[111] In British Columbia, the value of equity exempted, in Greater Vancouver and in Victoria, is higher than that in the rest of the province because of the difference in median house prices in those areas.[112]

7.3.3 The individual debt enforcement process

A mortgagee's usual remedies for default by the mortgagor include the taking of possession, foreclosure,[113] judicial sale, or contractual power of sale.[114] It is important to note that, despite the existence of statutory home exemptions, no province or territory precludes seizure of real property by way of mortgage foreclosure, or other security enforcement, proceedings.[115] However, the mortgagor's right of redemption, which he may exercise against proceedings for foreclosure or judicial sale, or in the case of extra-judicial sale, as well as provincial legislation regulating civil procedure, do impose restrictions on the enforcement of the mortgagee's rights.[116] Generally, the mortgagee, having first issued a demand for payment, must commence action by a petition, with accompanying affidavits to support the claim, in the particular court which has jurisdiction.[117] Once the court has established the amount owing, it may issue an "order *nisi*" of foreclosure, specifying a period – known as the "redemption period" – within which the mortgagor must pay. The redemption period has traditionally been six months, although it may be shorter, or longer, in specific cases.[118] If the respondent pays all amounts owing, including interest and any costs awarded by the court, within

[111]See s 5(1) of the Saskatchewan *Exemptions Act* RSS 1978 c E-14. A "purchase-money security interest" would arise out of an agreement such as is referred to, in South African law, as a *kustingbrief*, discussed at 4.3.3, above. In relation to types of security interests in land, recognised in Canadian law, see Roach *Mortgages* 3ff.
[112]See British Columbia *Court Order Enforcement Act* RSBC 1996 Chapter 78 and the applicable Regulations.
[113]It should be noted that the term "foreclosure" is not interpreted consistently across the Canadian provinces and territories. See Roach *Mortgages* 136ff.
[114]Roach *Mortgages* 13, 417, and other, specific, chapters on each remedy.
[115]For explanation and criticism of the position, see Buckwold 1999 *Osg Hall LJ* 305-306.
[116]See Roach *Mortgages* Chapter 4.
[117]It may be of interest, from a South African perspective, that in Canada, provision is made for a registrar to sign a default judgment for foreclosure; see Roach *Mortgages* 145-145.
[118]See Roach *Mortgages* 113,135.

the redemption period, he may redeem the property.[119] Further, at any time before foreclosure, the mortgagor may apply to the court for an order for the property to be sold.[120]

Once the order *nisi* has been issued, the mortgagee may enforce, or execute on, the judgment by selling other assets of the respondent. Alternatively, he may wait until the redemption period has expired, with no payment having been made by the mortgagor, to proceed with the foreclosure proceedings in which event he must apply for an order absolute. The grant of an order absolute has the effect of "foreclosing", or terminating, all of the interests of the mortgagor in the property and, once it is registered in the Land Title Office, to convey the property into the name of the mortgagee.[121]

In some of the provinces and territories, legislation provides a measure of protection for a mortgagor against the harsh consequences of an acceleration clause.[122] Where a mortgagor defaults and an acceleration clause renders the whole of the outstanding balance, including the principal amount and interest, due and payable, legislative provisions allow a court, on application by the mortgagor, to stay foreclosure or other proceedings. This may occur provided the default is cured within a specified period, by payment of all arrears and any other payments due, including costs and expenses incurred by the mortgagee. It may be noted that, in Nova Scotia, the applicable provision may be resorted to only once.[123]

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[119]The mortgagor's right to redeem is based on equity. See, further, Roach *Mortgages* Chapter 2, particularly, 43, 75ff.
[120]The order is usually made subject to the proviso that the sale must be approved by the court.
[121]It may be of interest, from a South African perspective, bearing in mind *ABSA v Bisnath*, and related issues, discussed at 4.3.3, above, that, in some provinces, where, after the order absolute has been granted, the erstwhile mortgagee sells the property for an amount less than the judgment debt, he has no claim against the erstwhile mortgagor for the shortfall, unless he is in a position to re-convey the land. Further, if the former later sells the property for more than the amount that was owed, he is not obliged to pay any surplus to the erstwhile mortgagor. See, further, Roach *Mortgages* 131, 134, with specific reference to *Lockhart v Hardy* (1846) 9 Beav 349 50 ER 378, 15 LJ Ch 347, and legislation applicable in Alberta, Manitoba, Ontario and Saskatchewan.
[122]See Roach *Mortgages* 131 and Chapter 12, particularly 419-421, with reference to ss 22 and 23 of the Ontario *Mortgages Act* RSO 1990 c M40; s 38(1) of the Alberta *Law of Property Act* RSA 2000 c L7; and s 115 of the Manitoba *Real Property Act* RSM 1988 c R30. See also s 17(1) of the Alberta *Judicature Act* RSA 2000 Chapter J-2; s 42 of the Nova Scotia *Judicature Act* 1989 *RS c 240.*
[123]See s 42(4) of the Nova Scotia *Judicature Act*.

7.3.4 Treatment of the home in bankruptcy

The federal Bankruptcy and Insolvency Act 1985 provides for certain assets, including assets which are exempt from execution or seizure under provincial law applicable where they are situated and where the bankrupt resides, to be placed beyond the reach of creditors in bankruptcy.[124] Thus, a bankrupt homeowner's entitlement to an exemption varies depending on the province in which he lives. Although the Personal Insolvency Task Force on Bankruptcy Law Reform recommended a standardised homestead exemption of CAN$5 000,[125] this has never been implemented.[126]

Exempt property which is subject to a security interest is excluded from distribution as part of the bankrupt's estate. Therefore, it does not vest in the trustee.[127] Although the Bankruptcy and Insolvency Act imposes a general stay on the exercise by creditors of any remedy against a bankrupt debtor of his property, the claims of secured creditors are exempt from the general stay.[128] However, provision is made for a court to postpone the rights of realisation of the security for a period of up to six months.[129] Apparently, such an order will be granted only where there is evidence that the creditor is likely to realise the security in a way which will yield an unreasonably low return, which would unduly increase the amount of that creditor's unsecured claim for any deficiency and would thus prejudice the interests of those entitled to share in a potential surplus.[130]

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[124]See ss 67(1)(a) and (b) of the *Bankruptcy and Insolvency Act* RSC 1985 c B-3, hereafter referred to as "the Bankruptcy and Insolvency Act".
[125]Final Report (Ottawa, Industry Canada: Office of the Superintendent of Bankruptcy, August 2002).
[126]See also the Canadian Association of Insolvency and Restructuring Professionals' submission on proposed personal insolvency amendments under Bill C-55 to the House of Commons Standing Committee on Industry, Natural Resources, Science and Technology, 21 October 2005, referred to by Sarra *Economic Rehabilitation* 17-18, 42-47. See also Telfer 2005 *Can Bus LJ* 279-327; Davies *Parliamentary Information and Research Service document PRB 02-28E* 11.
[127]See ss 67(1)(b), 70(1) and 71 of the *Bankruptcy and Insolvency Act*. See also Boraine, Kruger and Evans "Policy Considerations" 667-668, with reference to *MacKesey v Royal Bank of Canada* (1991) 97 Sask R (Sask CA); Evans 2008 *De Jure* 257; Buckwold 1999 *Osg Hall LJ* 304.
[128]See s 69.3(1) and (2) of the *Bankruptcy and Insolvency Act*. S 69.3(2) provides that "the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed…". See Buckwold 1999 *Osg Hall LJ* 281.
[129]See s 69.3(2) of the *Bankruptcy and Insolvency Act*.
[130]Buckwold 1999 *Osg Hall LJ* 284-285, with reference to *Northwest Territories (Commissioner) v Simpson Air* [1994] NWTR 184 (NWTSC) 189.

Such an approach has been regarded as being in accordance with the obligation on secured creditors, imposed by provincial legislation which regulates the individual debt enforcement process, to act in good faith and in a commercially reasonable manner in exercising rights of realisation.[131]

An insolvent debtor will often resort to a consumer proposal in an effort to save his home from forced sale. The consumer proposal provisions, contained in the Bankruptcy and Insolvency Act,[132] enable eligible consumer debtors to restructure their payment obligations through binding composition agreements with their creditors. However, a consumer proposal will not affect the rights of a secured creditor unless the latter elects to subject itself to its terms.[133] Once a consumer proposal has been filed in terms of the Bankruptcy and Insolvency Act, a security agreement may not be terminated. The filing may also not trigger the operation of an acceleration clause, even if the parties' agreement provides for it. However, any other type of default does entitle a secured creditor to realise its security, free of the general 30-day stay imposed by the filing of a consumer proposal.[134] Therefore, a debtor who wishes to protect his home from forced sale must ensure that the terms of the proposal enable him to maintain regular mortgage payments as agreed with the mortgagee.

In Canada, provincial family law provisions also operate to provide some protection for a spouse against third parties, in relation to the family home. Provincial legislation generally enables non-transacting spouses to prevent unilateral dispositions of the family home without their consent[135] and third party claims are regulated by legislation in a number of states.[136] Some of these statutes provide for designation and registration

[131]Buckwold 1999 *Osg Hall LJ* 285, 280, 303.
[132]See ss 66.11-66.40 of the *Bankruptcy and Insolvency Act* RSC 1985 c B-3, as amended.
[133]See s 66.28(2)(b): an approved proposal is binding on secured creditors only if they have filed a proof of claim. See also Buckwold 1999 *Osg Hall LJ* 299.
[134]See s 69.2 of the *Bankruptcy and Insolvency Act*.
[135]Fox 2006 *Legal Studies* 219-220; Fox *Conceptualising Home* 349.
[136]See s 21 of the Ontario *Family Law Act* 1986; Chapter 246 of the British Columbia *Land (Spouse Protection) Act* 1996 RSBC; c D-15 of the Alberta *Dower Act* 2000 RSA 2000; c H80 Manitoba *Homesteads Act* 1992 CCSM, which also recognises rights of a "common–law partner"; c M-1.1 of the New Brunswick *Marital Property Act* 1980 SNB 1980; Chapter F-2.1 Prince Edward Island *Family Law Act* 1995; Divisions II and III, dealing with the family residence and family patrimony, respectively, of the

of a family home. They also provide for the situation where a creditor proceeds to realise upon a lien, encumbrance or execution, or exercises a forfeiture on property that is a family home. In such a case, the spouse who has a right of possession of the family home has the same right of redemption or relief against forfeiture as the other spouse and is entitled to the same notice in respect of the claim and its enforcement or realisation.[137]

7.3.5 Comment

As is the position in the United States of America, the Canadian homestead exemptions, which apply both in the individual debt enforcement process and in the bankruptcy process, generally do not provide any protection for the home of the debtor against a mortgagee's, or other secured creditor's, claim. This has prompted the comment that, in this sense, secured creditors "enjoy the best of both worlds".[138] The homestead exemptions do not affect a mortgagee's right of realisation of the security but, when the family home is sold, once the mortgagee's claim has been satisfied, the permitted amount of equity is retained by the homeowner.[139] However, the right to redeem, and rules of civil procedure applicable in various provincial and territorial jurisdictions, place restrictions on the enforcement of a mortgagee's remedies, effectively allowing for a stay of foreclosure proceedings and affording the opportunity for a mortgagor to remedy his default within the redemption period, or a period specified by the court.[140] Also, as in the United States of America, in Canada, it is common for a homeowner to resort to an alternative debt relief measure, the consumer proposal,

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Quebec Civil Code; Chapter F-2 of the Newfoundland and Labrador *Family Law Act* 1990 RSNL 1990; and c 275 of the Nova Scotia *Matrimonial Property Act* RSNS 1989, which applies also to cohabitants in heterosexual and homosexual relationships by virtue of the Law Reform Act 2000 which extended the provisions of the Matrimonial Property Act to a "common-law partner" and the Vital Statistics Act which recognised a "domestic partnership". It may be noted that a domestic partnership declaration must be executed before cohabitants are protected by Nova Scotia's "homestead scheme".

[137]This statement uses wording employed, for example, in the Prince Edward Island *Family Law Act* 1995.

[138]See Buckwold 1999 37 *Osg Hall Law Journal* 305.

[139]Although, in Manitoba, a house may not be sold unless it has the prescribed value and, if so, that amount must be paid to the judgment debtor before the sale is carried out, or any person is put in possession of it, this does not affect the claim of a mortgagee. See ss 13(4), 17 of the Manitoba *Judgments Act*.

[140]See 7.3.3, above.

provided for in bankruptcy legislation, in an effort to save his home from forced sale. However, a mortgage debt will not be included in the consumer proposal and, therefore, its terms should enable the debtor to satisfy any arrear payments and maintaining regular mortgage payment obligations.[141]

An aspect of Canadian law which should be considered for implementation in South Africa is that, where an acceleration clause operates upon the mortgagor's default, he may apply for a court order to stay foreclosure proceedings commenced by the mortgagee, provided he cures his default and pays arrears and applicable costs within a period which the court has specified. Notably, in Nova Scotia, such indulgence is afforded to the mortgagor only once.[142] It is submitted that introduction of a similar provision, in South Africa, could pose a solution to the problem experienced in *ABSA v Ntsane*, in relation to the repeated defaults of the mortgagor.[143]

7.4 New Zealand

7.4.1 General

New Zealand, which commentators have regarded favourably as a jurisdiction where policies explicitly recognise the home as a site of special significance,[144] also has a long tradition of protecting the debtor's home against creditors' claims. The Family Home Protection Act 1895 was enacted "to make provision for securing homes for the people and for preventing such homes from being sold for debt or otherwise".[145] Available to married couples only, it enabled the owner to "settle" a dwelling house as a family home during his lifetime and until his children reached the age of 21. The act of "settlement" protected the home from the claims of unsecured creditors and the Official Assignee in

[141]See 7.3.4, above.
[142]See 7.3.3, above.
[143]Discussed at 5.5.2, above.
[144]Fox 2006 *Legal Studies* 219; Fox *Conceptualising* Home 349; Brown 2007 *J S Pacific L* 89, 93; Frieze *Personal Insolvency Law* 1148, 1150; Miller 1986 *Conv & Prop Law* 393, 404; Gravells 1985 *Ox J L Studs* 132, 140ff.
[145]See New Zealand Law Commission Preliminary Paper 44 *The Future of the Joint Family Homes Act* August 2001, hereafter referred to as "Preliminary Paper 44", par 1.

Bankruptcy and gave a total exemption from death duty. An important point to note is that no home that was settled could be mortgaged.[146]

The Joint Family Homes Act 1950,[147] enacted as part of a programme to reinforce Christian family values in an attempt to counteract the high divorce rate, permitted, by a process of registration, the settlement of a home which was occupied by a married couple, on both spouses. Thus, they became co-owners. It set at £4 000 the upper limit of value for a home to be eligible for settlement and protected the home from creditors' claims and death duty to the limit of £2 000.[148] Mortgaged property could be settled as long as the spouse who was not a party to the mortgage assumed personal liability to the mortgagee on settlement. A 1955 amendment removed the upper limit on the value of a home that could be settled.

The Joint Family Homes Act 1964, which is still on the statute books, was enacted primarily "to obtain protection of a family asset and put it beyond the reach of creditors"[149] and "to encourage joint ownership of the matrimonial home as a means of promoting stability and security in family life".[150] This was perceived to be "a higher social end than that represented by commercial security for the creditor."[151] It enabled married couples, through a simplified process, to register their home as a joint family home upon which immunity would be provided against creditors' claims up to a maximum amount, referred to as the "specified sum". Thus, a creditor could bring an action to realise the value of the registered home but, once sold, the spouse would be entitled to the proceeds of the sale, up to the amount of the specified sum, before an

[146]See Preliminary Paper 44 pars 1 and 2. These provisions were re-enacted as Part I of the Family Protection Act 1908 in terms of which only an unmortgaged home with a capital value of £1 500 or less qualified for protection. Not widely used, the Family Protection Act 1908 was repealed in 1955.
[147]For discussion of the Joint Family Homes Act 1950, see Preliminary Paper 44 pars 3-8. This Act was amended in 1951, 1952, 1955, 1957, 1959 and 1960.
[148]According to Preliminary Paper 44 par 7, "these were not unsubstantial amounts in the currency of the day". The amounts were set with reference to house prices at the time.
[149]This was stated in a parliamentary debate prior to its amendment; see Preliminary Paper 44 par 13, with reference to (1974) 390 NZPD 1504. See also Fox *Conceptualising Home* 349.
[150]See Preliminary Paper 44 par 9, with reference to a statement made in a parliamentary debate by the then Minister of Justice; see (1964) 340 NZPD 2994. See also Fox 220.
[151]Frieze *Personal Insolvency Law* 1150.

unsecured creditor would receive any of the proceeds.[152] As in the 1950 Act, mortgagees were protected in that mortgaged property could be settled only if the spouse consented and assumed personal liability to the mortgagee.[153]

A 1974 amendment created a type of exemption in insolvency by excluding the proceeds, up to the protected limit, of the sale, transfer, or other disposition of the home from the definition of "property" in the Insolvency Act 1967, as long as the home was registered as a joint family home at least two years prior to bankruptcy.[154] Section 16 of the Joint Family Homes Act 1964 provides that, as long as the net equity exceeds the specified sum, upon application by any creditor or the Official Assignee in bankruptcy, the high court may direct a mortgage or sale of the entire settled property and a distribution of the money borrowed, or of the proceeds of the sale. However, the spouses must be left with "an 'absolute' protected entitlement" which is equal to the specified sum.[155] In *Official Assignee of Pannell v Pannell*,[156] the court held that, except in special circumstances, the policy behind the statute was to preserve a joint family home for the benefit of the registered proprietors and their family. Wilson J stated:[157]

> The special circumstances which justify an order for the sale of a joint family home will necessarily vary with each case but I think the greater the hardship to the registered proprietors and their family the weightier must be the countervailing circumstances necessary to be proved in order to justify making an order for sale.

In the circumstances, the court, not regarding the bankruptcy of either or both of the spouses nor the large amount of the bankrupt's debts in themselves to be sufficient to justify an order for sale, refused an application for it.[158] However, in *Official Assignee v*

[152]Initially, the specified sum, for protection from unsecured creditors, was £2 000. In the course of successive amendments to the Act, the specified sum has been increased. The amount is currently NZ$103 000; see cl 3 of the Joint Family Homes Act (Specified Sum) Order 2002 (SR 2002/364).
[153]See Preliminary Paper 44 pars 23-24.
[154]See the second proviso to s 9(2)(d) of the Joint Family Homes Act 1964. See also Preliminary Paper 44 par 12; *Official Assignee v Noonan* [1988] 2 NZLR 252, referred to by Brown 2007 *J S Pacific L* 89, 93.
[155]See s 16(1) and (2) of the Joint Family Homes Act 1964, as amended.
[156]*Official Assignee of Pannell v Pannell* [1966] NZLR 324 (HC).
[157]*Official Assignee of Pannell v Pannell* [1966] NZLR 324 (HC) 326. See also the Preliminary Paper 44 par 22; Gravells 1985 *Ox J Legal Studs* 141.
[158]*Official Assignee of Pannell v Pannell* [1966] NZLR 324 (HC) 326.

Lawford,[159] the court held that it had an unfettered discretion to permit the sale of the home without the need for defined special circumstances. The court ordered the sale in circumstances where both spouses had been declared bankrupt and where the outstanding debts amounted to less than half of the value of the equity in the joint family home. However, the court did not order the immediate sale of the home but ordered the bankrupts to execute a mortgage, preferably in favour of the Official Assignee, for a period of one year, with a power to sell the property in the event of the bankrupts failing to refinance within that period. In view of the poor health of the husband, the amount to be raised by mortgage was fixed at only two-thirds of the total debts.[160]

Another statute, the Property (Relationships) Act 1976,[161] applicable to marriages, civil unions and *de facto* partnerships, including same-sex relationships,[162] provides that each spouse or partner has a protected interest in the family home which includes the proceeds of the sale of the family home.[163] It provides that the protected interest of each spouse or partner is not liable for the unsecured debts of the *other* spouse or partner.[164] The value of the protected interest of a spouse or partner is the lesser of the specified sum or half of the equity of the spouses or partners in or, if it has been sold, half of the proceeds of the sale of the family home.[165] In practice, the specified sum is kept equal with the specified sum, under the Joint Family Homes Act 1964, and is currently set at $103 000.[166]

[159] *Official Assignee v Lawford* [1984] 2 NZLR 257.
[160] *Official Assignee v Lawford* [1984] 2 NZLR 257, 264. See Preliminary Paper 44 par 22; Gravells 1985 *Ox J Legal Studs* 141-142.
[161] Formerly known as the Matrimonial Property Act 1976 which, in some respects was regarded as superseding the Joint Family Homes Act 1964; see Preliminary Paper 44 par 14.
[162] See s 1 of the Property (Relationships) Amendment Act 2001.
[163] See s 20B(1) of the Property (Relationships) Amendment Act 2001.
[164] Except for an unsecured debt incurred for the purpose of acquiring, improving or repairing the family home.
[165] See s 20B(2) of the Property (Relationships) Amendment Act 2001.
[166] See Preliminary Paper 44 par 29. See also cl 3 of the Property (Relationships) Act (Specified Sum) Order 2002 (SR 2002/363).

In 2001, the New Zealand Law Commission considered whether the Joint Family Homes Act 1964 should be retained or repealed.[167] It compared, in minute detail, its provisions with those contained in the Matrimonial Property Act 1976 and analysed their shortcomings.[168] It specifically considered whether both Acts should be repealed and replaced "with a blanket protection (up to the amount of the specified sum) of a bankrupt's principal dwelling house, roughly analogous in effect to the protection of necessary tools of trade and necessary household furniture and effects to be found in the Insolvency Act 1967 section 52".[169] However, the Law Commission did not recommend a "blanket exemption", stating that, in bankruptcy, it would discriminate against non-homeowners who would not "be able to start their post-adjudication life assisted by a nest egg represented by the protected interest in the homestead". It also took into account the "geographical inequity" in light of variances in median home prices.[170] The Law Commission acknowledged the advantage of the protection which the Joint Family Homes Act 1964 offered against creditors.[171] However, it took into account that it had seldom been used[172] and that, without any amendment, it discriminated against single homeowners, unmarried persons, and those in hetero- and homosexual *de facto* relationships, in a society which reflected a reduced rate of marriage and couples' preferences for *de facto* relationships.[173] It also regarded the requirement, where mortgaged property was settled, that the spouse had to assume personal liability, to be disadvantageous to the spouse, particularly in cases of negative equity.[174] In the result, the Law Commission recommended that the Joint Family Homes Act 1964 should be repealed and not replaced.[175] However, a decade later, it has not yet been repealed.[176]

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[167]See Preliminary Paper 44 and New Zealand Law Commission Report 77 *The Future of the Joint Family Homes Act* December 2001, hereafter referred to as "Report 77".
[168]See Preliminary Paper 44 pars 26-33, 38, 42.
[169]See Preliminary Paper 44 par 45; Report 77 pars 17-18.
[170]See Preliminary Paper 44 par 34; Report 77 par 18.
[171]See Preliminary Paper 44 pars 5, 20 and Report 77 par 14.
[172]See Report 77 par 15.
[173]See Preliminary Paper 44 pars 38, 42. Under s 21(1)(b) of the Human Rights Act 1993, marital status is a prohibited ground of discrimination.
[174]See Preliminary Paper 44 par 24.
[175]See Report 77 par 22.
[176]The reason for the delay is not clear, it is submitted. The Joint Family Homes Act 1964 is apparently on the parliamentary agenda for debate on the recommended repeal; see http://www.parliament.nz/en-

7.4.2 Comment

It is ironic, it is submitted, that a form of statutory protection for the home, *per se*, against the claims of creditors, lauded as it was by certain commentators, is due for repeal, especially at a time when solutions are being sought across the globe to protect debtors' homes from forced sale.[177] The original statutory provisions contained "forward-thinking" features which reflected a balance between "promoting stability and security in family life" and the commercial interests of the creditor. It is submitted that it is unfortunate that the Law Commission did not more seriously consider preserving at least the essence of the protection afforded by the Joint Family Homes Act 1964, in an amended form which conforms to constitutional imperatives and extends its application to civil unions and *de facto* relationships.

A pertinent observation, it is submitted, is that, as in the United States of America and in Canada, New Zealand's legislation does not provide any meaningful protection for the home, from the debtor's family's perspective, against the claims of a mortgagee and other secured creditors.

7.5 England and Wales

7.5.1 General

England and Wales have no formal homestead exemption. However, a combination of

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NZ/PB/Legislation/Bills/Ballot/8/0/f/49HOOOCBallot201011111-Member-s-bill-ballot-Thursday-11-November-2010.htm [date of use 15 March 2012]. On the other hand, however, it may be noted that, on 25 August 2008, a new regulation 5A, in the Joint Family Homes Amendment Regulations 2008 (2008/280), was made to provide for electronic lodgment of applications for registration of a home as a joint family home. Apparently, it is anticipated that new applications will be lodged despite the Law Commission's recommendation for the repeal of the Joint Family Homes Act 1964.

[177] New Zealand has apparently also been affected. See McManus "Mortgagee sales rise 'frightening'" *Sunday Star Times* New Zealand (15 February 2009) http://www.stuff.co.nz/the-press/1401532/Mortgagee-sales-rise-frightening [date of use 15 March 2012]; Page "Mortgage sales reach 1-in-25-level" *Sunday Star Times* New Zealand (28 June 2009) http://www.stuff.co.nz/business/2546165/Mortgagee-sales-reach-1-in-25-level [date of use 15 March 2012].

statutory provisions which were first introduced in the second half of the twentieth century into legislation regulating family law, provides a scheme which gives family members "home" occupation rights. Legislation and other rules regulating debt, including mortgage, enforcement procedures and bankruptcy processes, empower the courts to delay the forced sale of the home in appropriate circumstances, depending on the ability of the debtor to pay and, in some cases, his personal circumstances. Although the law of England and Wales reflects a concept of land ownership and land use[178] which is very different from that applicable in South Africa, the effects of these statutory provisions allow useful comparisons to be made. With English law as a source, at one stage, of South African commercial and insolvency law, and with the impact of the Human Rights Act 1998 which applies the European Convention on Human Rights to the United Kingdom, interesting commonalities emerge between the English and the South African position. Given the influence of English law on the development of South African law, a historical overview will be provided of the treatment of debtors and bankruptcy, generally,[179] as well as an account of treatment of the home. It should be noted, however, that English law influences on South African law[180] took place at a time before English law developments which provided statutory protection for "matrimonial home rights".[181] These rights are now more correctly, from constitutional and other perspectives, referred to as "home rights".[182]

[178]See, generally, Gray and Gray *Elements of Land Law*; Omar 2006 *Conv & Prop Law* 157, 157-158.
[179]For a succinct account of the historical development of bankruptcy law in England, see Milman *Personal Insolvency Law* 5-12.
[180]As mentioned at 2.3.1, above, the Cape Ordinance 6 of 1843, which was based on English law may be regarded as the basis of current South African insolvency law.
[181]For discussion of which, see 7.5.3, below.
[182]One of the effects of the enactment of the Civil Partnership Act 2004 was to amend the Family Law Act 1996, and related enactments, so that they apply in relation to civil partnerships, that is, registered, same-sex relationships, in the same way as they apply in relation to marriages.

7.5.2 Historical background

During the twelfth and thirteenth centuries, a creditor could execute against the movable assets of a debtor.[183] In the thirteenth century, a trader could be imprisoned for outstanding debt[184] and, in later centuries, so too could a non-trader.[185] A later development was that imprisonment could be prevented by an assignment for the benefit of creditors.[186] Because, under the feudal system, land had occupied a central position, execution could occur only against personal property and profits or rents of real property.[187] However, from the late thirteenth century onwards, execution was permitted against the real property of a debtor who was a trader.[188]

Originally, personal bankruptcy was regulated by the Law Merchant,[189] consisting of European commercial customs and practices, based on Italian mercantile law, itself originally based on Roman law,[190] in terms of which only traders could go bankrupt.[191] From the fourteenth century onwards, the Law Merchant was absorbed into the English Common Law. The first English Bankruptcy Act[192] was enacted in 1542. It was conceived as a criminal statute to combat debt evasion[193] and it dealt with debtors who were traders and who had absconded in the sense that they were "fleeing" or "keeping

[183]See, generally, Rajak "Culture of Bankruptcy" 11ff. In relation to the writs of *levari facias*, *fieri facias* and *elegit*, see Evans *Critical Analysis* 84, with reference to Bauer *The Bankrupt's Estate* 33; Dalhuisen *International Insolvency* vol 1 1-39.
[184]11 Edward I (1283), also known as the Statute of Acton-Burnell; 13 Edward I (1285). Milman *Personal Insolvency Law* 6 states that imprisonment for debt may be traced back to a statute of 1263.
[185] The creditor could imprison the debtor, take him to court and deprive him of his goods in payment of his debts, instead of applying for writs of *fieri facias* and *elegit*. This was extended to non-traders by enactments in 1352 and 1503. See the *Report of the Review Committee: Insolvency Law and Practice* (1982) Cmnd 8558, hereafter referred to as "the *Cork Report*", pars 26ff, 31ff; Dalhuisen *International Insolvency* vol 1 1-41; Evans *Critical Analysis* 84-85, with reference to Bauer *The Bankrupt's Estate* 35; Milman *Personal Insolvency Law* 6.
[186]Dalhuisen *International Insolvency* vol 1 1-40; Evans *Critical Analysis* 85.
[187]By obtaining a writ of *fieri facias* or *elegit*. See Evans *Critical Analysis* 85, with reference to Bauer *The Bankrupt's Estate* 39.
[188]Provided for by the second Statute of Merchants, of 1285, and the Statute of Staples, of 1353. See Evans *Critical Analysis* 86-87, with reference to Bauer *The Bankrupt's Estate* 44.
[189]The Law Merchant was a body of law developed by medieval courts in various European countries.
[190]See Fletcher *Law of Insolvency* 8, with reference to Dalhuisen *International Insolvency* Vol 1 Part 1 Ch 2; Keay 2001 *Common L World Rev* 206, 221-228.
[191]See the *Cork Report* par 32ff; Evans *Critical Analysis* 83, with reference to Jones *English bankruptcy* 5.
[192]34 & 35 Henry VIII c 4 (1542-3).
[193]See Milman *Personal Insolvency Law* 5-6.

their houses".[194] This Act made provision for the seizure and sale of the debtor's property, including personal and real property, at the instance of any aggrieved party and the distribution of the proceeds to the creditors in proportion to the respective debts.[195]

Criticisms of the position were that an insolvent trader could not apply to be declared bankrupt and bankrupts were treated as if they were criminals, with no differentiation being made between honest debtors who had become insolvent through misfortune and dishonest, or reckless, debtors.[196] There was no provision for discharge[197] until, in 1732, necessary wearing apparel of the bankrupt and his wife and children, his tools, household goods and furniture were exempted.[198] The English Common Law continued to apply to "non-trader" debtors, the treatment of whom became increasingly harsh and inhumane, with committal to debtor's prison a common occurrence, even where the debtor had no assets with which to satisfy his debts.[199] Reforms were introduced by the creation, in 1813, of a Court for the Relief of Insolvent Debtors and, thereafter, by the enactment of various successive Bankruptcy Acts. In 1861, a Bankruptcy Act was enacted which was applicable to all debtors, including "non traders".[200]

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[194]A debtor was "keeping his house" if he had taken refuge in his house, often with his creditor's goods, where he enjoyed immunity from the law. See the *Cork Report* par 35; Rajak "Culture of Bankruptcy" 12; and Evans *Critical Analysis* 87-88, with reference to Bauer *The Bankrupt's Estate* 68, who links it with the notion that an Englishman's home was his castle. Evans suggests that this might have been one of the earliest indications of the notion of exempt property in bankruptcy, and, more specifically, that a debtor's home deserved to be protected.

[195]This reflected, for the first time, a system of collective participation by creditors and *pari passu* distribution among them of the debtor's available property. See Fletcher *Law of Insolvency* 9; Evans *Critical Analysis* 87, with reference to Bauer *The Bankrupt's Estate* 65, 71. In 1571, the Bankrupts Act 13 Elizabeth 1 c 7 was enacted to make more detailed provision for bankrupt traders.

[196]See the *Cork Report* pars 37-38; Fletcher *The Law of Insolvency* 10-11.

[197]Although a measure of discharge was introduced by statute (4 & 5 Anne, c 4 (1705), amended and explained by 6 Anne, c 22 (1706) and 10 Anne, c 25) which allowed bankrupts to surrender their property in exchange for the exemption of some of their goods and discharge of liability for debts. See Fletcher *Law of Insolvency* 10; Evans *Critical Analysis* 92.

[198]This was in terms of a statute, 5 George II, c 30 (1732); see Evans *Critical Analysis* 92.

[199]"Non-traders" were persons who were employed, or who practised a profession, or who were landowners or farmers. In the late eighteenth century, imprisonment of debtors was referred to as "the English equivalent of the slave trade". See the *Cork Report* pars 32, 40-41; Milman *Personal Insolvency Law* 7-8. The state of affairs was depicted by Charles Dickens in *The Pickwick Papers* 1836 and *Little Dorrit*; see Rajak "Culture of Bankruptcy" 12.

[200]Except for married women who were not traders; see the *Cork Report* par 42; Evans *Critical Analysis* 87; Milman *Personal Insolvency Law* 8.

The Bankruptcy Act of 1883 provided for a bankruptcy order to vest the property of the bankrupt in the official receiver of the court and thereafter, once appointed, in a trustee. The property included land and "hereditaments" of the debtor and included not only property of the bankrupt, at the date of the bankruptcy order, but also that which he acquired during bankruptcy. Exemptions included after-acquired earnings, any award made for a personal wrong committed against the bankrupt and trust property held by the bankrupt. The trustee could disclaim any right to property that would be onerous to the bankrupt estate.[201] In terms of the Bankruptcy Act of 1914, the trustee could claim excess income which the bankrupt would not require for the survival of himself and his family. Real property acquired after the bankruptcy order did not vest in the trustee unless he intervened to claim it.[202]

In January 1977, a Review Committee on Insolvency Law and Practice[203] was appointed, under the chairmanship of Sir Kenneth Cork, to carry out a comprehensive review of insolvency law and practice and to consider necessary and desirable reforms.[204] The Cork Committee, in its report,[205] commonly referred to as the *Cork Report*, having considered exempt property and family assets,[206] recommended that greater emphasis should be placed on a bankrupt's surplus income during bankruptcy being applied to the payment of his debts.[207] In particular, it called for clarity in the position of the family home[208] and recommended that a court should be obliged to take into account the welfare of the bankrupt's family.[209]

[201]Evans *Critical Analysis* 94-95, with reference to Stephen *New commentaries* 176-177.
[202]Evans *Critical Analysis* 95-96, with reference to s 47 of the (Bankruptcy) Act of 1914.
[203]Hereafter referred to as the "Cork Committee".
[204]Fletcher *Law of Insolvency* 17-18 observes that the mandate did not include a review of the general law of credit and security, nor debt enforcement and nor was the Law Commission for England and Wales involved in the review.
[205]*Report of the Review Committee: Insolvency Law and Practice* (1982) Cmnd 8558, which, as mentioned above, is referred to, in this thesis, as "the *Cork Report*".
[206]The *Cork Report* pars 1094ff.
[207]The *Cork Report* par 591.
[208]The *Cork Report* par 241.
[209]The *Cork Report* par 1120. See 7.5.3.1, below.

The Insolvency Act 1986 introduced new provisions, many of which were based on the Cork Committee's recommendations regarding estate assets,[210] including changes to the trustee's powers in relation to the debtor's home. The enactment of the Insolvency Act 2000 brought about further, debtor-orientated reform[211] and the Enterprise Act 2002 introduced provisions impacting on the way a trustee in bankruptcy deals with the home of the bankrupt.[212] In 2000, the coming into operation of the Human Rights Act 1998 has impacted on certain aspects of debtor-creditor law and insolvency law.[213] Section 6(1) of the Human Rights Act imposes a duty on public authorities, including courts and tribunals, not to act in a way which is incompatible with rights recognised by the European Convention on Human Rights and to protect individuals against breaches of their rights. Section 3 requires that all primary and subordinate legislation must be read and implemented in a way which is compatible with such rights. Article 8 of the European Convention on Human Rights, which provides that everyone has the right to respect for his family life and his home, is applicable, in particular, to protection of a debtor's home, in this context.[214]

Article 8 provides:

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[210] See Fletcher *Law of Insolvency* 21.
[211] See Fletcher *Law of Insolvency* 23-24.
[212] See Fletcher *Law of Insolvency* 24-26 for discussion of the Enterprise Act 2002 the relevant provisions of which came into effect on 1 April 2004.
[213] See Gearty and Davies *Insolvency Practice and the Human Rights Act 1998* 41. See also, 7.5.3.3 (c), below, in relation to interpretation of the Insolvency Act 1986.
[214] Lindberg 2010 *Denning LJ* 1. It has also been argued that Article 1 to the First Protocol may provide a defence to a debtor against an application by a creditor for forced sale of the home. See Pines Richman 2000 *NLJ* 1102, 1104. See 7.5.3.3 (c), below.

It has been held that interference with respect for the home can take place either at the home or by affecting the continued enjoyment of the home itself.[215] However, the approach of the English courts has been that Article 8 does not affect the mortgagee's right to possession after the mortgagor has fallen into arrears. In *Harrow London Borough Council v Qazi*,[216] Lord Scott stated, with reference to the decision in *Wood v UK*,[217] that "the [European] Commission's conclusion … [made] it clear … that a mortgagor cannot invoke Article 8 in order to diminish the contractual and proprietary rights of the mortgagee under the mortgage. Article 8 is simply not applicable."[218] The majority, in *Harrow London Borough Council v Qazi*, adopted the view "that courts were not required to conduct a balancing exercise in individual cases, as domestic law itself struck the right balance between the interests of individuals and the interests of the community."[219] On the other hand, in a minority judgment, Lord Bingham of Cornwall declared that "few things are more central to the enjoyment of human life than having somewhere to live."[220] It has been submitted that the decision of the European Court of Human Rights, in *Connors v United Kingdom*,[221] "carries the strongest implication that *Qazi* was wrongly decided".[222] Cases that are more recent seem to suggest that this might indeed be the position.[223] This, it is submitted, is a current issue which requires clarification in English law.

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[215]See *McCann v United Kingdom* [2008] 47 EHRHR, 40 ECHR par 50; *Howard v United Kingdom* 52 DR 198 (1985), which concerned the compulsory purchase of the home; Pines Richman 2000 *NLJ* 1104; Fox *Conceptualising Home* 8; Lindberg 2010 *Denning LJ* 1.
[216]*Harrow London Borough Council v Qazi* [2003] UKHL 42, [2004] 1 AC 983.
[217]*Wood v UK* (1997) 24 EHRR CD 69, a decision concerning possession proceedings brought by a local authority against a tenant. See Miller *Family, Creditors and Insolvency* 78.
[218]*Harrow London Borough Council v Qazi* [2003] UKHL 42, [2004] 1 AC 983 par 135. On the impact of this decision, see Fox *Conceptualising Home* 481ff; Gray and Gray *Elements of Land Law* 89.
[219]See "Housing: possession proceedings by local authority - absence of an offence - judicial review" 2011 *EHRLR* 105-106.
[220]See remarks by Gray and Gray *Elements of Land Law* 89, with reference to *Harrow London Borough Council v Qazi* [2004] 1 AC 983 par 8.
[221]*Connors v United Kingdom* (2005) 40 EHRR 9; also mentioned at 3.3.1.1, above.
[222]Gray and Gray *Elements of Land Law* 128.
[223]See *McCann v UK* (2008) 47 EHRR 40 and *Kay v United Kingdom* (App No 37341/06) [2011] HLR 2 (ECHR). See also *Manchester City Council v Pinnock* [2010] UKSC 45 (SC). See Loveland 2011 *EHRLR* 151; Lindberg 2010 *Denning LJ* 1, 21ff, 30; Baker 2010 *Conv & Prop Law* 352, 359; Bright "Dispossession for Arrears" 13, 18.

7.5.3 Statutory treatment of the debtor's home

7.5.3.1 General

In modern English law, a creditor may apply for orders for possession, and for sale, of a debtor's land, provided certain requirements have been met.[224] With regard to mortgaged property, it has been stated that the mortgagee holds an inherent right to possession "as soon as the ink is dry".[225] However, in practice, it will only be once the mortgagor has defaulted that the mortgagee will exercise his right to sell the property and apply the proceeds to satisfy the debt.[226] The mortgagee will ordinarily seek a court order for the possession of the property so that it can be sold with vacant possession.[227] However, a court order is not always necessary. Where a mortgage deed contains a clause providing for the mortgagee to sell the property once payment is due, he may exercise his contractual rights without a court order.[228] Even in the absence of such a clause, the mortgagee has an implied statutory power, conferred by section 101 of the Law of Property Act 1925, to sell the property.[229] However, a mortgagee may not exercise this power until a mortgagor has been in default of payment for at least three months after having received notice to pay.[230] A mortgagee may also apply, under section 91(2) of the Law of Property Act 1925, for a judicial order for the sale of the property in consequence of which the court may direct a sale of the mortgaged property

[224]See, generally, Schofield and Middleton *Debt and Insolvency* 13ff; Miller *Family, Creditors and Insolvency* Chapter 4.
[225]*Per* Harman J, in *Four Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317. See Lindberg 2010 *Denning LJ* 1, 7-8.
[226]The mortgagee also has other remedies, for discussion of which see, generally, Cousins *Mortgages*. See also Omar 2005 *Int Co Comm LR* 445; Harper 2002 *NILQ* 318.
[227]See Miller *Family, Creditors and Insolvency* 53ff; Fox *Conceptualising Home* 43ff. It may be noted, that, in English law, a mortgagee's claims, in this regard, are referred to as a claim for an order for possession, and for sale, respectively. Other legal systems refer to this as a claim for "foreclosure". In English law, "foreclosure" connotes a termination of the mortgagor's right to redeem the mortgage, and not merely an order for possession and sale. A court order is required for foreclosure. For discussion of foreclosure, see Cousins *Mortgages* 514ff; for discussion of secured credit in English law, see McCormack *Secured Credit* 39-53.
[228]Miller *Family, Creditors and Insolvency* 71; Lindberg 2010 *Denning LJ* 1, 8ff.
[229]The mortgagee may convey the property sold to a purchaser. See Miller *Family, Creditors and Insolvency* 71-72.
[230]See s 103 of the Law of Property Act 1925.

"on such terms that it thinks fit".[231] In terms of the Charging Orders Act 1979, an unsecured judgment creditor may, in the court's discretion, obtain a charging order which has the effect of securing the debt by creating a charge, *ex post facto*, against the debtor's property. A charge imposed by a charging order has the same effect as an equitable charge created by the debtor.[232] In the context of the family home, the court will exercise its discretion in such a way as to "strike a balance between the normal expectation of the creditor and the hardship to the spouse or partner and children if an order is made".[233]

Where the mortgaged property constitutes the debtor's home, although, traditionally, the claims of secured creditors enjoyed priority over any other claims of creditors or family members, developments reflect a measure of recognition for the need to consider the interests of "innocent" family members.[234] Where the debtor owned the home, in some cases, courts allowed the wife a right of occupation of the "matrimonial home" to prevail over the right of the husband's trustee in bankruptcy to sell the property, based on the "deserted wife's equity".[235] The position became statutorily regulated with the enactment of the Matrimonial Homes Act 1967[236] the effect of which was to give the "non-entitled" spouse statutory rights of occupation which could also be protected against third parties by registration.[237] However, these rights of occupation were expressly made void against the trustee in bankruptcy of the "entitled spouse" or against his creditors,[238]

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[231]For discussion of judicial sale, see Cousins *Mortgages* 530ff.
[232]See s 3(4) of the Charging Orders Act 1979. Thus the creditor acquires the status of a secured creditor who may, upon the debtor's default, ask for an order for the sale of the property. However, a charging order is void against a purchaser for value of the land unless it is registered. See Schofield and Middleton *Debt and Insolvency* 15-25; Miller *Family, Creditors, and Insolvency* 15-21; Fox 2006 *Legal Studies* 210.
[233]Cousins *Mortgages* 323ff, with reference to *Harman v Glencross* [1968] Fam 81, 104A.
[234]Fletcher *Law of Insolvency* 231; Fox 2006 *Legal Studies* 203, 208; Davey 2000 *Insolv Law* 2 2-3; Omar 2006 *Conv & Prop Law* 159. Milman *Personal Insolvency Law* 97-109; Miller *Family, Creditors and Insolvency* 106; Fox *Conceptualising Home* Chapter 3.
[235]*Bendall v McWhirter* [1952] 2 QB 466 (CA) was one such case. However, the decision was overruled by the House of Lords, in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175. See Hunter 1999 *J Bus L* 491, 505; Fletcher *Law of Insolvency* 231 n 54; Cretney 1989 *LQR* 169; Fox *Conceptualising Home* 314-319. See, also, for interesting parallels drawn between equity and *ubuntu*, Bennett 2011 *PELJ* 30, mentioned at 3.2.2, above.
[236]The provisions of the Matrimonial Homes Act 1967 were consolidated by s 1 of the Matrimonial Homes Act 1983.
[237]Miller *Family, Creditors and Insolvency* 80.
[238]S 2(7) of the Matrimonial Homes Act 1967.

which meant that a person's home was always at risk of being sold in the event of bankruptcy.[239]

In most cases, courts tended to favour the interests of creditors over those of the bankrupt's spouse and children unless circumstances were clearly exceptional.[240] A case, frequently cited as an illustration of "home interests" prevailing over commercial interests,[241] is *Williams & Glyn's Bank Ltd v Boland*.[242] In this case, in an action by the mortgagee, upon the mortgagor's default, for possession of his home, both the Court of Appeal and the House of Lords found that the mortgagor's wife's equitable interest, under an implied trust, of which the mortgagee had been unaware, prevailed over the latter's claim against the husband. Lord Denning stated that "monied might [should not be given] priority over social justice" and that the bank was "not entitled to throw these families onto the street – simply to get the last pennies of the husband's debt".[243] As Fox related, Lord Wilberforce, in a separate judgment, acknowledged that the court's decision "signalled the need for a 'a departure from an easygoing practice of dispensing with inquiries as to occupation beyond that of the vendor, and substitution of a more careful inquiry extending to spouses and other members of the family, or even of persons outside it'".[244] Fox also highlights a passage from the judgment of Lord Scarman who "also suggested that: '[t]he difficulties are, I believe, exaggerated: but bankers, and solicitors, exist to provide the service which the public needs. They can – as they have successfully done in the past – adjust their practice, if it be socially required'."[245] In a subsequent debate, in the House of Lords, it was stated that the "integrity" of the family home is of great social importance and that there was a need to

[239]Hunter 1999 *J Bus L* 493.
[240]See, for example, *Jones v Challenger* [1961] 1 QB 176; *Re Solomon* [1967] CH 573; *Re Turner* [1975] 1 All ER 5, [1974] 1 WLR 1556; *Re Densham* [1975] 3 All ER 726, [1975] 1 WLR 1519; *Re Bailey* [1977] 2 All ER 26, [1977] 1 WLR 278; *Re Lowrie* [1981] 3 All ER 353; *Re Citro Domenico, Re Citro Carmine* [1990] 3 WLR 880. Cf *Re Holliday* [1981] 1 Ch 405 (CA), where the sale of the home was postponed for five years.
[241]Fox *Conceptualising Home* 53.
[242]*Williams & Glyn's Bank Ltd v Boland* [1979] Ch 312 (CA), [1981] AC 487.
[243]See Fox *Conceptualising Home* 54, with reference to *Williams & Glyn's Bank Ltd v Boland* [1979] Ch 312 (CA) 333.
[244]See Fox *Conceptualising Home* 54, with reference to *Williams & Glyn's Bank Ltd v Boland* [1979] Ch 312 (CA) 508.
[245]See Fox *Conceptualising Home* 54-55, with reference to *Williams & Glyn's Bank Ltd v Boland* [1979] Ch 312 (CA) 510.

"secure and safeguard the values which society upholds in the institution of marriage and the family".[246] Although, apparently, subsequent cases[247] did not reflect the same measure of judicial activism, Fox makes an interesting comment that, "despite initial concerns regarding the standard of inquiry after *Boland*, within a few years the requirement that *all* occupiers be ascertained and inquiry made of them had come to be regarded as acceptable." Fox also points out that, "[i]n order to avoid losing priority to the equitable interests of occupiers, it is now standard conveyancing practice for creditors to make inquiries from all adult occupiers, to ask that they disclose any interests claimed in the land, and to seek their consent or join them as parties to the transaction." She also states that, "in 1987, the Law Commission concluded that 'conveyancers have learnt to live with it'".[248]

The Cork Committee expressed concern that "[e]viction from the family home … may be a disaster not only to the debtor himself … but also to those who are living there as his dependants."[249] It observed that the family home was often the most valuable asset in the bankrupt's estate. It also took into account the shortage of domestic accommodation as well as how expensive housing was.[250] It recommended that the bankrupt debtor's interest in the family home should vest in the trustee and that the bankruptcy court should be required to resolve any dispute in relation to it.[251] It further recommended that the court should have specific power, taking into account the welfare of any children and of any ailing or elderly adults in the family, to postpone a trustee's right of possession

[246]See Fox *Conceptualising Home* 326; Fox 2006 *Legal Studies* 204, with reference to 437 HL Official Report (5th series) cols 640 and 653, 15 December 1982.
[247]For discussion of which, see Fox *Conceptualising Home* 55-61. See, in particular, *Bank of Bharoda v Dhillon* [1998] 1 FLR 524; *Mortgage Corp Ltd v Silkin* and *Mortgage Corp Ltd v Shaire* [1998] 1 FLR 973.
[248]Fox *Conceptualising Home* 55, with reference to Law Commission *Third Report on Land Registration* Law Com No 158 1987.
[249]The *Cork Report* par 1116.
[250]The *Cork Report* par 1115.
[251]The *Cork Report* pars 1126-1128.

and sale of the family home.[252] The *Cork Report* contained the following summative recommendations as regards the sale of a bankrupt's home:[253]

The court will have absolute discretion, but it may be expected to consider, *inter alia*, the following factors:

(a) the means available to the family (other than the debtor himself);
(b) how much of the debtor's income is to be contributed to the creditors, and how much is likely to be left for him and his family;
(c) the suitability of the standard of amenity provided by the present family home and the available alternatives;
(d) any offer by the debtor to move if given help (whether out of the proceeds of the sale or otherwise) in rehousing the family;
(e) the amount likely to be realised by the sale of the debtor's interest in the family home in relation to the disturbance caused;
(f) the need for the family to remain in a specific area for business or schooling reasons;
(g) any personal hardship caused to an individual creditor by a proposed postponement; and
(h) any arrangements that may have been made with a mortgagee of the premises.

Although the Insolvency Act 1986 did not go as far as these recommendations,[254] it reversed the effect of the Matrimonial Homes Act 1967, so that the family members' occupational rights were no longer void as against the trustee in bankruptcy. It also permitted the bankruptcy court to delay the sale of the home by the trustee in bankruptcy in appropriate circumstances.[255]

[252]The "family home" was defined as a dwelling in which there is, or are, living: the debtor and his wife; the debtor or his wife with (in either case) a dependent child or children; the debtor's wife; or the debtor, and a dependent parent of the debtor or of his wife who has been living there as part of the family on the basis of a long-term arrangement. See the *Cork Report* pars 1120, 1124.
[253]The *Cork Report* par 1131.
[254]In relation to the debates preceding the enactment of the Insolvency Act 1985, see Fletcher *Law of Insolvency* 232 n 56, with reference to Miller 1986 *Conv & Prop Law* 393; Cretney 1991 *LQR* 177.
[255]Fletcher *Law of Insolvency* 232; Hunter 1999 *J Bus L* 505.

Thus, since the enactment of the Insolvency Act 1986, the position differs, depending on whether the debtor has been declared bankrupt or not. A distinction is also drawn between the position where the debtor is the sole owner of the home and, on the other hand, where the home is jointly owned by the debtor and his spouse or civil partner. This is because, in all cases where it is sought to sell jointly-owned property, the provisions of the Trusts of Land and Appointment of Trustees Act 1996[256] are applicable.[257] The applicable "home rights" provisions now form part of the Family Law Act 1996, as amended by the Civil Partnership Act 2004.[258] The following attempts briefly to set out the current position in the debt enforcement process, where the home is solely, and where it is jointly, owned. Thereafter, the position, where the debtor has been declared bankrupt, will be discussed.

7.5.3.2 The individual debt enforcement process

(a) Where the debtor is the sole owner of the home

Where there is sole ownership of the home, the Family Law Act 1996[259] provides "home rights"[260] for the "non-owner" spouse or civil partner, former spouse or former civil partner, or cohabitant or former cohabitant, respectively.[261] Home rights may include a right not to be evicted or excluded from their home by the other party to the relationship, except with the leave of the court, and, if not in occupation, a right, with the leave of the court, to enter and to occupy the home. Section 31 of the Family Law Act provides that, where one spouse or civil partner is entitled to occupy a dwelling-house by virtue of a

[256]Hereafter referred to as "the TLATA".
[257]S 30 of the Law of Property Act 1925 used to apply. Now, ss 14 and 15 of the TLATA apply. See 7.5.3.2 (b), below.
[258]The effect of s 82 and Sch 9 of the Civil Partnership Act 2004 is to amend the Family Law Act 1996, and related enactments, so that they apply in relation to civil partnerships, in the same way as they apply in relation to marriages. A "civil partnership", defined in s 1 the Civil Partnership Act 2004, is a registered, same-sex, relationship.
[259]Hereafter referred to "the Family Law Act".
[260]Formerly referred to as "matrimonial home rights", the effect of the enactment of the Civil Partnership Act is that they are now referred to as "home rights".
[261]See ss 30-36 of the Family Law Act.

beneficial estate or interest, the other spouse's or civil partner's home rights are a charge on the estate or interest.[262]

Section 33 provides for a court, in its discretion, to make an occupation order,[263] on application by a person who has estate or interest or who has home rights. In the exercise of its discretion, the court is obliged to have regard to all the circumstances, including: the housing needs and housing resources of each of the parties and of any relevant child; the financial resources of each of the parties; the likely effect of any order, or of any decision by the court not to exercise its powers under the section, on the health, safety or well-being of the parties and of any relevant child; and the conduct of the parties in relation to each other and otherwise.[264] The court may impose restrictions on the parties concerned where it considers this just and reasonable.[265]

Under the English Common Law, where a mortgagee sought to enforce his rights, the court had no discretion to decline to make an order for possession or to adjourn the hearing for the mortgagor to pay the arrears, if the mortgagee did not agree to it.[266] Section 36 of the Administration of Justice Act 1970 provides that, where the mortgagee claims possession of mortgaged property that is a dwelling-house, if it appears to the court that the mortgagor is likely to be able, within a reasonable period, to pay any sums due under the mortgage, or to remedy any other default, the court may adjourn the proceedings, stay or suspend execution of any judgment or order, or postpone the date

[262]See ss 31(1) and (2) of the Family Law Act. In terms of s 31(3), such charge has the same priority as if it were an equitable interest. For further detail, especially in relation to the claim of a mortgagee, see Cousins *Mortgages* 316-317.
[263]The occupation order may regulate or impose restrictions on the parties' respective rights, such as to declare a party entitled to occupy the home, to evict, or to bar a party from having access to the home.
[264]See s 33(6) of the Family Law Act. S 33(7) makes provision for the interests of the applicant or any relevant child. In relation to an order in respect of a cohabitant's home rights, the court is obliged to have regard to additional factors, including the nature of the parties' relationship, the length of time during which they have lived together, circumstances relating to any children of both parties or for whom they have, or have had, parental responsibility, and the legal or beneficial ownership of the dwelling-house. See ss 36(6), (7) and (8) which make provision for the interests of the applicant or any relevant child in such circumstances.
[265]See s 33(8). Under s 33(10), such an order may, in so far as it has continuing effect, be made for a specified period, until the occurrence of a specified event or until further order.
[266]Although an exception did apply for the hearing to be adjourned, for a short period, if there was a reasonable prospect of the mortgagor paying the mortgagee in full. See Miller *Family, Creditors and Insolvency* 54.

for delivery of possession, for a reasonable period.[267] The purpose of section 36 is to assist a person who has mortgaged his home and is experiencing temporary financial difficulties.[268] Following a restrictive interpretation of this section,[269] section 8 of the Administration of Justice Act 1973 was passed to provide that, in the situation where, upon default, the principal sum became due, then, for the purposes of section 36 of the Administration of Justice Act 1970, a court may treat as due under the mortgage, on account of the principal sum secured and of interest on it, only such amounts as the mortgagor would have expected to be required to pay if there had been no such provision for earlier payment.[270] Thus, in appropriate cases, a court may exercise its discretion not immediately to grant the order sought in order to enable the mortgagor to clear the arrears or to sell the property.[271]

As to what would constitute "a reasonable period" in this context, for the mortgagor to clear the arrears or to remedy any other default, in *Cheltenham & Gloucester Building Society v Norgan*,[272] the Court of Appeal stated that a good starting point was to calculate whether, by the end of the full term of the mortgage, the mortgagor would be able to clear the arrears.[273] The court took into account the options available to a mortgagee, such as extending the term of the loan and deferring interest payments. It also considered the policy declaration of the Council of Mortgage Lenders that "[l]enders seek possession only as a last resort" and that "[t]hey are in business to help people buy homes, not to take loans away from them".[274] The court provided a summary of the

[267]See s 36(2) of the Administration of Justice Act 1970. See Cousins *Mortgages* 503-508.
[268]See Cousins *Mortgages* 504.
[269]In *Halifax Building Society v Clark* [1973] Ch 307.
[270]Further, a court may only make an order under s 36(1) if it is also likely that, by the end of the period of postponement, the mortgagor will be able to pay any further amounts that he would have expected to be required to pay by then if there had been no such provision for earlier payment; see s 8(2) of the Administration of Justice Act 1973.
[271]See Miller *Family, Creditors and Insolvency* 61; Fox *Conceptualising Home* 43. See also Lindberg 2010 *Denning LJ* 31 who questions whether s 36 of the Administration of Justice Act 1970 is *necessary* to safeguard the mortgagee's rights and is therefore compliant with Article 8 of the European Convention on Human Rights.
[272]*Cheltenham & Gloucester Building Society v Norgan* [1996] 1 All ER 449, hereafter referred to as "*Cheltenham v Norgan*".
[273]*Cheltenham v Norgan* 459-460, *per* Waite LJ, who expressed the view that treating the full loan term as a guide to what was a reasonable period would operate in the interests of the mortgagee and the mortgagor as it would avoid the need for frequent court attendance and would thus minimise costs.
[274]*Cheltenham v Norgan* 461-462. See also Miller *Family, Creditors and Insolvency* 61-62.

judgments as a guide for future cases and suggested that the mortgagor should provide detailed figures, including, ideally, a "budget", for the court to be in a position to exercise its discretion appropriately.[275] Income support and other social security assistance to which the debtor and his spouse or civil partner may be entitled are also relevant.[276]

A criticism of the position is that, where a mortgagee exercises its contractual right to sell the property without a court order,[277] the Administration of Justice Acts of 1970 and 1973 will not apply, and thus, the court will not be in a position to exercise the discretion given to it by that Act.[278] Another criticism is that section 36 of the Administration of Justice Act 1970 requires consideration to be given only to the debtor's ability to pay the debt within a reasonable period and does not contemplate any consideration at all for the personal circumstances of the debtor or the reasons for the default.[279] However, it may be noted that, under the Family Law Act, a "connected person", being a spouse, former spouse, cohabitant or former cohabitant, who is able to meet the mortgagor's liabilities, may apply to be joined as a party to the proceedings before final disposal of the matter. It follows that the court ought to take into account a "connected person's" ability to assist in satisfying the mortgagor's liabilities when exercising its discretion in terms of section 36 of the Administration of Justice Act 1970.[280]

(b) Where the home is jointly owned

Where the home is jointly owned by spouses, civil partners, or cohabitants, if one of them defaults on payment of a debt, the creditor may exercise his rights against the debtor's share in the property. Thus, the entire home is vulnerable to forced sale at the instance of the creditor.[281] In terms of the TLATA, where property is co-owned, a trust of

[275] *Cheltenham v Norgan* 459, 463.
[276] See Miller *Family, Creditors and Insolvency* 63-64.
[277] See 7.5.3.1, above.
[278] See *Ropaigealach v Barclays Bank* [1999] 4 All ER 235; *Horsham Properties Group v Clark and Beech* [2008] EWHC 2327 (Ch). See Lindberg 2010 *Denning LJ* 8ff; Dixon 1999 *Camb LJ* 281; Cousins *Mortgages* 505.
[279] See Lindberg 2010 *Denning LJ* 9.
[280] See Cousins *Mortgages* 499.
[281] See Fox *Conceptualising Home* 61-62. A creditor may obtain a charging order over a debtor's share of the property. The co-owner spouse, civil partner or cohabitant may defend an action for possession

land is regarded as being in existence, with the owners as trustees and beneficiaries.[282] Where the creditor seeks to exercise its security rights against the debtor's share, it must bring an application for a court order for sale of the land in terms of section 14 of the TLATA.[283] Section 15(1) requires the court, in determining an application under section 14, to have regard to:

> (a) the intentions of the person or persons (if any) who created the trust;
> (b) the purposes for which the property subject to the trust is held;
> (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home; and
> (d) the interests of any secured creditor of any beneficiary.

Section 15(3) provides that the court may also have regard to the circumstances and wishes of any beneficiaries of full age, and entitled to an interest in possession in property subject to the trust, or of the majority according to the value of their combined interests.

Before the TLATA was enacted, in disputes between beneficiaries, the courts had often applied a "collateral purpose" doctrine, taking into consideration that the property had been purchased with the purpose of providing a family home.[284] However, most of the reported decisions favoured the creditor's interests.[285] After the TLATA came into force, there was an apparent trend to favour the creditor's interests,[286] although a number of later reported cases reflect some consideration for the family members' interests, even if the outcome was not in their favour.[287]

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and/or sale of their home by trying to establish that his or her equitable interest takes priority over the creditor's charge. If this fails, an occupier may rely on s 36 of the Administration of Justice Act 1970, where it is applicable, to try to delay the repossession of the property, as discussed in 7.5.3.2 (a), above.

[282]See Cousins *Mortgages* 39, 510-512.

[283]Ss 14 and 15 of the TLATA replaced s 30 of the Law of Property Act 1925. In terms of s 17(2) and (3), the court may give directions as to the disposal of the proceeds of sale to those interested.

[284]See, for example, *Re Evers' Trust* [1980] 1 WLR 1327.

[285]See Omar 2006 *Conv & Prop Law* 162-163. Cf *Abbey National Building Society v Moss* [1994] 1 FLR 307. See *Bankers Trust v Namdar* [1997] EGCS 20, for comments made about the impact of the TLATA.

[286]The position was possibly influenced by decisions concerning bankrupt debtors, such as *Re Citro Domenico, Re Citro Carmine* [1990] 3 WLR 880, [1991] Ch142 CA, hereafter referred to as "*Re Citro*". See further cases cited by Omar 2006 *Conv & Prop Law* 163-164.

[287]For example, in *Mortgage Corp Ltd v Silkin and Mortgage Corp Ltd v Shaire* [1998] 1 FLR 973, the court allowed the wife to remain in the property as long as she maintained its value, for later mortgagees, by repairing and insuring the property. This decision was approved in *Bank of Ireland Home Mortgages v Bell* [2000] EGCS 151 although, on the facts, the court did not allow the wife to remain in the property on

7.5.3.3 The bankruptcy process

(a) Where the debtor is the sole owner of the home

Where the bankrupt is the sole beneficial owner of the home, sections 336 and 337 of the Insolvency Act 1986 apply. Their effect is to enable a court to postpone the sale of the family home for up to one year from the date when the bankrupt's estate vests in the trustee and, thereafter, to postpone it further, but only in exceptional circumstances.[288] Section 336(2) provides that, where a non-bankrupt spouse or civil partner has acquired statutory rights of occupation under the Family Law Act which give rise to a charge on the estate or on the interest of the bankrupt,[289] the charge not only continues to subsist despite the bankruptcy but also binds the trustee of the bankrupt's estate and persons deriving title through him.[290] It further provides that any application to evict[291] a spouse or civil partner who is in occupation must be made to the bankruptcy court.[292] Section 336(4) provides that the court may make such order as it thinks just and reasonable, having regard to:

(a) the interests of the bankrupt's creditors;
(b) the conduct of the spouse or civil partner or former spouse or civil partner in contributing to the bankruptcy;
(c) the needs and financial resources of the spouse or civil partner or former spouse or civil partner;
(d) the needs of any children; and
(e) all the circumstances of the case other than the needs of the bankrupt.

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account of her share in the property being only 10% and her inability to afford to buy the remaining interest in the property. In *First National Bank v Achampong and others* [2003] EWCA Civ 487, the court allowed the sale of property as it had been bought ostensibly for business purposes and, although the wife's signature had been obtained by undue influence, and she had children to support, there were no other "exceptional circumstances" to take into account. See Pawlowski 2007 *Conv & Prop Law* 78, 86 who comments that "the trend … is to afford the interest of the creditor priority over the occupying spouse even in circumstances where the effect of the order is to cause considerable hardship to the wife and her resident family."

[288] Fletcher *Law of Insolvency* 232.

[289] As explained in 7.5.3.1 and 7.5.3.2 (a), above.

[290] For discussion of s 336, see Sealy and Milman *Annotated Guide* Vol 1 384-385.

[291] Under s 33 of the Family Law Act.

[292] See s 336(2)(b) of the Insolvency Act 1986.

Section 336 has been criticised for falling short of the recommendations of the Cork Committee in that it does not reflect the emphasis which the committee placed on the welfare and education of the bankrupt's children which had been fundamental to the courts' approach until then.[293] It may be significant that the interests of the creditors stand first, in the order of the factors listed, while the needs of any children stand fourth. Fletcher submits that, although there is express mention only of children, the interests of other dependants, such as ailing, or elderly, adult members of the household, including parents or grandparents, could be taken into account by the court under section 336(4)(e).[294]

In terms of section 336(5), if the application is made more than one year after the vesting of the bankrupt's estate in the trustee, "the court shall assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations".[295] Thus, the court's discretion is unfettered during the period of one year after the first vesting of the bankrupt's estate in his trustee. However, as Fletcher observes, these provisions seem to suggest that, if the trustee in bankruptcy brings an application for an order of eviction after a year, in most cases, a court would probably grant an order in his favour. It would seem that the legislative intention was to allow a "period of grace" of up to one year in order to "minimise the inevitable hardship and distress for those in the process of losing their home".[296]

Section 337 applies where the bankrupt is entitled to occupy the home by virtue of a beneficial estate or interest, and any persons under the age of 18 occupied the home

[293]See Cretney 1991 *LQR* 177, 179, also referred to by Gibson 1998 11(4) *Insolv Intell* 29, 31.
[294]See Fletcher *Law of Insolvency* 233, with reference to the *Cork Report* pars 1120-1121.
[295]For reported cases concerning the interpretation of "exceptional circumstances" which affect a decision about the postponement of sale of the home, see *Re Citro*; *Judd v Brown* [1997] BPIR 470; *Re Raval* [1998] BPIR 389; *Re Bremner* [1999] 1 FLR 558; *Zandfraid v BCCI* [1996] 1 WLR 1420; *Re Ng* [1997] BCC 507; *Trustee of the Estate of Bowe v Bowe* [1997] BPIR 747. Earlier cases included *Jones v Challenger* [1961] 1 QB 176; *Re Solomon* [1967] CH 573; *Re Turner* [1975] 1 All ER 5, [1974] 1 WLR 1556; *Re Densham* [1975] 3 All ER 726, [1975] 1 WLR 1519; *Re Bailey* [1977] 2 All ER 26, [1977] 1 WLR 278; *Re Lowrie* [1981] 3 All ER 353. Cf *Re Holliday* [1981] 1 Ch 405 (CA), a case in which the sale of the home was postponed for five years. For further discussion of "exceptional circumstances", see 7.5.3.3 (c), below.
[296]Fletcher *Law of Insolvency* 234.

with the bankrupt, at the time of the bankruptcy proceedings.[297] If he is in occupation, the bankrupt has a right as against the trustee of his estate, not to be evicted or excluded from the home, except with the leave of the court[298] and, if he is not in occupation, a right, with the leave of the court, to occupy the home. The bankrupt's rights are a charge, with the same priority as an equitable interest, on his estate or interest in the home which vests in the trustee in bankruptcy.[299] The bankruptcy court is required to make an order, as it thinks just and reasonable having regard to the interests of the creditors, the bankrupt's financial resources, the needs of the children and all the circumstances of the case other than the needs of the bankrupt.[300] If the application is made more than a year after the vesting of the bankrupt's estate in the trustee, the court must assume, unless the circumstances of the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations.[301]

Re Haghighat (A Bankrupt)[302] illustrates the application of sections 336 and 337 with regard to a family home which is owned solely by the bankrupt. The bankrupt's severely disabled child, who could not walk or speak and had to be fed through a tube, required constant care by his mother, the bankrupt's wife, whose health was also deteriorating. The evidence was that, in the absence of an order of possession, the City Council would be able to provide suitable alternative accommodation for the family only after six years. Two of the creditors held charges over the home, the bankrupt's only asset. If the home were to be sold, this would still leave a large shortfall in the bankruptcy, in respect of other, unsecured creditors' claims and costs.[303] The court found these circumstances to be exceptional and, having carefully considered the balancing of the creditors' and

[297]See s 337(1)(a) and (b) of the Insolvency Act 1986.
[298]Any application made by the trustee in bankruptcy to evict the bankrupt must be brought to the bankruptcy court. See s 337(4) of the Insolvency Act 1986 and s 33 of the Family Law Act.
[299]See 337(2)(a) and (b) of the Insolvency Act 1986. This applies regardless of whether a spouse or civil partner of the bankrupt has home rights under the Family Law Act
[300]See s 337(5) of the Insolvency Act 1986.
[301]See s 337(6) of the Insolvency Act 1986.
[302]*Re Haghighat (A Bankrupt)* [2009] EWHC 90 (Ch), [2009] 1 FLR 439, hereafter referred to as "*Re Haghighat*".
[303]*Re Haghighat* par 75.

the bankrupt's family's interests,[304] directed that the order for possession by the trustee in bankruptcy should be deferred for three years.[305]

As far as a mortgaged home is concerned, the making of a bankruptcy order does not affect a mortgagee's right to enforce his security.[306] When the mortgagor has been declared bankrupt, the mortgagee may realise his security and, in the event of the proceeds being insufficient to satisfy the debt, prove a claim, as an unsecured creditor, for any balance owing to him.[307] Alternatively, he may value his security and prove a claim for the unsecured balance.[308] On the other hand, the mortgagee may surrender his security to the trustee and prove his claim in full as an unsecured creditor or he may decline to prove a claim in the bankruptcy in which event he will be obliged to rely on his security alone.[309] If a mortgagee wishes to cause the property to be sold, he may apply to the court for an order directing that it be sold. Usually, the trustee is given the duty to sell the mortgaged property.[310]

(b) Where the debtor is co-owner of a jointly owned home

Before the enactment of specifically applicable provisions in the Insolvency Act 1986, the courts usually favoured the interests of the creditors over those of bankrupt's spouse and children. This occurred even though they did have the discretion to refuse orders for possession and for sale, in exceptional cases, where the sale of the home was likely to cause serious hardship for the spouse and children.[311] An example of a case in which

[304] *Re Haghighat* pars 80-83.
[305] *Re Haghighat* par 82.
[306] See s 285(4) of the Insolvency Act 1986. See Cousins *Mortgages* 669.
[307] See rule 6.109(1) of Insolvency Rules 1986.
[308] See rule 6.93(4) of Insolvency Rules 1986. See Cousins *Mortgages* 670 on the position where the trustee is not satisfied with the value which the mortgagee has placed upon the security.
[309] See rule 6.109(2) of Insolvency Rules 1986; Cousins *Mortgages* 671.
[310] See rule 6.197(1) of the Insolvency Rules 1986; Cousins *Mortgages* 671.
[311] See Fletcher *Law of Insolvency* 231; Hunter 1999 *J Bus L* 493; Van Heerden, Boraine and Steyn "Perspectives" 233-234. As mentioned above, at 7.5.3.2 (b), s 30 of the Law of Property Act 1925, which used to apply in this situation, has been repealed and, now, s 14 of the TLATA 1996 applies.

the court *did* exercise its discretion in this regard is *Re Holliday*,[312] where the court held, *per* Goff J, that the test to be applied was:[313]

> having regard to all the circumstances, including the fact that there are young children and that the debtor was made bankrupt on his own petition, whose voice, that of the trustee seeking to realise the debtor's share for the benefit of his creditors or that of the wife seeking to preserve a home for herself and the children, ought in equity to prevail.

In the circumstances, the court postponed the sale of the home for five years, thus "balancing the interests of the creditors and of the wife". In particular, the court considered the "wife's inability to purchase a home for herself and the children out of her resources[,] … the possible upsetting of the children's education and the fact that any postponement of sale would cause no great hardship to the principal creditors."[314]

The position now is that, where the home is owned jointly by the bankrupt and his spouse, former spouse, civil partner, or former civil partner, a trust of land is regarded as having arisen. Section 335A of the Insolvency Act 1986 requires the trustee in bankruptcy to apply, under section 14 of the TLATA, to the bankruptcy court for an order authorising the sale of the family home. In the event of a sale, the trustee will be entitled to the proportion of the proceeds which represents the bankrupt's beneficial interest in the family home.[315] The same factors apply as in section 336(4). The court must have regard to: the interests of the bankrupt's creditors; the conduct of the spouse, or civil partner, or former spouse, or civil partner, in contributing to the bankruptcy; the needs and financial resources of the spouse, or civil partner, or former spouse, or civil partner; the needs of any children; and all the circumstances of the case, other than the needs of the bankrupt.[316] After one year has passed since the vesting of the bankrupt estate in the trustee, as in section 336(5), "the court shall assume, unless the circumstances of

[312] *Re Holliday* [1981] Ch 405 CA.
[313] *Re Holliday* [1981] Ch 405 CA 420.
[314] *Re Holliday* [1981] Ch 405 CA headnote par 4.
[315] See Fletcher *Law of Insolvency* 236; Sealy and Milman *Annotated Guide* Vol 1 382-384.
[316] See, further, Schofield and Middleton *Debt and Insolvency* 107-109.

the case are exceptional, that the interests of the bankrupt's creditors outweigh all other considerations".[317]

(c) The interpretation of "exceptional circumstances" and the impact of the Human Rights Act 1998

The extent of protection for the family home depends largely on the courts' interpretation of what constitutes "exceptional circumstances", for the purposes of sections 335A, 336, and 337 of the Insolvency Act 1986.[318] A very narrow interpretation was applied in *Re Citro*, in relation to the pre-1986 position, where Nourse LJ stated:[319]

> What then are exceptional circumstances? As the cases show it is not uncommon for a wife with young children to be faced with eviction in circumstances where the realisation of her beneficial interest will not produce enough to buy a comparable house in the same neighbourhood or indeed elsewhere. And, if she has to move elsewhere, there may be problems over schooling and so forth. Such circumstances, while engendering a natural sympathy in all who hear of them, cannot be described as exceptional. They are the melancholy consequences of debt and improvidence with which every civilised society has been familiar.

In *Re Citro*, the decision of the court of first instance was overturned on appeal. That judgment, delivered by Hoffmann J, had inclined more towards the interests of the family by ordering the postponement of the sale of the bankrupt brothers' homes until the youngest child of each of them turned 16. It has been regarded as having taken into account the views of the Cork Committee.[320] Later judgments reflected a more "sympathetic" tendency by the courts to consider family hardship as "exceptional circumstances".[321] In *Mortgage Corporation v Shaire*,[322] the court viewed the legislative

[317]See s 335A(3) of the Insolvency Act 1986.
[318]For a useful discussion of what constitutes "exceptional circumstances" in this context, see Schofield and Middleton *Debt and Insolvency* 109-114.
[319]*Re Citro* 157A-D.
[320]*Re Citro* 142; see Omar 2006 *Conv & Prop Law* 167.
[321]In *Re Raval* [1998] BPIR 384, the court held that the mental illness (schizophrenia) of a spouse was an exceptional circumstance. In *Re Bremner* [1999] BPIR 185, the court postponed the sale of the home so that the bankrupt's wife could look after her 79-year old terminally ill husband. An interesting aspect of the decision was that it was the wife's interests which the court took into consideration and not the bankrupt's illness *per se*. See Omar 2006 *Conv & Prop Law* 169; Davey 2000 *Insolv Law* 12-13; Baker 2010 *Conv & Prop Law* 353.
[322]*Mortgage Corporation v Shaire* [2000] EWHC 452 (Ch), [2001] Ch 743.

changes as likely to have been "intended to relax the fetters on the way in which the court exercised its discretion in cases such as *Citro* and *Byrne*, so as to tip the balance somewhat more in favour of families and against banks and other charges".[323] This *dictum* may be regarded as posing an opportunity for wider interpretation of "exceptional circumstances" in this context.[324]

Further, the application of the Human Rights Act 1998 potentially impacts on the interpretation of "exceptional circumstances" in the application of the relevant provisions of the Insolvency Act 1986.[325] Pines Richman questions whether interfering with the family home, by granting an order for possession, is "necessary" for the protection of the rights of creditors who can acquire a charge over the home until such time as the home may be sold, without harm, or by choice. She contends that the term "exceptional circumstances" should include all instances where the family home and the rights of children are in issue. Regarding the doctrine of proportionality, she advocates that the impairment of the creditors' rights to realise the bankrupt's assets is justified in that it is necessary to accomplish the legitimate objective of protecting the family home and is in the best interests of the children.[326]

The reality, however, is that the reported cases do not reflect a marked change in the outcome of applications by trustees for orders for possession and sale.[327] Although, in *Barca v Mears*,[328] the court having considered the published views of various authors

[323] *Mortgage Corporation v Shaire* [2000] EWHC 452 (Ch), [2001] Ch 743 par 73.
[324] Pines Richman 2000 *NLJ* 1103 advocates an interpretation which "favours the family in all domestic circumstances and not just unusual and tragic circumstances such as acute or chronic debilitating sickness and death". Schofield and Middleton *Debt and Insolvency* 102 state that ss 336 and 337 of the Insolvency Act 1986 "effectively tip the scales in the direction of creditors, although the balance has been tipped back slightly in favour of the bankrupt and his family in recent years. It has been suggested that Art 8 of the European Convention on Human Rights will confirm this trend."
[325] See 7.5.2, above. See Pines Richman 2000 *NLJ* 1103; Baker 2010 *Conv & Prop Law* 357ff.
[326] Pines Richman 2000 *NLJ* 1104.
[327] See *Barca v Mears* [2004] EWHC 2170 (Ch), hereafter referred to as "*Barca v Mears*"; *Nicholls v Lan* [2006] EWHC 1255 (Ch), [2006] BPIR 1243, [2006] Fam Law 1020; *Donohue v Ingram* [2006] EWHC 282 (Ch); *Foyle v Turner* [2007] BPIR 43; *Dean v Stout* [2004] EWHC 3315 (Ch), [2006] 1 FLR 725 which, Dixon *Modern Land Law* 146 stated, indicates more what are *not*, rather than what *are*, exceptional circumstances.
[328] *Barca v Mears* [2004] EWHC 2170 (Ch), referred to, in this thesis, as "*Barca v Mears*".

on the human rights issues raised by the insolvency legislation,[329] did remark that the approach adopted by the majority, in *Re Citro*, might need to be revisited in order to comply with the European Convention on Human Rights.[330] In *Nicholls v Lan*,[331] it was held that the purpose of section 335A(2)(b) of the Insolvency Act 1986 was "to identify the need to respect the home, not as an absolute objective to be guaranteed in every case but as a consideration in a balancing exercise".[332] Considering cases dealing with sections 336 and 335A of the Insolvency Act 1986, Fox identified a "persistently decisive" pro-creditor position which was adopted by the courts, with circumstances having to be "extreme" before they would refuse to order sale, and the mere presence of children being insufficient to justify delaying the sale of the family home.[333] However, more recently, some cases have indicated a tendency towards a more debtor-orientated interpretation of "exceptional circumstances".[334] In *Avis v Turner and another*,[335] although "exceptional circumstances" were not pleaded by the wife, the court *mero motu* raised the question of their possible existence thus reflecting its regard for the importance of evidence concerning factors which, historically, might have been treated as the "melancholy consequences of debt and improvidence with which every civilised society has become familiar".[336]

[329]See *Barca v Mears* pars 37 and 39, where the court referred to (Lord) Steyn 1998 *EHRLR* 153, 155; Lester and Pannick *Human Rights* 33-37 and Rook *Property Law* 2001 203-5.
[330]*Barca v Mears* pars 39-43. For discussion of this case, and subsequent cases, see Baker 2010 *Conv & Prop Law* 352; Dixon *Modern Land Law* 146.
[331]*Nicholls v Lan* [2006] EWHC 1255 (Ch), [2006] BPIR 1243, [2006] Fam. Law 1020.
[332]See Pawlowski 2007 *Conv & Prop Law* 85. In the circumstances, the court held that there was no compelling reason why the bankruptcy creditors should not be paid their money, while the wife, who was chronically ill, retained an interest in another property, and it regarded the court *a quo*'s postponement, for 18 months, of the sale of the home, as a just and reasonable solution.
[333]Fox 2006 *Legal Studies* 209 with reference to *Judd v Brown* [1997] BPIR 470; *Claughton v Charalambous*[1998] BPIR 558; *Re Raval (a Bankrupt)* [1998] BPIR 389.
[334]See *Foenander and another v Allan* [2006] EWHC 2101 (Ch), [2006] BPIR1392, [2006] All ER (D) 352; *Martin-Sklan v White* [2006] EWHC 3313; *Everitt v Budhram* [2009] EWHC 282 (Ch), [2010] 2 [WLR] 637; *Re Haghighat*, discussed at 7.5.3.3 (a), above. See also Dixon *Modern Land Law* 146.
[335]*Avis v Turner and another* [2007] 4 All ER 1103, [2007] EWCA Civ 748, [2008] Ch 218.
[336]This observation, made with reference to *Re Citro*, is based on a comment by Pavitt "High Court clarifies impact of Human Rights Act in Family Home Possession Cases" which used to be, but is no longer, available at http://www.bllaw.co.uk [date of use 8 June 2011].

(d) Other relevant provisions of the Insolvency Act 1986

(i) Trustee may obtain charging order

Section 313 of the Insolvency Act 1986 provides that, where the trustee is unable, for the time being, to realise the bankrupt's home, he may apply to the court for a charging order to be made in respect of the property, for the benefit of the bankrupt estate.[337] The benefit of such charge forms part of the bankrupt's estate and, until it is enforced, it attaches to the property which re-vests in the bankrupt.[338] A trustee will probably rely on this procedure where, having applied section 335A, section 336, or section 337, the court has regarded the needs of the bankrupt or his family members, to remain in occupation of the home, as prevailing over the interests of the creditors.[339] In terms of an amendment brought about by the Enterprise Act 2002, the maximum value of the charge will be the value of the bankrupt's interest in the property at the date of the court order, together with interest on that amount.[340] Thus, any increase in the value of the equity will redound to the benefit of the bankrupt and not to the trustee in bankruptcy.[341]

(ii) Restriction on sale of "low equity" home

Partly in response to widespread differences, in practice, in the way in which trustees in bankruptcy dealt with the home of the bankrupt,[342] a new section 313A was introduced into the Insolvency Act 1986 by the Enterprise Act 2002.[343] Section 313A(2) requires the court to dismiss an application by a trustee in bankruptcy for an order for sale, or for

[337]Fletcher *Law of Insolvency* 232, 237-238; Sealy and Milman *Annotated Guide* Vol 1 365-366. See also r 6.237D of the Rules, inserted by SI 2003/1730.
[338]Ss 313(2) and (3) of the Insolvency Act 1986 require that the order must provide for the property itself to cease to form part of the bankrupt's estate, and to re-vest in the bankrupt subject to the charge.
[339]Under s 332 of the Insolvency Act 1986, a trustee in bankruptcy is permitted to summon a final meeting of creditors even though he has not been able to realise the property due to the occupation rights which exist and the trustee may present his concluding report upon his administration and seek his release. See Fletcher *Law of Insolvency* 238.
[340]See ss 313(2), (2A) and (2B) of the Insolvency Act 1986 and r 6.237D of the Rules, inserted by SI 2003/1730. The amendment was brought about by s 261 of the Enterprise Act 2002.
[341]See Tolmie *Insolvency Law* 298.
[342]See Tolmie *Insolvency Law* 298-299, with reference, *inter alia*, to the Annual Report of the Insolvency Practices Council for 2000.
[343]S 313A was inserted by the enactment of s 261(3) of the Enterprise Act 2002.

possession, or for a charging order under section 313, in relation to the sole or principal residence of the bankrupt, his spouse, civil partner, former spouse, or civil partner, if the value of the bankrupt's interest in it is below a prescribed level. Thus, the purpose of this provision is effectively to prevent the sale of the bankrupt's home where the net equity which he holds is so low that, after the costs of the procedure have been covered, it would not yield any benefit for creditors.[344] As Tolmie explains, section 313A was inserted in the Insolvency Act 1986 to address the practical problem, for trustees in bankruptcy, where the bankrupt or his spouse are unable to borrow money to cover the value of the bankrupt's share in the equity, but it is uneconomic for the trustee to pursue the matter through the courts.[345] An aspect worth noting is that the "low value" home is not excluded from the bankrupt estate, but re-vests in the bankrupt after the expiry of the three-year period laid down in section 283A of the Insolvency Act 1986, which is discussed below.[346]

Tolmie submitted, before the determination of the prescribed level, that the extent to which the amendments would ameliorate the position for bankrupts would depend largely on the level at which the "amount prescribed" was pitched. She anticipated that the measure was more a way of addressing a practical difficulty facing the trustees in bankruptcy than a way of providing protection for the family.[347] Tolmie states that the government recognised that there was a need for widespread consultation before the prescribed amount was set and that differences in the values of property in various parts of the country would have to be taken into account. She refers to the Minister's suggested amount of between £2 500 and £10 000.[348] The amount was set at £1 000[349] and has not been amended. One may anticipate that Tolmie would not regard this as providing effective protection for the family.

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[344]See Walters 2005 *J Corp L Studies* 65; Sealy and Milman *Annotated Guide* Vol 1 366-367.
[345]Tolmie *Insolvency Law* 299.
[346]See Schofield and Middleton *Debt and Insolvency* 118-119. Cf Milman *Personal Insolvency Law* 32-33 who states that "certain 'low value' properties were entirely excluded from the estate" by s 261 of the Enterprise Act 2002. S 283A is discussed at 7.5.3.3 (d) (iii), below.
[347]Tolmie *Insolvency Law* 299.
[348]Tolmie *Insolvency Law* 299 n 28, with reference to comments by the Minister, Melanie Johnson, when she introduced the clause to the House of Commons on 17 June 2002.
[349]Fixed in terms of Article 2 of the Insolvency Proceedings (Monetary Limits) (Amendment) Order 2004 (SI 2004/547).

(iii) Trustee to deal with home within three years

In the past, in order to obtain as high a price as possible, a trustee in bankruptcy would often wait for several years and, sometimes, depending on the property market, even after the date of the discharge order, before he would bring an application for an order for possession and sale of the bankrupt's home.[350] This practice was criticised for leaving the bankrupt and his family vulnerable and as running contrary to the policies of finality and of the bankrupt receiving a fresh start on the discharge of the bankruptcy order.[351] The Enterprise Act 2002 introduced a new section 283A to the Insolvency Act 1986[352] which requires the trustee to deal with the sole or principal residence of the bankrupt, his spouse, or civil partner, within three years of the date of the bankruptcy order. Failure on the part of the trustee to do so has the effect that the property will re-vest in the bankrupt, unless a court has extended this three-year period, which it may do if it deems it just and reasonable in the circumstances.[353] The trustee must either realise the bankrupt's interest in the home, or do one of the following. He must apply for an order for possession or sale, apply for an order for a charge on the family home for the benefit of the bankrupt's estate,[354] or reach an agreement with the bankrupt that the latter will give consideration in return for which the interest in the family home will cease to form part of the estate.

In *Lewis v Metropolitan Property Realisations Ltd*,[355] the court applied a purposive interpretation of section 283A. It recognised that its purpose was to provide certainty for bankrupts by requiring that the value of the realisation should be known by the end of the three-year period after the granting of the bankruptcy order, a consideration being

[350]See, for example, *Nicholls v Lan* [2006] EWHC 1255, [2006] BPIR 1243, [2006] Fam Law 1020; *Avis v Turner and another* [2007] 4 All ER 1103, [2007] EWCA Civ 748; *Holtham v Kelmanson* [2006] EWHC 2588, [2006] BPIR 1422, [2006] NPC 112.
[351]See Curl 2010 23(5) *Insolv Intell* 74-76; *Pannell v Official Receiver* [2008] EWHC 736 (Ch), [2008] BPIR 629.
[352]This section was inserted by s 261 of the Enterprise Act 2002 which came into force on 1 April 2004.
[353]R 6.237C of the Insolvency Rules 1986 (SI 1986/1925), inserted by r 51 of the Insolvency (Amendment) Rules 2003 (SI 2003/1730). See, for further detail, Sealy and Milman *Annotated Guide* Vol 1 334-336; Omar 2006 *Conv & Prop Law* 169.
[354]Under s 313 of the Insolvency Act 1986, as discussed, at 7.5.3.3 (d) (ii), above.
[355]*Lewis v Metropolitan Property Realisations Ltd* [2008] EWHC 2760 (Ch), [2009] BPIR 79 and, on appeal, *Lewis v Metropolitan Property Realisations Ltd* [2009] EWCA Civ 448, [2009] BPIR 820.

that the bankrupt, or spouse, might wish to purchase the property themselves.[356] The comment has been made that this and other decisions suggest a recent tendency by courts to favour the interests of the spouse above those of creditors of the bankrupt's estate.[357]

(iv) *Individual Voluntary Arrangement*

Because a bankrupt's interest in his home vests in the trustee for the benefit of creditors, a debtor will often try to come to an arrangement with his creditors in an effort to avoid bankruptcy and the forced sale of his home. The Insolvency Act 1986 introduced a procedure called Individual Voluntary Arrangement ("IVA") to regulate arrangements between debtors and their creditors. This formal debt relief mechanism, available as an alternative to bankruptcy, makes provision for the payment of debts over a period of up to five years, according to a payment plan agreed upon by a majority of creditors whose decision is binding on other creditors, regardless of whether the latter participated in the voting.[358] An IVA may not contain terms which affect the rights of secured creditors to enforce their security or the treatment of preferential creditors, in the absence of their express consent to the specific modification of their rights.[359]

A debtor who wishes to protect his position while the terms of the IVA are being negotiated may apply to the court for an interim order pending the approval of the IVA. A court may, in terms of such an interim order, stay any action, execution or other legal process against the debtor or his property.[360] The effect of an interim order is to

[356]See *Lewis v Metropolitan Property Realisations Ltd* [2009] EWCA Civ 448, [2009] BPIR 820 par 24.
[357]See *Lewis and Another v Metropolitan Property Realisations Ltd*, as well as other decisions, concerning ss 339, 340 and 423 of the Insolvency Act 1986, in which trustees sought to have set aside the transfer of the home by the bankrupt to his or her spouse or former spouse, including *Hill v Haines* [2007] EWCA Civ 1284, [2008] 2 WLR 1250; *Re Jones (A Bankrupt)* 2 FLR 1969, [2008] BPIR 1051 Ch D; *Papanicola v Fagan* [2008] EWHC 348 (Ch), [2009] BPIR 320. See Curl 2010 23(6) *Insolv Intell* 81-87, with reference to Briggs 2008 21 *Insolvency Intelligence* 90; Capper 2008 *LQR* 361; and Miller 2008 *PCB* 227. Clearly, it is submitted, Curl's viewpoint is pro-creditor.
[358]The required majority is 75% in value of creditors who voted; see ss 257-258, 260 of the Insolvency Act 1986.
[359]See s 258(4) of the Insolvency Act 1986. See Walters 2009 *Int Insolv Rev* 18; Fletcher *Law of Insolvency* 62-63; Cousins *Mortgages* 668.
[360]See s 254(1) of the Insolvency Act 1986.

preclude a bankruptcy petition relating to the debtor being presented or proceeded with as well as any other proceedings, execution or legal process being commenced or continued against the debtor or his property, except with the leave of the court. An interim order is effective for 14 days which period may be extended.[361] While a mortgagee may be precluded from enforcing his security while an interim order is in force, his security rights and remedies, as mortgagee, remain preserved and, once the IVA is approved, he may rely on them unless he has consented specifically to their modification or limitation in terms of the IVA.[362]

A debtor may submit a proposal for a voluntary arrangement even after he has been declared bankrupt. If the proposed arrangement is approved by creditors, the court may annul the bankruptcy order.[363] The Enterprise Act 2002 introduced amendments to provide for a "fast-track voluntary arrangement"[364] which is now available to an undischarged bankrupt. The "IVA Protocol"[365] provides a standard framework for dealing with a "Straightforward Consumer IVA" where, typically, a salaried consumer debtor has sufficient income to provide for his and his dependants' needs, with a surplus to make payments to creditors over a period. The provisions which apply, in bankruptcy, to allow a secured creditor to realise his security and prove for the balance, or to re-value his security, or for the security to be redeemed at the value attributed to it by the secured creditor,[366] do not apply to an IVA. Thus, a secured creditor, who anticipates that his security is worth less than the amount of the debt secured by it, usually insists

[361]See ss 252, 254(1) and 255(6) of the Insolvency Act 1986. See Cousins *Mortgages* 666-667.
[362]See Cousins *Mortgages* 668 who also states, however, that the mortgagee's right to sue for the debt under the personal covenant to repay will be suspended while the IVA is in effect.
[363]Fletcher *Law of Insolvency* 68-69.
[364]Ss 263A-263G, providing for a "fast-track voluntary arrangement", were inserted in the Insolvency Act 1986 by s 264 and Sch 22 of the Enterprise Act 2002. See Fletcher *Law of Insolvency* 51, 74.
[365]The "IVA Protocol", "brokered" by the Insolvency Service, through consultation with all stakeholders, became available for use in February 2008. It was amended by the IVA Standing Committee in June 2008. See Walters 2009 *Int Insolv Rev* 34-35; Fletcher *Law of Insolvency* 75-76. A revised version of the IVA Protocol, known as the "2010 Protocol", which has been in use since May 2010, is http://www.insolvencyhelpline.co.uk/downloads/pdf-files/iva_terms_of_business_2010.pdf [date of use 15 March 2012].
[366]See 7.5.3.3, above. See rr 6.109, 6.5115 and 6.117 of Insolvency Rules 1986, referred to by Cousins *Mortgages* 669.

that the appropriate bankruptcy provisions are expressly incorporated in the terms of the IVA.[367]

Because an IVA will not affect the claim of a mortgagee, a debtor who is a homeowner must maintain regular mortgage repayments in order to avoid repossession of his home. Therefore, the payment plan should cater for this.[368] According to the IVA Protocol, it is expected that, in addition to making monthly payments to debtors, salaried homeowners will release a portion of any equity which might accrue during the course of the IVA.[369] Typically, an obligation is placed upon the debtor to re-mortgage the home as the IVA is nearing completion, in order to release capital for the benefit of unsecured creditors who are bound by the IVA.[370] Thus, the IVA potentially provides an effective means for a salaried debtor who owns the family home to protect it against forced sale.[371]

An approved IVA will usually provide for a stay on debt enforcement proceedings by individual creditors during the operation of the payment plan and will allow for a measure of discharge for the debtor once he has completed the payment plan.[372] However, the stay of enforcement proceedings will apply only for as long as the debtor continues to comply with his obligations under the arrangement.[373] Although the Insolvency Act 1986 provides that a supervisor of a voluntary arrangement, or any person other than the debtor himself, may present a bankruptcy petition against the debtor, it should be noted that a court must not make a bankruptcy order on such a petition unless it is satisfied as to at least one of three matters. These are that: either, the debtor has failed to comply with his obligations under the voluntary arrangement; or the debtor furnished false or misleading information in a statement of affairs or any

[367]Cousins *Mortgages* 669.
[368]See Walters 2009 *Int Insol Rev* 20-21.
[369]Debtors will be expected to release, in the fifth year of the IVA, an amount of equity of at least £5 000 of equity, any amount in excess depending on the particular circumstances of the case. See Walters 2009 *Int Insol Rev* 34-35; Fletcher *Law of Insolvency* 76.
[370]See Walters 2009 *Int Insol Rev* 21.
[371]See Walters 2009 *Int Insol Rev* 20-21.
[372]See Pt VIII ss 252-263G of the Insolvency Act 1986, as amended by provisions contained in the Insolvency Act 2000 and the Enterprise Act 2002. See Fletcher *Law of Insolvency* 50ff; Walters 2009 *Int Insolv Rev* 17ff.
[373]Fletcher *Law of Insolvency* 69.

other document; or the debtor has failed to comply with all things reasonably required of him by the supervisor of the voluntary arrangement. The making of a bankruptcy order in this instance will ordinarily terminate the voluntary arrangement.[374]

7.5.4 The recent recessions and related developments

7.5.4.1 Council of Mortgage Lenders' commitment

Of current significance are various government and other initiatives which have been implemented in the United Kingdom to avoid unnecessary possession and sale of mortgaged homes and, more recently, in response to the financial distress caused by the global recessions.[375] The Council of Mortgage Lenders reaffirmed a commitment, originally made on 19 December 1991, to a policy of taking possession only as a last resort.[376] The Council of Mortgage Lenders stated that it supported compliance with the civil procedure rules issued by the Ministry of Justice and the principle of "treating customers fairly" and confirmed that lenders are duty-bound to obtain the best price reasonably obtainable when they sell repossessed property.[377]

[374]Fletcher *Law of Insolvency* 69.
[375]For a useful summary of these initiatives, see http://www.legalmortgage.co.uk/#/government-initiatives/4532753545 [date of use 15 March 2012]. In relation to the impact of the recessions, see O'Grady "British Repossessions Soar" *Business Week* (6 May 2008) http://www.businessweek.com/globalbiz/content/may2008/gb2008056_230244.htm [date of use 15 March 2012]; Werdigier "As foreclosures mount, Britain acts to change mortgage system" *New York Times* (23 August 2007) http://www.nytimes.com/2007/08/23/business/worldbusiness/23iht-home.5.7233625.html [date of use 15 March 2012]; Treanor "The Bank of England mortgage plan" *The Guardian* England (17 April 2008) http://www.guardian.co.uk/business/2008/apr/17/banking.bankofenglandgovernor [date of use 15 March 2012]. See also Bright "Dispossession for Arrears" 13-40; Dyal-Chand "Home as Ownership" 41-54.
[376]A formal announcement to this effect was made by the Chancellor of the Exchequer in the House of Commons and at a Council of Mortgage Lenders Press Conference on 19 December 1991. The Council of Mortgage Lenders undertook that, where borrowers had suffered a significant reduction in their income but were making a reasonable regular payment, lenders would not seek possession. This was contained in par 16 of a Statement of Practice on Handling of Arrears and Possessions which was, but is no longer, available at http://www.cml.org.uk/cml/policy/issues/1629 [date of use 28 June 2011].
[377]This was stated in the Statement of Practice on Handling of Arrears and Possessions par 17.

7.5.4.2 Mortgage Conduct of Business rules

The Mortgage Conduct of Business rules, first issued by the Financial Services Authority in October 2004, regulate lenders' practices in England and Wales.[378] The rules apply in respect of all "home finance transactions"[379] and to every firm that carries on a "home finance activity".[380] The rules, covering arrears and repossessions, require a lender to deal fairly with any borrower who is in arrears or who has a sale shortfall[381] and requires a lender to put in place, and operate in accordance with, a written policy and procedures to comply with this duty.[382] The MCOB also requires a lender, when a borrower is experiencing "payment difficulties", to make reasonable efforts to reach agreement on the method of payment of any arrears or payment shortfall, or an alternative to taking possession of the home, or, if the home has already been sold, any sale shortfall. The lender must also liaise, at the borrower's instance, with a third party source of advice regarding the payment shortfall or sale shortfall and must allow a reasonable time over which the payment shortfall or sale shortfall should be repaid in terms of a payment plan which is practically suited to the borrower's circumstances. Further, the lender must grant, unless it has good reason not to do so, a customer's request for a change to the date on which the payment is due (provided it is within the same payment period) or the method by which payment is made. It must give the customer a written explanation of its reasons if it refuses the request.

Where no reasonable payment arrangement can be made, a lender must allow the customer to remain in possession for a reasonable period to effect a sale and must not repossess the property unless all other reasonable attempts to resolve the position have

[378]See the *Mortgages and Home Finance: Conduct of Business sourcebook* http://fsahandbook.info/FSA/html/handbook/MCOB [date of use 15 March 2012], hereafter referred to as the "MCOB". The Financial Services Authority derives its powers to make these rules from the Financial Services and Markets Act 2000. The rules have been amended from time to time.
[379]These include "regulated mortgage contracts", "home purchase plans", "home reversion plans" and "regulated sale and rent back agreements". According to the MCOB glossary definition, a "regulated mortgage contract" is a loan on the security of a first legal mortgage on land in the United Kingdom of which at least 40% is used as or in connection with a dwelling by the borrower. See, also, other definitions in the MCOB glossary.
[380]This includes a mortgage lender, administrator, arranger or adviser; see MCOB 1.2.1.
[381]A "sale shortfall" is defined as the amount due to the lender following the sale of the property.
[382]MCOB 13.3.1.

failed.[383] Whenever a property is repossessed, whether this occurs voluntarily or through legal action, a lender must ensure that steps are taken to market the property for sale as soon as possible and to obtain the best price reasonably possible in the circumstances.[384] A lender is also required to consider whether it would be appropriate to extend the payment period, defer payment of interest due, capitalise the arrears,[385] or make use of any government forbearance initiatives which may be available.[386] Although the MCOB Sourcebook is implemented under the statutory authority, the criticism has been made that it is a "non-legal code of practice" with which mortgagees are not legally obliged to comply, and that it therefore "lacks legal backing" and is "neither consistently nor uniformly followed by mortgage providers".[387]

7.5.4.3 Regulation of sale-and-rent-back schemes

The Financial Services Authority has implemented an interim regime, effective since 30 June 2010, to regulate firms that engage in sale-and-rent-back schemes.[388] This protective framework of rules and guidance sought to curb exploitation of financially distressed homeowners who had frequently sold their homes, often at prices well below their market value, to companies on terms which allowed them to remain in their homes for a limited period but which later changed dramatically, to their prejudice. This had often resulted in eviction, at the instance of the mortgagee, upon the company's default.[389]

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[383] MCOB 13.3.2A(1)-(6).
[384] See MCOB 13.6.1; Cousins *Mortgages* 288-289.
[385] Although, it may noted, it is not entitled to do so automatically; see MCOB 13.3.2A.
[386] MCOB 13.3.4A.
[387] See Lindberg 2010 *Denning LJ* 11 who notes that the Financial Services Authority has proposed that the guidelines be converted into binding rules. See Cousins *Mortgages* 289.
[388] See Sale and Rent Back (Regulatory Reporting) Instrument 2010 http://www.fsa.gov.uk/pages/Library/Policy/Policy/2010/10_08.shtml [date of use 15 March 2012].
[389] See Lauren Thompson "Beware of the debt traps" *The Times* England (13 March 2009). See, for example, *Redstone Mortgages Plc v Welch* (2009) 36 EG 98 CC where the court allowed the occupiers, the previous owners, to remain in the house. Cf *North East Property Buyers Litigation* 2010 EWHC 6 (Ch).

7.5.4.4 Regulation of administration costs

Another abuse which came to light was that, frequently, lenders had levied excessive arrears charges which "did not reflect administration costs". The Financial Services Authority, viewing the charges as unfair, directed that mortgagors should be refunded.[390] It also drafted proposals that lenders should cease to levy monthly arrears charges when customers agree to a plan to clear the missed payments over a period.[391] In this regard, the Financial Services Authority expressed the view that "[l]enders need be in no doubt of their obligations to customers who fall behind with payments and must realise that such circumstances are not an opportunity to create further profits."[392] The Financial Services Authority has drafted revised guidelines on good practice for lenders in relation to mortgage arrears charges.[393]

7.5.4.5 The Pre-Action Protocol

The Ministry of Justice has put in place specific civil procedure rules[394] and practice directions[395] which apply to claims for possession of mortgaged residential property.[396] This is supported by the *Pre-Action Protocol for Possession Claims based on Mortgage*

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[390]Hall "Thousands of homeowners set for big mortgage refunds" *The Times* England (23 January 2010).
[391]James Charles "Homeowners in arrears to get better protection" *The Times* England (26 January 2010).See also "Redstone Mortgages fined over mortgage arrears failings" http://www.fsa.gov.uk/pages/consumerinformation/firmnews/2010/redstone_mortgages.shtml [date of use 15 March 2012].
[392]*Per* Lesley Titcombe, the director responsible for the mortgage sector at the Financial Services Authority; see James Charles "Homeowners in arrears to get better protection" *The Times* England (26 January 2010).
[393]See http://www.fsa.gov.uk/pubs/cp/cp10_02.pdf; http://www.fsa.gov.uk/pages/Library/Other_publications/Miscellaneous/2009/mortgage_arrears_1/charges.shtml [date of use 15 March 2012].
[394]See Civil Procedure Rules (CPR) 55th Update from 6 April 2011; Part 55 *Possession Claims*http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/parts/part55.htm#id4223902 [date of use 15 March 2012], commonly referred to as "CPR 55".
[395]See Practice Direction 55A *Possession Claims* http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part55a.htm#id4223900 [date of use 15 March 2012] and Practice Direction 55B *Possession Claims On-line* http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/practice_directions/pd_part55b.htm [date of use 15 March 2012].
[396]For useful discussion of the rules and their application, see Cousins *Mortgages* 498ff.

or Home Purchase Plan Arrears in Respect of Residential Property.[397] The aim of the Pre-Action Protocol is to "encourage more pre-action contact between the lender and the borrower in an effort to seek agreement between the parties, and where this cannot be reached, to enable efficient use of the court's time and resources."[398] This Pre-Action Protocol sets out what action a court would require a lender to have taken before the latter starts a possession claim.[399]

The Pre-Action Protocol requires the lender to provide a borrower, who has fallen into arrears, with, where appropriate, the required regulatory information sheet, or the National Homelessness Advice Service booklet on mortgage arrears, as well as other information. Such information includes: the amount of the arrears; the total amount outstanding on the mortgage or home purchase plan; whether interest or charges will be added to such amount; and, if so, details of the interest or charges that may be payable. The lender must advise the borrower to make early contact with the housing department of the borrower's local authority and, should, where necessary, refer the borrower to appropriate sources of independent debt advice. Further, the parties must take all reasonable steps to discuss the cause of the arrears, the borrower's financial circumstances, and proposals for repayment of the arrears. The lender must consider a reasonable request from the borrower to change the date of regular payment (within the same payment period), or the method by which payment is made. It must, within a reasonable period, give the borrower a written explanation of its reasons for any refusal of such request. Where a borrower makes a proposal for payment to which the lender does not agree, the lender should give reasons in writing to the borrower within ten business days of the proposal. If the lender submits a proposal for payment, it must set it out in sufficient detail to enable the borrower to understand the implications of the proposal and to give the borrower a reasonable period in which to consider it. If the

[397]See the *Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property*, hereafter referred to as the "Pre-Action Protocol" http://www.justice.gov.uk/guidance/courts-and-tribunals/courts/procedure-rules/civil/contents/protocols/prot_mha.htm[date of use 15 March 2012]. The Pre-Action Protocol came into force on 19 November 2008 and has been amended on a number of occasions, the most recent amendment being the CPR 55th Update from 6 April 2011.
[398]Pre-Action Protocol par 2.
[399]Pre-Action Protocol pars 5-9.

borrower fails to comply with an agreement, the lender should warn the borrower, by giving the borrower 15 business days' written notice, of its intention to start a possession claim unless the borrower remedies the breach in the agreement.[400]

A lender must consider not commencing a possession claim for mortgage arrears where the borrower is eligible for assistance in terms of the Support for Mortgage Interest scheme, or from a local authority under a Mortgage Rescue Scheme, or is entitled to payment under a "mortgage payment protection insurance policy". A lender must consider postponing a possession claim for mortgage arrears if a borrower can demonstrate that reasonable steps have been, or will be, taken to market the property at an appropriate price. If the lender decides against postponing the possession claim, it must inform the borrower of the reasons for its decision at least five business days before starting proceedings.[401]

The Pre-Action Protocol specifically requires a possession claim to be brought as a last resort and only after all other reasonable attempts to resolve the position have failed. The parties should consider whether, given the individual circumstances of the borrower, and the form of the agreement, it is reasonable and appropriate to: extend the term of the mortgage; change the type of a mortgage; defer payment of interest due under the mortgage; capitalise the arrears; or make use of any government forbearance initiatives in which the lender chooses to participate.[402] A Mortgage Pre-action Protocol checklist has been issued by the Ministry of Justice, for use in every claim for possession of mortgaged property.[403] A copy of the checklist, Form N123, is attached as "Annexure A" to this thesis manuscript. As indicated on the form, two copies of the completed checklist, with a signed statement confirming the truth of its contents, must be handed in at court on the day of the hearing. The checklist is posed in a questionnaire type of format, with straightforward questions which are simply put. The

[400]Pre-Action Protocol par 5.
[401]Pre-Action Protocol par 6.
[402]Pre-Action Protocol par 7.
[403]See Annexure A to this manuscript; Mortgage pre-action protocol checklist Form N123, issued by the Ministry of Justice http://hmctscourtfinder.justice.gov.uk/courtfinder/forms/n123_e.pdf [date of use 15 March 2012].

issues which are required to be addressed are clearly stated, as are the requests for explanations which are required. Further, the Law Society of England and Wales has issued a Practice Note on Mortgage Possession Claims, to assist legal practitioners involved in cases of mortgage default.[404]

The purpose of the checklist is obvious: the type, and level of detail, of information and explanations required to be furnished ensure that lenders are familiar, and have complied, with the Pre-Action Protocol before they proceed to court. Further, a court will be in a position easily to ascertain whether the matter is ready for consideration by it and immediately to identify the crisp issues which need to be addressed in each matter. This Pre-Action Protocol has been criticised on similar bases as was the MCOB. It has been submitted that "the lack of compulsory wording and sanctions for non-compliance" means that the Pre-Action Protocol is "toothless" and constitutes "an opportunity lost" in addressing, *inter alia*, "premature repossession proceedings".[405]

7.5.5 Comment

7.5.5.1 Comment on the position in England and Wales

Thus, in England and Wales, a variety of statutory mechanisms potentially protects the debtor's home against the claims of creditors. Outside of insolvency, ordinary rules of civil procedure, supported by principles, policies and protocols, implemented by government and regulatory bodies, provide the framework within which a debtor's home, whether mortgaged or not, will be subjected to forced sale only as a last resort. The Pre-Action Protocol, applied through the employment of a Mortgage pre-action checklist, makes explicit, for all concerned, the steps required before a court will consider an application for an order for possession or sale of a home. Once the debtor

[404]See Practice Note on Mortgage Possession Claims http://www.lawsociety.org.uk/productsandservices/practicenotes/mortgagerepossession/2827.article [date of use 15 March 2012]. For an outline of the procedure which is followed, see Cousins *Mortgages* 499ff.
[405]See Lindberg 2010 *Denning LJ* 12 and references cited there, including McAuslan 2009 *JIBFL* 138 who has referred to the Pre-Action Protocol as a "complete waste of time and paper". Cf Bright "Dispossession for Arrears" 24ff.

has been declared bankrupt, specific statutory provisions contained in the Insolvency Act 1986 apply, requiring the trustee in bankruptcy to obtain an order of court before he can sell the bankrupt's home. Where appropriate, the bankruptcy court is empowered to delay the sale of the home. The Insolvency Act 1986 also places restrictions on the way in which the trustee may deal with the bankrupt's home. Nevertheless, commentators have criticised the framework of debt enforcement rules and protocols, in England and Wales, as lacking legal standing[406] and the application of the law, as being too creditor-orientated.[407] On the other hand, there are also those who view the courts as leaning too far in favour of the debtor's family.[408] This, it is submitted, underscores the challenge inherent in balancing the interests of all interested parties.

It may be apposite at this juncture to comment on the relative positions, depending on whether or not the debtor has been declared bankrupt – in other words, whether it is a creditor, or a trustee in bankruptcy, who seeks an order for the sale of the home. Although different statutory provisions apply, there is a measure of alignment between decisions reached both inside and outside of insolvency.[409] It may be observed that, in *Lloyds Bank v Byrne*,[410] an *obiter* statement was made that a chargee may be in a better position to obtain an order of sale. This is because postponement would occasion that creditor to have to bear the full amount of the debt, while individual creditors may lose very little in the collective procedure involved in a bankruptcy.[411]

[406]See 7.5.4.2, above.
[407]See Lindberg 2010 *Denning LJ* 1; Fox *Conceptualising Home* 10, 12-14, 79-130; Fox 2006 *Legal Studies* 202; Pines Richman 2000 *NLJ* 1103; Cretney 1989 *LQR* 173-174; Cretney 1991 *LQR* 179-180; Wise 1995 8(5) *Insolv Intell* 35; Dixon 2005 *Conv & Prop Law* 161; McQueen 2002 *JIBL* 85, 88; Frieze *Personal Insolvency Law* 1148-1149; Baker 2010 *Conv & Prop Law* 352. See also Tolmie *Insolvency Law* 297-298 who states that the provisions contained in the Insolvency Act 1986, in relation to the bankrupt's home, are "a continuation of the previous pro-creditor stance of the common law".
[408]See Curl 2010 23(6) *Insolv Intell* 87, where he expresses concern that "the pendulum has now swung too far in favour of the interests of the spouses of bankrupts and against the interests of the creditors of those bankrupts".
[409]See Miller *Family, Creditors and Insolvency* 86; Fletcher *Law of Insolvency* 236; Omar 2006 *Conv & Prop Law* 165.
[410]*Lloyds Bank v Byrne* [1993] FLR 369.
[411]See Omar 2006 *Conv & Prop Law* 165.

Tolmie highlights several, in her view, unsatisfactory aspects of the position where the debtor is insolvent.[412] She suggests that a better balance might have been achieved between concern for the bankrupt's family and respect for the creditors' rights, by exempting the bankrupt's home under section 238(2) of the Insolvency Act 1986. This would render the home subject to section 308, which would entitle the trustee to claim it if the value of the property exceeded the cost of a reasonable replacement. Tolmie also rejected the notion, suggested by the Insolvency Service, in its consultation document *Bankruptcy – A Fresh Start*,[413] of a form of limited exemption in relation to a bankrupt's home. Tolmie pointed out that, frequently, where the bankrupt has little or no equity in the home, it will be the mortgagee's actions, outside of the insolvency context, which dictate the fate of the home.[414] It is submitted that Tolmie's earlier, published views tend to indicate that she would be dissatisfied with the current position.

The position in England and Wales has also been criticised for providing insufficient protection for the individual occupiers in their homes, as the emphasis has been on the *family*. This, critics argue, occurs not only in the ordinary debt enforcement process[415] but also in bankruptcy, where a court's consideration of individual needs, as directed by sections 336 and 335A of the Insolvency Act 1986, may only take place in the *family* context.[416] However, it may be noted that the interests of child occupiers of homes are

[412]Tolmie *Insolvency Law* 298 discusses, for example, the fact that the equity in the home might be owned jointly by the bankrupt and a spouse or a cohabitee and, in light of the complexities of English property law, it may be difficult to establish who is entitled to share, and in what proportions, in the proceeds of the family home. The same difficulties would apply if the bankrupt and other owners wish to buy out the interest of the trustee by passing another mortgage over the property. See also, in this regard, Schofield and Middleton *Debt and Insolvency* 85ff; Barlow "Rights in the family home" 53ff.

[413]Insolvency Service consultation document *Bankruptcy – A Fresh Start* (March 2000) http://insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/con_doc_archive/consultation/freshstart/sec1.htm [date of use 15 March 2012].

[414]See Tolmie *Insolvency Law* 299.

[415]See Fox 2006 *Legal Studies* 203-204 and references cited there. Fox also identifies "tension between individual and family-oriented perspectives" in the courts' application of the collateral purpose doctrine, in actions for the sale of a family home, which, she states, focused on the family unit and relationships, rather than the interests of individual family members.

[416]See Fox 2006 *Legal Studies* 207-208 who points out that the Cork Committee had been concerned "to alleviate the personal hardships of those who are dependent on the debtor but not responsible for his insolvency", in the *Cork Report* par 1118, and, at par 1116, that "eviction from the family home … may be a disaster not only to the debtor himself … but also to those who are living there as his dependants." Fox observes, at 208, that, to distinguish the protection of the debtor, who was viewed as the wrongdoer, from that of the debtor's dependants, innocent victims of the bankrupt's default, suits those who see the home

required specifically to be taken into account, both in section 15 of the TLATA and in section 335A of the Insolvency Act 1986.[417] Commentators have also criticised the provisions of the Insolvency Act 1986 for not allowing consideration of aged persons or ailing adults who occupy the home.[418]

Another criticism is that different principles apply where the home has a sole owner, such as in a single adult household, as opposed to where the home is jointly owned.[419] Also, no specific provision has been made for cohabiting couples, regardless of gender, who are either unmarried or who have not registered a civil partnership.[420] Given these criticisms, it is not surprising, it is submitted, that debtors who own homes might prefer to resort to an IVA, provided for by the Insolvency Act 1986 as amended, in an effort to retain their family home.

Gravells, writing before the Insolvency Act 1986 was enacted in England, comparing the then English position with the position in New Zealand, stated:[421]

> …what English law requires, in particular, is certainty for both creditors and debtors; and what the New Zealand statute demonstrates is that it is possible to confer a discretion on the courts which permits a sufficient degree of flexibility without generating uncertainty and unnecessary litigation.

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as deserving protection but are concerned about elevating the debtor's interests over those of the creditor. Fox, at 206, cites, as an example, *Stevens v Hutchinson* [1953] Ch 299, where the court stated, at 307, that, although the debtor was "a ne'er do well and a waster", who probably would not pay his debts, to sell the property would be "unjust" since it would result in turning an innocent wife out of her home.

[417]However, see Fox 2006 *Legal Studies* 213-214 for comments, in relation to the consideration of children's interests, in *Bank of Ireland Home Mortgages Ltd v Bell* [2001] 2 FLR 809 and *Edwards v Lloyd's TSB Bank plc* [2004] EWHC 1745.

[418]See Keay 2001 *Common L World Rev* 206, 221; Fox 2006 *Legal Studies* 203-204. Cf Fletcher *Law of Insolvency* 233 who submits that the interests of elderly occupiers of the home may be taken into account under s 336(4)(e) of the Insolvency Act 1986.

[419]See Fox 2006 *Legal Studies* 214-215.

[420]In *Re Citro*, it was held, at 159, that the law which applied to spouses prior to 1986 would be applicable to unmarried couples. See remarks, in this regard, by Hunter 1999 *J Bus L* 506; Keay 2001 *Common L World Rev* 221; Schofield and Middleton *Debt and Insolvency* 114-115. However, changes to the position, in relation to same-sex civil partners, since the enactment of the Civil Partnerships Act 2004, should be borne in mind. In relation to the position of cohabitees, see Tolmie *Insolvency Law* 301 n 41; Barlow "Rights in the family home" 73-75; Omar 2006 *Conv & Prop Law* 176-177.

[421]Gravells 1985 *Ox JL Studs* 132, 143.

It is somewhat ironic, it is submitted, that the New Zealand statute referred to, namely, the Joint Family Homes Act 1964, is destined for repeal. It is also notable that, although the Insolvency Act 1986, as amended by the Enterprise Act 2002, now makes specific statutory provision for a measure of protection for the home, in insolvency, the position is still the subject of criticism. Be that as it may, Gravells' comment, it is submitted, identifies crucial criteria: that the court should have a discretion which provides flexibility without compromising the level of certainty, or predictability, required to avoid the need for litigation.

7.5.5.2 Comparative comment from a South African perspective

The validity of arguments that, if creditors' rights are curtailed by the extension to home occupiers of more effective remedies against possession and sale, creditors would simply not lend money, has been questioned. Sceptics refute concerns expressed about the potential effect on the availability of finance credit and capital investment as well as the property market. A contrary view is that the risk of default is inherent to the nature of the business of lending money and that creditors are in a position to protect their own interests. For instance, they could make reasonable enquiries into the debtor's situation, before lending money, and they are able to build their losses into their interest rates and charges.[422] With reference to the devastating financial, psychological and emotional effects which loss of a home may have on individuals and families, Fox submits that the "broader social and economic costs of repossession add weight to the argument that the interests of creditors should not be presumed to outweigh the home interests of occupiers, but that their respective interests should be evaluated within a more systematic framework."[423]

Bearing in mind similar assumptions made in judgments, in South African cases,[424] and,

[422]See Fox *Conceptualising Home* 11-23, specifically, 15-16, and 79-130, specifically 89-92; Fox 2006 *Legal Studies* 223; Lindberg 2010 *Denning Law Journal* 31. Cf McCormack *Secured Credit* 4ff, 15ff, 18ff.
[423]Fox 2006 *Legal Studies* 223.
[424]*Jaftha v Schoeman* par 58; *Standard Bank v Saunderson* par 3; *ABSA v Murray* par 46; *FirstRand Bank v Seyffert* par 12; *Standard Bank v Bekker* par 20.

notably, Evans' submissions, discussed in Chapters 5 and 6, above,[425] it is submitted that Fox's remarks are also pertinent in the South African context. It is interesting to note that the concerns raised by the Cork Committee indicate essentially similar reservations to those expressed by Mokgoro J in *Jaftha v Schoeman*, in the South African context, in relation to a home exemption constituting a "poverty trap" and its implications for the mortgage industry, the property market, and the economy.[426] Academic commentators have suggested the introduction of an exemption from forced sale, in both the individual debt enforcement, and in the insolvency, process, of a "low value" home and, particularly, one in which a state subsidy was provided for its acquisition.[427] Evans advocates that it should become entrenched policy completely to exclude low value homes from the reach of creditors in general and he goes further to suggest that the passing of mortgage bonds over low value homes, in order for debtors to access capital, should be prohibited.[428] If such an exemption is considered for implementation in South Africa, valuable insights may be gleaned from the English experience, in relation to the restriction on the sale of a "low equity" home imposed on the trustee in bankruptcy by section 313A of the Insolvency Act 1986, introduced by the Enterprise Act 2002. Mindful of Tolmie's criticisms, it would be useful to consider the method by which the prescribed level of equity was determined.[429] The wording of any provision to be proposed, for South Africa, should be carefully considered in view of the apparent uncertainty which exists as to whether section 313A has the effect of excluding a low equity home from the insolvent estate, or, on the other hand, exempting it from sale for three years after which it re-vests in the insolvent debtor.[430] This is particularly pertinent to South Africa as Evans has indicated the lack of an appropriate

[425]See 5.6.8 and 6.6.1, above.
[426]See the *Cork Report* pars 20, 21, 24 and 25; Fox 2006 *Legal Studies* 223 and references cited there; Fletcher *Law of Insolvency* 232; *Jaftha v Schoeman* par 51.
[427]Evans "Does an insolvent debtor have a right to adequate housing?"; Boraine, Kruger and Evans "Policy Considerations" 694; Van Heerden and Boraine 2006 *De Jure* 352 argued for exemption from execution of state-subsidised houses. Steyn 2007 *Law Dem Dev* 118-119 did not regard an exemption as a "ready solution" to the problem and submitted that a thorough enquiry would first need to be conducted.
[428]See discussion at 6.6.3, above, and Evans "A brief comparative analysis"; Evans "Does an insolvent debtor have a right to adequate housing?". See, also, earlier comments by Evans *Critical Analysis* 423-424, 474; Evans 2008 *De Jure* 270. Cf *Standard Bank v Bekker* par 23, with reference to *Jaftha v Schoeman* par 58, discussed at 5.6.6, above.
[429]See 7.5.3.3 (d)(ii), above. In relation to the prescribed level of equity, see recent proposals, in Scotland, discussed at 7.6.4, below.
[430]See 7.5.3.3 (d)(ii) and (iii), above.

distinction between excluded and exempt property in our insolvency law.[431]

It may be observed that, despite the existence of specifically applicable legislative provisions, the English courts encounter problems with issues which have not been pleaded, initially, nor raised on appeal. In *Avis v Turner and Another*, the Court of Appeal was not in a position to adjudicate upon the *real* issue – whether "exceptional circumstances" were present which would justify the postponement of the order for sale of the home by the trustee in bankruptcy – because this had not been raised in the pleadings or in the grounds of appeal.[432] Similarly, in the South African cases of *Standard Bank v Saunderson* and *ABSA v Ntsane*, the court in each case had to decide whether it could deal *mero motu* with the issue whether the defendants' section 26 rights would be unjustifiably infringed by the forced sale of their homes. The two courts adopted opposing views on this issue.[433] However, clearly, the English Court of Appeal's approach is that, in the absence of the occupier of the home having raised the issue, the court may properly raise it *mero motu*.

In *Nedbank v Fraser*, the court questioned the correctness of a different aspect of the decision in *ABSA v Ntsane*. This was whether, where the mortgage deed includes an acceleration clause, it is the total amount outstanding or only the arrear amount which ought to be taken into account by a court when deciding whether to declare a person's mortgaged home specially executable.[434] The English solution to a similar dilemma was the enactment of section 8 of the Administration of Justice Act 1973.[435] Perhaps the enactment of a specific legislative provision would also be the answer in South Africa.

Another discernible parallel between contentious aspects of the position, in England and Wales and in South Africa, emerges from the approach of the court, in *Alliance and*

[431]See 6.6.1, above.
[432]*Avis v Turner and another* [2007] 4 All ER 1103, [2007] EWCA Civ 748, [2008] Ch 218, 14-15, 38.
[433]In *Standard Bank v Saunderson*, the Supreme Court of Appeal adopted the approach that, because, none of the defendants had raised that sale in execution of their homes would infringe their s 26 rights, it did not have to decide the issue. On the other hand, *in ABSA v Ntsane*, the court dealt *mero motu* with the issue. See 5.5.2, above.
[434]*Nedbank v Fraser* pars 28-38, discussed at 5.6.3, above.
[435]See 7.5.3.2 (a), above.

Leicester plc v Slayford.[436] In this case, it was held that it is not an abuse of process for a mortgagee, who is unable to exercise a power of sale in the ordinary debt enforcement process, to seek to place the debtor in bankruptcy. The rationale was that all creditors have the right to petition the court where they are owed an amount in excess of the statutory threshold, or where a demand for payment has gone unpaid, and such petitions cannot be unreasonably denied.[437] This approach is apparently similar to that which has been adopted in South African law, as reflected in *Investec v Mutemeri*, *ABSA v Naidoo* and *FirstRand Bank v Evans*.[438] It is submitted that this bolsters an argument for the need for specific judicial oversight, including consideration of all the relevant circumstances, before a trustee may sell an insolvent debtor's home, to bring requirements in the insolvency process into line with those in the individual debt enforcement process. A related, pertinent observation may also be that the introduction in South African insolvency legislation of a procedure akin to the English IVA would provide for a repayment plan as an alternative to the liquidation of assets in insolvency, with a clearly defined and regulated relationship between the two different procedures. This would create a possible means for averting the forced sale of a consumer debtor's home in the insolvency context.

In relation to the need for judicial oversight, it is interesting to observe, as an aside, that, in English law, a registrar is empowered to make an order for possession or for sale of a person's home.[439] In light of the decisions in *Jaftha v Schoeman* and *Gundwana v Steko*, one may enquire whether this conforms to constitutional imperatives under the

[436] *Alliance and Leicester plc v Slayford* [2001] 1 All ER (Comm) 1.
[437] *Alliance and Leicester plc v Slayford* [2001] 1 All ER (Comm) 1 par 28. See remarks by Omar 2006 *Conv & Prop Law* 165; Miller *Family, Creditors and Insolvency* 106-107.
[438] See Chapter 6, above.
[439] In *Barca v Mears* [2004] EWHC 2170, the law report indicates that it was an appeal to the High Court against an order for possession and sale sought by the trustee in bankruptcy and granted by the Deputy Registrar. In *Foenander and another v Allan* [2006] EWHC 2101 (Ch), [2006] BPIR1392, [2006] All ER (D) 352 (Jul), the law report indicates that the decision appealed against was made by "the registrar". In passing, it may also be noted that a registrar is empowered to sign a default judgment for mortgage foreclosure, under Canadian law; see, for example, r 64.03(9) and (10) of the Rules of Civil Procedure RRO 1990 Reg 194, referred to by Roach *Mortgages* 143-145.

European Convention on Human Rights. It is clear, however, that in England, registrars are legally qualified persons.[440]

In England and Wales, the position is affected largely by aspects of family law, supported, where appropriate, by Article 8 of the European Convention on Human Rights which recognises the right to a home and family life. This is not the case in South Africa, where the basis of the protection granted is the right to have access to adequate housing, as provided in section 26 of the Constitution.[441] Criticisms have been levelled at the emphasis, in English law, on the interests of the family, as opposed to the individual, in the process of forced sale of the home.[442] The same criticisms do not arise in South Africa, with the focus thus far having been on the section 26 rights of the individual debtor. Indeed, it is submitted, if anything, these criticisms of the English system underscore the lack of attention paid, in the South African approach, to the debtor's family and other dependants. Commentators have expressed concern about how little regard is had for rights to shelter and the best interests of children who reside at the debtor's home.[443] Now, in terms of the Constitutional Court's decision in *Gundwana v Steko*, a court must consider all the relevant circumstances before an order is made for the sale in execution of the "home of a *person*".[444] This could perhaps be construed as effectively requiring that the interests of *all* occupiers of the home, as well as the debtor, should be taken into account.

Consideration of what the English courts regard as "exceptional circumstances", for the purposes of sections 335A, 336 and 337 of the Insolvency Act 1986, in their evaluation

[440]Curl 2010 23(6) *Insolv Intell* 84 makes the comment that counsel on opposing sides, in *Re Jones (A Bankrupt)*, had subsequently taken up appointments as "full-time" Registrar and Deputy Registrar respectively.
[441]In *Ex parte Chairperson of the Constitutional Assembly In re Certification of the Constitution of the Republic of South Africa Act*, *1996* 1996 4 SA 744 (CC), 1996 10 BCLR 1253 (CC), the court found that the non-inclusion of the "right to family life" in the final Constitution allowed for flexibility in the recognition of different family forms in a diverse society. See also *Grootboom* pars 73-79, in relation to a child's right to shelter, as provided by s 28(1)(c) of the Constitution, as opposed to a child's right to family care, or parental care, as provided in s 28(1)(b) of the Constitution.
[442]Fox 2006 *Legal Studies* 201; Omar 2006 *Conv & Prop Law* 157; Hunter 1999 *J Bus L* 491; Baker 2010 *Conv & Prop Law* 368; Dixon 2005 *Conv & Prop Law* 161, 167.
[443]See Steyn "'Safe as Houses?'"; Stander and Horsten 2008 *TSAR* 215-216; Evans "Does an insolvent debtor have a right to adequate housing?".
[444]See *Gundwana v Steko* pars 49, 65.

of whether the sale of the family home by a trustee should be delayed, and the potential impact of the Human Rights Act 1998 on the interpretation of "exceptional circumstances" in this context provide useful pointers for potential application in the South African context. The question may be raised to what extent the concept of "exceptional circumstances", in the English insolvency law context, is similar to the notion of "extraordinary circumstances" employed by the court in *FirstRand Bank v Folscher*,[445] in the context of the South African individual debt enforcement process.

It is submitted that the solution, as far as the perceived shortcomings of the English system are concerned, may well be the introduction of a bill of rights containing socio-economic rights,[446] as has recently been considered in the United Kingdom.[447] The following provision, in relation to housing, has been proposed:[448]

> **Housing**
> Everyone has the right to adequate accommodation appropriate to their needs.
> Everyone is entitled to be secure in the occupancy of their home.
> No one may be evicted from their home without an order of a court.

It is also anticipated that, if this provision is ever enacted, from a South African perspective, it will be useful to observe the manner in which it will be applied, in practice.

Given the well-established social security system of England and Wales which provides housing for the needy,[449] there is an obvious point to postponing the sale of the home

[445]See *FirstRand Bank v Folscher* par 39, referred to at 5.6.4.2 (c), above.
[446]See arguments raised by Lindberg 2010 *Denning LJ* 1 in relation to upholding socio-economic rights under the Human Rights Act 1998.
[447]See *Report of the Joint Committee on Human Rights "A Bill of Rights for the UK?"* Twenty-ninth Report of Session 2007-2008 (August 2008) http://www.publications.parliament.uk/pa/jt200708/jtselect/jtrights/165/165i.pdf [date of use 15 March 2012].
[448]*Report of the Joint Committee on Human Rights "A Bill of Rights for the UK?"* 54-55.
[449]See, for example, policies and information, in relation to the system of Mortgage Interest Support, which is one of the Government forbearance initiatives referred to in MCOB 13.3.4A, discussed at 7.5.4.2, above. See, also, Local Housing Allowance, offered by the Department of Works and Pensions http://www.dwp.gov.uk/policy/welfare-reform/housing-support/ [date of use 15 March 2012]. See also Woodroofe 1968 *J Soc Hist* 301 for an informative account of the origin, from the Elizabethan initiatives, including the passing of the Poor Law, in 1601, which "marked the beginning of a national system of poor

for a period, in order for the local authority to arrange appropriate accommodation for the family where the debtor is not in a position to settle the debt in question.[450] This is in stark contrast to the lack of state funded housing support available, in South Africa, to a debtor and his family when they are rendered homeless by the forced sale of their home.[451] This, it is submitted, reinforces the argument that the personal circumstances of the debtor and other occupiers, including their accommodation needs, are highly relevant to a court's decision whether to declare their home executable. Further, the approach of the Constitutional Court, in *Blue Moonlight Properties* (CC),[452] that it is the duty of the municipality to provide emergency accommodation to persons, who, once evicted from privately owned property, will be homeless, as "decant" pending admission to other housing programmes should be borne in mind.

A more systematic approach is called for, in South Africa, with the explicit inclusion, in housing policies and programmes, of debtors and insolvent persons and their families and other dependants who lose their homes through forced sale. This, it is submitted, would go a long way to enhance the effective application of the state's duty to provide access to adequate housing, as envisaged by the Constitutional Court in *Grootboom*. It is submitted that, in order truly to uphold all persons' section 26 rights in South Africa, a more explicit process is required to be mapped out for practitioners and for courts to follow, as is done by the English Pre-Action Protocol, through its tool, the Mortgage pre-action checklist.[453] It is submitted that a similar checklist ought to be compiled for use, and applied, in South Africa.

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relief directed by the state and incorporating the principle of communal responsibility", and development of the social security system in modern England.

[450]See, for example, *Re Haghighat*, discussed at 7.5.3.3, above.

[451]See 4.2.1, above.

[452]See 3.3.1.4 (c), above.

[453]See Annexure A to this thesis manuscript.

7.6 Scotland

7.6.1 General

Scotland does not have a formal home exemption, but similar to England and Wales, a legislative scheme applies to afford a measure of protection for a debtor's family home against the claims of creditors. The level of protection, both inside and outside of insolvency, was enhanced in a number of respects by provisions contained in the Bankruptcy and Diligence etc (Scotland) Act 2007[454] and in the Home Owner and Debtor Protection (Scotland) Act 2010.[455] In August 2011, the Scottish Law Commission published its *Consultation Paper on Consolidation of Bankruptcy Legislation in Scotland*, accompanied by a consultation draft of the *Bankruptcy (Scotland) Bill 2011*.[456] The aim is to revise and restate the bankruptcy legislation in the wake of the numerous recent amendments effected by, mainly, the Bankruptcy and Diligence etc (Scotland) Act 2007 and the Home Owner and Debtor Protection (Scotland) Act 2010.

In February 2009, a proposal was made to introduce a home exemption in the individual debt enforcement process and within the bankruptcy regime.[457] The Scottish

[454]It may be noted that certain controversial provisions, contained in the Bankruptcy and Diligence etc (Scotland) Act 2007, which introduced a new form of "diligence", or debt enforcement process, called "land attachment", have not been brought into operation. A reason for this is the impact that they would have had on the treatment of a debtor's home. A proposal has been made that the family home should be exempt from the proposed "land attachment" provisions. See Accountant in Bankruptcy "Abolition of Adjudication for Debt and the introduction of Land Attachment", compiled for the Debt Action Forum http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000847.pdf [date of use 15 March 2012]; St Clair and Gretton "Legislative Options Paper for the Debt Action Forum", commonly, and hereafter, referred to as the "Gretton-St Clair paper" February 2009 http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000850.pdf [date of use 15 March 2012].

[455]The Home Owner and Debtor Protection (Scotland) Act 2010 modified and, in a sense, weakened, mortgagees' rights in the family home by amending, and ultimately effecting the repeal of, certain provisions of the Mortgage Rights (Scotland) Act 2001. This occurred in response to recommendations and proposals contained in the Repossessions Group *Final Report* June 2009 http://scotland.gov.uk/Publications/2009/06/08164837/0 [date of use 15 March 2012].

[456]See the *Consultation Paper on Consolidation of Bankruptcy Legislation in Scotland* and the consultation draft of the *Bankruptcy (Scotland) Bill 2011* http://www.scotlawcom.gov.uk/news/making-bankruptcy-law-accessible/ [date of use 15 March 2012].

[457]See McKenzie Skene 2011 *Int Insolv Rev* 29, 35. See, also, the proposals contained in the Gretton-St Clair paper, which constitutes Annex D to the Debt Action Forum *Final Report* June 2009

Government's response was that it would "issue consultation on … what changes, if any, might be appropriate to the way in which the family home is treated in bankruptcy."[458]

7.6.2 The individual debt enforcement process

Under Scots law, upon a mortgagor's default, by failing either to make necessary payments or to comply with a term under a standard security,[459] the mortgagee is entitled to seek repossession[460] and sale of the mortgaged property. The Conveyancing and Feudal Reform (Scotland) Act 1970 provides for a mortgagee to proceed by issuing a calling-up notice, or a notice of default, to the debtor and to apply for a court order to exercise the power of sale.[461] Section 5 of the Heritable Securities (Scotland) Act 1894[462] provides for the mortgagee to eject the debtor from the mortgaged property. The effect of the coming into force, on 1 April 2009, of section 11 of the Homelessness etc (Scotland) Act 2003, is that a creditor is required to give notice to the local authority of proceedings to call up, or to apply to court for remedies on default of, a standard security or to eject a proprietor in personal occupancy.[463] The purpose of these amendments was to place the local authority in a position to make timeous arrangements for the provision of alternative accommodation, where necessary, to prevent the debtor and his family from being rendered homeless.

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http://www.aib.gov.uk/sites/default/files/publications/Resource/Doc/4/0000813.pdf [date of use 15 March 2012].

[458] See the Scottish Government response to the Debt Action Forum *Final Report* http://www.aib.gov.uk/About/DAF/DAFofficialresponse [date of use 15 March 2012]. See also http://www.scotland.gov.uk/About/programme-for-government/2009-10/summary-of-bills/debt-family-homes-bill [date of use 15 march 2012].

[459] For the meaning of "standard security", see s 9 of the Conveyancing and Feudal Reform (Scotland) Act 1970. It is submitted that, for the purposes of this study, a standard security may be regarded as an equivalent, in South Africa, of a mortgage over immovable property.

[460] "Repossession" is the term commonly used, in this context, even though the mortgagee has never been in possession of the property. See Repossessions Group *Final Report* June 2009 4 n 1.

[461] See ss 19, 21 and 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

[462] "Heritable security", in this context, means immovable property.

[463] This occurs under ss 19 and 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970 and s 5 of the Heritable Securities (Scotland) Act 1894.

For various reasons, including inconsistencies between treatment of the debtor's home in the individual enforcement, as opposed to the bankruptcy, process,[464] the Home Owner and Debtor Protection (Scotland) Act 2010 introduced restrictions to a creditor's rights to enforce a security over land that is "used to any extent for residential purposes". It amended the Conveyancing and Feudal Reform (Scotland) Act 1970 with the effect that, on default of a calling up notice or after service of a notice of default, a creditor may not exercise its rights, upon the voluntary surrender of the residential property, unless it is unoccupied.[465] Otherwise, the creditor is required to apply for a court order upon which the court may continue the proceedings or make any other order that it thinks fit. However, it may not grant the application unless it is satisfied that certain pre-action requirements have been complied with and that it is reasonable in the circumstances of the case to do so.[466] In reaching a decision, the court must have regard, in particular, to:[467]

- the nature of and reasons for the default;
- the ability of the debtor to fulfil within a reasonable time the obligations under the standard security in respect of which the debtor is in default;
- any actions taken by the creditor to assist the debtor to fulfil those obligations;
- where appropriate, participation by the debtor in a debt repayment programme approved under Part 1 of the Debt Arrangement and Attachment (Scotland) Act 2002; and
- the ability of the debtor and any other person residing at the security subjects to secure reasonable alternative accommodation.

[464]For example, under the Heritable Securities (Scotland) Act 1894 and the Conveyancing and Feudal Reform (Scotland) Act 1970, a mortgagee could enforce its rights without a court order, and without the consent of the occupiers, and, under the Mortgage Rights (Scotland) Act 2001, although it provided for a court to suspend the exercise of the mortgagee's rights, this could only occur on application by, and the initiative of, the debtor, the owner, or their non-entitled spouse, civil partner or cohabitee. There was no limit to the time period for which the court could suspend the exercise of the mortgagee's rights. On the other hand, under the Bankruptcy (Scotland) Act 1985, the trustee was required to obtain the authority of the court, before he could sell the debtor's home, and the court could, in its discretion, postpone the sale, in appropriate circumstances, but only for a period up to 12 months. For further detail, see the Gretton-St Clair paper.

[465]In addition, certain potentially affected persons must certify in writing that the property is unoccupied. See s 23A of the Conveyancing and Feudal Reform (Scotland) Act 1970, effective 30 September 2010.

[466]See s 24 of the Conveyancing and Feudal Reform (Scotland) Act 1970.

[467]See s 24(7)(a)-(e) of the Conveyancing and Feudal Reform (Scotland) Act 1970.

The following pre-action requirements apply.[468]

- The creditor must provide the debtor with clear information about the terms of the standard security, the amount due under it, including any arrears and any charges in respect of late payment or redemption, and any other obligation in respect of which the debtor is in default.
- The creditor must make reasonable efforts to agree with the debtor on proposals in respect of future payments and the fulfilment of any other obligation in respect of which the debtor is in default.
- The creditor must not apply for a court order if the debtor is taking steps which are likely to result in the payment, within a reasonable time, of any arrears or the whole amount due, and fulfilment, within a reasonable time, of any other obligation in respect of which the debtor is in default.
- The creditor must provide the debtor with information about sources of advice and assistance in relation to management of debt.
- The creditor must encourage the debtor to contact the local authority in whose area the security subjects are situated.
- The creditor must have regard to any guidance issued by the Scottish Ministers in relation to pre-action requirements.

Similar amendments brought about by the Home Owner and Debtor Protection (Scotland) Act 2010 to the Heritable Securities (Scotland) Act 1894 have the effect that almost identical provisions apply to an action by a secured creditor to eject a person in occupation of land used to any extent for residential purposes.[469] In addition, certain persons, referred to as "entitled residents",[470] even though they were not cited as

[468]See 24A of the Conveyancing and Feudal Reform (Scotland) Act 1970.
[469]See s 5 of the Heritable Securities (Scotland) Act 1894.
[470]An "entitled resident" includes the proprietor of the secured property, and the non-entitled spouse, or civil partner, of the debtor or the proprietor, or a cohabitee, living with the debtor or proprietor as husband and wife, or in a relationship which has the characteristics of the relationship between civil partners, and a person who lived with the debtor or proprietor, where the secured property is the sole or main residence of their child aged under 16. "Child" includes a stepchild and any person brought up, or treated, as their child. See s 24C(1) and (2) of the Conveyancing and Feudal Reform (Scotland) Act 1970 and s 5D(1) and (2) of the Heritable Securities (Scotland) Act 1894.

parties to the proceedings,[471] may apply for the postponement of proceedings brought either under the Conveyancing and Feudal Reform (Scotland) Act 1970 or the Heritable Securities (Scotland) Act 1894 or for any other order that the court thinks fit. In such event, the court must have regard, in particular, to the same matters, as set out above, with respect to an application by a debtor.[472] Further, certain persons[473] may apply for the setting aside of a court order granted under section 24(1B) of the Conveyancing and Feudal Reform (Scotland) Act 1970 or section 5A of the Heritable Securities (Scotland) Act 1894.[474] Provision has also been made for approved lay representation of the debtor and any entitled resident in relevant proceedings.[475]

The Debt Arrangement and Attachment (Scotland) Act 2002 provides debtors with a moratorium from creditor enforcement action through a Debt Arrangement Scheme which allows interest and penalty charges to be frozen and also provides for a measure of debt cancellation. However, it does not affect the claim of a secured creditor. Therefore, a Debt Arrangement Scheme is appropriate for a debtor with a reasonable income, but who has temporary cash flow difficulties, to avert the forced sale of his home. Recent improvements were made to simplify and streamline the system which is now administered by the Accountant in Bankruptcy and debtors may make online applications.[476]

[471]This is a reference to proceedings either under sections 24(1B) of the Conveyancing and Feudal Reform (Scotland) Act 1970, or to which section 5A of the Heritable Securities (Scotland) Act 1894 applies.
[472]See s 24B(2) of the Conveyancing and Feudal Reform (Scotland) Act 1970 and s 5C(2) of the Heritable Securities (Scotland) Act 1894.
[473]Such persons are: the creditor; the debtor, but only if the debtor did not appear or was not represented in the proceedings, on the application under section 24(1B), or to which section 5A applies, respectively; and an "entitled resident".
[474]Notice of such an application must be given to the creditor, the debtor and every entitled resident. See s 24D of the Conveyancing and Feudal Reform (Scotland) Act 1970 and s 5E of the Heritable Securities (Scotland) Act 1894.
[475]See s 24E of the Conveyancing and Feudal Reform (Scotland) Act 1970 and s 5F of the Heritable Securities (Scotland) Act 1894.
[476]See http://www.aib.gov.uk/Services/das [date of use 15 March 2012] and the official Debt Arrangement Scheme website http://dasscotland.gov.uk [date of use 15 March 2012].

7.6.3 The bankruptcy process

7.6.3.1 Sale of home by trustee

When the Bankruptcy (Scotland) Act 1985 was enacted, its provisions in relation to the sale of an insolvent debtor's home[477] were very similar to those contained, at the time, in the English Insolvency Act 1986.[478] However, there were notable differences. One was that, in terms of section 40 of the Bankruptcy (Scotland) Act 1985, before the trustee could sell or dispose of any right or interest in the debtor's home, he was required to obtain the consent of the spouse or former spouse, if the latter was in occupation. Where the spouse was not in occupation, but the home was occupied by the debtor with a child of the family, the consent of the debtor was required.[479] Where the trustee was unable to obtain the relevant consent, he was required to obtain the authority of the court.[480] This difference remains, although, in each jurisdiction, the respective provisions have since been extended to apply to civil partners.[481]

Another difference is evident in the list of considerations to which the court must have regard before deciding whether to authorise the sale of the bankrupt debtor's home. As mentioned above,[482] section 336(4) of the English Insolvency Act 1986 requires a court to have regard to:

(a) the interests of the bankrupt's creditors;
(b) the conduct of the spouse or civil partner or former spouse or civil partner in contributing to the bankruptcy;
(c) the needs and financial resources of the spouse or civil partner or former spouse or civil partner;
(d) the needs of any children; and
(e) all the circumstances of the case other than the needs of the bankrupt.

[477]"Family home" is defined in s 40(4)(a) of the Bankruptcy (Scotland) Act 1985.
[478]The Bankruptcy (Scotland) Act 1985 came into effect on 29 December 1986, by virtue of SI 1985/1924, on the same day as the English Insolvency Act 1986, discussed at 7.5.2, above.
[479]S 40(1)(a) read with s 40(4)(c) of the Bankruptcy (Scotland) Act 1985.
[480]See s 40(1)(b) of the Bankruptcy (Scotland) Act 1985.
[481]This has been the position since the enactment of the Civil Partnership Act 2004 which came into effect on 5 December 2005.
[482]See 7.5.3.3, above.

On the other hand, section 40 of the Bankruptcy (Scotland) Act 1985 requires the sheriff[483] to have regard to all the circumstances of the case, including:[484]

(a) the needs and financial resources of the debtor's spouse or former spouse;
(aa) the needs and financial resources of the debtor's civil partner or former civil partner;
(b) the needs and financial resources of any child of the family;
(c) the interests of the creditors;
(d) the length of the period during which the family home was used as a residence by any of the persons referred to in paragraphs (a) to (b) above.

The fact that "the interests of the creditors" feature lower on the list than they do in the equivalent English provision may be regarded as an indication that, in the application of section 40 of the Bankruptcy (Scotland) Act 1985, they carry less weight, relative to the needs of the debtor's family, than in the application of the English provision.[485]

A significant reform was brought about by the Bankruptcy and Diligence etc (Scotland) Act 2007, by the insertion of a new section 39A into the Bankruptcy (Scotland) Act 1985. Section 39A provides for ownership[486] of the debtor's family home, which forms part of the sequestrated estate, to be returned to the debtor if the trustee has not taken any action in relation to that property within three years of the date of sequestration.[487] This, in effect, brought the position into line, in this regard, with that in England and Wales, subsequent to the passing of the Enterprise Act 2002.[488] As is the position in England and Wales, the court may refuse to grant an application by the trustee to sell the debtor's home, or may postpone the granting of the application for a specified period.[489] The Home Owner and Debtor Protection (Scotland) Act 2010 amended the

[483]This is a reference to the sheriff's court. The sheriff's courts are the lower courts. The amendments brought about by the Bankruptcy and Diligence etc (Scotland) Act 2007 had the effect that the sheriff's court has jurisdiction.
[484]See s 40(2) read with s 40(4)(d) of the Bankruptcy (Scotland) Act 1985.
[485]Cf Fletcher *Law of Insolvency* 233.
[486]Or other right.
[487]S 39A(3) of the Bankruptcy (Scotland) Act 1985 lists the types of action which the trustee may take which would prevent the home being returned to the debtor.
[488]This provision is similar to s 283A of the Insolvency Act 1986, applicable in England and Wales, which was inserted by a provision of the Enterprise Act 2002; see 7.5.3.3 (d) (iii), above.
[489]The same applies to an action for division and sale of the debtor's family home or to an action for the purpose of obtaining vacant possession of the debtor's family home. See ss 40(2) and 40(3)(a) and (b) of the Bankruptcy (Scotland) Act 1985. In relation to the interpretation of s 40, especially in light of the *Cork*

maximum period for which the sale could be postponed by extending it from 12 months to three years.[490] Thus, the maximum permissible period now coincides with that in section 39A. The Home Owner and Debtor Protection (Scotland) Act 2010 also introduced a new section in terms of which the trustee must give notice to the local authority in whose area the home is situated before commencing proceedings to obtain authority to sell the debtor's home.[491] The rationale behind this provision is to place the local authority in a position to make timeous arrangements, if necessary, for the accommodation of the debtor and his family.

7.6.3.2 The trust deed

A debtor who wishes to avoid sequestration may grant a "trust deed" in which he transfers his estate to a trustee for the benefit of creditors.[492] The Bankruptcy (Scotland) Act 1985 provides this as a formal alternative to sequestration. The Bankruptcy and Diligence etc (Scotland) Act 2007 introduced requirements, including a process of registration, for the creation of a "protected trust deed".[493] One of the consequences of this is that the creditors are prevented thereafter from applying for the debtor's sequestration. A common practice, in order to avoid the sale of a debtor's family home, is to exclude it from the trust deed.[494] In the past, this left the debtor more vulnerable as such a trust deed did not fall within the definition of a "protected trust deed" which required the debtor's entire estate, except for specific exempt property, to be included in

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Report, see *McMahon'sTrustees v McMahon* 1997 SLT 1090 in which the court noted that there might be cases which would give rise to wide and, possibly, complex inquiry as a result of the variety of circumstances to which the section expressly allows the court to have regard.

[490]See s 11(b) of the Home Owner and Debtor Protection (Scotland) Act 2010.

[491]See s 40(3A) of the Bankruptcy (Scotland) Act 1985, inserted by s 11(c) read with s 11(d)(i) of the Home Owner and Debtor Protection (Scotland) Act 2010.

[492]The relevant provisions were amended in 1993. This may be regarded as the Scottish equivalent of the English individual voluntary arrangement discussed at 7.5.3.3 (d) (iv), above.

[493]S 73(1) of the Bankruptcy (Scotland) Act 1985 was amended in this respect, by par 60 of Sch 1 to the Bankruptcy and Diligence etc (Scotland) Act 2007, so that a "protected trust deed" means a trust deed which has been granted protected status in accordance with regulations made under par 5 of sch 5 to the Bankruptcy (Scotland) Act 1985 Act.

[494]This generally occurs where the debtor has very little, or no, equity in the home and where its inclusion in the trust deed would not provide any advantage to unsecured creditors. If the debtor does have equity in the home, and it is included in the trust deed, he would generally re-mortgage it, and make the proceeds available for creditors, in order that he might retain the home. See, in this regard, the Gretton-St Clair paper.

it. In recognition of the need to protect the family home, the Home Owner and Debtor Protection (Scotland) Act 2010 amended the definition of a "protected trust deed" to include a trust deed which excludes the debtor's dwelling house. It also extended the application of section 40 of the Bankruptcy (Scotland) Act 1985 to a trustee acting under a trust deed with the effect that he too must obtain a court order before he can sell the debtor's family home. The trustee acting under the trust deed is also required to give notice to the local authority in whose area the home is situated before commencing proceedings to obtain authority to sell the debtor's home.[495]

7.6.4 The proposed home exemption

The Scottish Accountant in Bankruptcy disclosed, in its Business Plan 2011/12, that high on the agenda is "to consult on how the family home is treated" in insolvency and to implement the Protected Trust Deed Best Practice guidance.[496] It should be borne in mind that it is proposed that land attachment[497] under the Bankruptcy and Diligence etc (Scotland) Act 2007 will not be permissible in respect of a debt of less than £3 000, an amount which will coincide with the minimum amount required for the claim of a sequestrating creditor in the bankruptcy process. In a sense, this may be regarded as posing a "low value" home exemption. However, a proposal was put forward in the Gretton-St Clair paper for an exemption to apply in respect of the claims of unsecured creditors. It would be an exemption of equity in the debtor's main residence of an amount up to £200 000.[498] This amount was arrived at by studying the average house prices across Scotland. The suggestion is that the home should initially vest in the trustee, upon sequestration, but could thereafter be divested, where appropriate. It has been proposed that, where the debtor holds equity in the home which is less than

[495]See s 40(3A) of the Bankruptcy (Scotland) Act 1985, inserted by s 11(c) read with s 11(d)(i) of the Home Owner and Debtor Protection (Scotland) Act 2010.
[496]See the Accountant in Bankruptcy's *Business Plan 2011/12* http://www.aib.gov.uk/publications/aib-business-plan-2011-12 [date of use 15 March 2012]. The Protected Trust Deeds (Scotland) Regulations 2008 SSI 2008/143 came into force on 1 April 2008 http://www.legislation.gov.uk/ssi/2008/143/contents/made [date of use 15 March 2012].
[497]For more detail in respect of which, see first footnote to text at 7.6.1, above, and relevant sections of the Bankruptcy and Diligence etc (Scotland) Act 2007.
[498]See the proposals contained in the Gretton-St Clair paper. The proposal is also referred to by McKenzie Skene 2011 *Int Insolv Rev* 46.

£200 000, the trustee would abandon the home to the debtor. However, where the debtor's equity is more than £200 000, the trustee could sell the home but pay the debtor an amount of up to £200 000 out of the proceeds, so that the debtor could purchase another average-priced home.[499] A similar exemption is proposed to apply to land attachment.[500]

The proponents noted that the introduction of the home exemption would supersede largely section 40 of the Bankruptcy (Scotland) Act 1985.[501] On the other hand, it was submitted that it would obviate any need to consider whether section 40 should be amended to provide protection for a debtor's own home, rather than protecting only the home interests of other family members.[502] McKenzie Skene observes that the proposed home exemption "would be a radical change to existing exemptions".[503] However, it is noteworthy that most of the other proposals put forward in the Gretton-St Clair paper have already been implemented. Therefore, thus far, apparently, the Scottish Parliament has agreed largely with the proponents' approach that it would be best to implement the radical changes and then, if it turned out that the reforms went too far, the balance could be redressed. As Gretton and St Clair stated, in their proposals:[504]

> This argument has particular force in exceptional circumstances as at present … the status quo – keeping persons in their homes – is easily reversed on later review with little damage, whereas once homes are lost, the damage may be irreversible.

7.6.5 Comment

Scots law, like South Africa, is classified as a mixed legal system,[505] with English legal influences as well as indirect influences by Roman law and continental law. Under Scots

[499]Gretton-St Clair paper pars 51-52.
[500]Gretton-St Clair paper par 57.
[501]Gretton-St Clair paper par 46.
[502]Gretton-St Clair paper pars 43, 51 n 28. See related criticisms of the position, in England and Wales, for insufficient regard being had to the needs of the debtor, discussed at 7.5.5.1, above.
[503]McKenzie Skene 2011 *Int Insolv Rev* 46.
[504]See the Gretton-St Clair paper pars 73-76.
[505]See Du Bois *et al Wille's principles* 33ff; Girvin "Mixed Legal System" 138-139.

law, we see the recent recognition of, and emphasis on, the importance of the protection of the family home against action by creditors, including statutory restrictions on the claims of even secured creditors. A significant proposal is to exempt from forced sale, in both individual debt enforcement and bankruptcy procedures, the debtor's home, where he has equity in an amount which is less than £200 000 and, where he has equity of more than £200 000, to exempt such amount so that the debtor may acquire an alternative residence. The amount of £200 000 may be viewed as a more practical, meaningful and effective solution, as opposed to the meagre amount of £1000 exempted, in England and Wales, by the enactment of the Enterprise Act 2002.[506]

In Scotland, as is the recently established position in South Africa, a court order is required before the forced sale of a debtor's home may occur. The exercise of a mortgagee's rights has been modified, from a procedural point of view. As in England and Wales, there are pre-action requirements which must be satisfied, without any need for the debtor or other affected person to initiate consideration of the specific circumstances before a court will entertain an application by a creditor for an order for the sale of the debtor's home. However, in Scotland the pre-action requirements are explicitly enumerated as such in the applicable national legislation, thus providing them with more "teeth" than equivalent provisions which are applicable, in England and Wales, in protocols and codes of practice.[507] Also, in the individual debt enforcement process, Scottish legislation requires a court to consider the personal circumstances of the debtor and his family as well as the reasons for the default in mortgage obligations, whereas in England and Wales, the applicable legislation requires a court only to consider the debtor's ability to pay the arrears within a reasonable period.[508]

A significant feature is that a creditor who intends to bring an application for an order for the sale of a debtor's home, as well as a trustee of an insolvent estate, and the trustee of an estate transferred in a trust deed, must serve notice on the local authority. This is

[506]See the criticisms levelled at s 283A of the Insolvency Act 1986, mentioned at 7.5.3.3 (d) (iii), above.
[507]See the criticisms levelled at MCOB 13 and the Pre-Action Protocol, discussed at 7.5.5, above.
[508]Cf s 24(7)(a)-(e) of the Conveyancing and Feudal Reform (Scotland) Act 1970 with s 36 of the Administration of Justice Act 1970, applicable in England and Wales. See the criticism of the position in England and Wales by Lindberg 2010 *Denning LJ* 9, discussed at 7.5.3.2 (a), above.

so that, if necessary, timeous arrangements may be made for alternative accommodation of the debtor and other occupants of the home to avoid their being rendered homeless. It is submitted that it would be appropriate for a similar provision to be incorporated in South African legislation. Certainly, it would provide evidence of genuine recognition on the part of the state of its duty to provide access to adequate housing, as confirmed by the Constitutional Court in *Grootboom*.

7.7 Ireland

7.7.1 General

The Family Home Protection Act 1976 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 provide a measure of protection for the family home against a claim by a mortgagee.[509] With its economy hard hit by the recent recessions, Ireland introduced a mortgage arrears resolution process in an effort to reduce the forced sale of homes.[510] Various statutory reforms are embodied in the proposed Family Home Bill 2011,[511] put forward by Fianna Fáil,[512] and contained in the Personal Insolvency Bill 2010,[513] drafted by the Irish Law Reform Commission, in order to provide greater protection for the home against creditors' claims both inside and outside of insolvency.

[509]See 7.7.2, below.
[510]See 7.7.2, below.
[511]See *Protecting Family Homes, Reforming Personal Debt* Introduction http://fail.3cdn.net/c4bcb1edd1bd8e136d_02m6iyc4l.PDF [date of use 15 March 2012].
[512]The Republican Party.
[513]See the Law Reform Commission's *Report on Personal Debt Management and Debt Enforcement* LRC 100-2010, published on 16 December 2010, which forms part of the Law Reform Commission's Third Programme of Law Reform 2007-2014 http://www.lawreform.ie/news/report-on-personal-debt-management-and-debt-enforcement.324.html [date of use 15 March 2012].

7.7.2 The individual debt enforcement process

7.7.2.1 Statutory provision for family home protection

The Family Home Protection Act 1976 and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 each provides that, if it would be just and equitable, in all the circumstances, having regard to the terms of the mortgage, the interests of the mortgagee, and the respective interests of the spouses or civil partners, as the case may be, the court may postpone foreclosure proceedings in order for the spouse or civil partner to pay the arrears. Where, thereafter, on application by the spouse or civil partner, it appears to the court that all arrears have been paid and that mortgage instalments which will subsequently fall due, will continue to be paid, the court may by order make such a declaration.[514] In the case of spouses, the effect of such an order will be that an acceleration clause will be of no effect for the purposes of those, or subsequent, proceedings.[515]

7.7.2.2 Mortgage Arrears Resolution Process

In Ireland, the Code of Conduct on Mortgage Arrears[516] applies to mortgage lending activities of all regulated entities in respect of every mortgage loan secured by the borrower's primary residence.[517] Every lender is required to have in place a Mortgage Arrears Resolution Process, commonly referred to as "MARP", which conforms to the

[514]See ss 7-8 of the Family Home Protection Act 1976 and ss 32-33 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
[515]See s 8(2) of the Family Home Protection Act 1976. There is no equivalent provision in the Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010.
[516]The Code of Conduct on Mortgage Arrears, issued by the Central Bank of Ireland under s 117 of the Central Bank Act 1989, was issued on 19 February 2010 and revised on 6 December 2010, with effect from 1 January 2011; see http://www.centralbank.ie/regulation/processes/consumer-protection-code/Documents/Code%20of%20Conduct%20on%20Mortgage%20Arrears%20%201%20January%202011.pdf [date of use 15 March 2012].
[517]See the Code of Conduct on Mortgage Arrears Chapter 1 Introduction. According to the definition, in Chapter 2, a "primary residence" means a property which is the residential property which the borrower occupies as his or her primary residence, in Ireland, or a residential property in Ireland which is the only residential property owned by the borrower.

detailed requirements contained in the Code of Conduct on Mortgage Arrears.[518] A borrower will enter the lender's MARP once he has been in mortgage arrears for 31 days.

The Code of Conduct on Mortgage Arrears prescribes detailed information which must be communicated to the borrower and which thereafter must be updated every three months.[519] After a third full or partial mortgage repayment has been missed, the lender is required to convey a warning to the borrower about the possibility, and consequences, of repossession, as well as advice to the borrower to consult his local Money Advice and Budgeting Service.[520] An assessment must be carried out taking into account the "full circumstances of the borrower" including: his personal circumstances; his overall indebtedness; the information provided in the standard financial statement; his current repayment capacity; and his previous payment history.[521] The alternative repayment arrangements which a lender must consider include: an interest-only arrangement for a specified period; an arrangement whereby the capital element of the repayment is reduced for a specified period; deferring payment of all or part of the instalment repayment for a period; extending the term of the mortgage; changing the type of the mortgage; capitalising the arrears and interest; and any voluntary scheme to which the lender has signed up, such as a Deferred Interest Scheme.[522]

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[518]See the Code of Conduct on Mortgage Arrears Chapter 3 Provision 15. A lender's MARP must consist of five steps pertaining to: the method, and the specific content, of communications with borrowers; a standardised form for obtaining reliable and relevant financial information from borrowers who are in arrears; the examination, and assessment, of the borrower's financial position; the need to explore all options for alternative repayment arrangements; and establishing an appeals process.

[519]See the Code of Conduct on Mortgage Arrears Chapter 3 Provisions 22(a) and 24. The information includes, *inter alia*: the date on which the borrower fell into arrears; the number and total amount of full or partial payments missed; the amount of the arrears to date; confirmation that it is being treated as a MARP case; and details of fees, charges and surcharge interest in relation to the arrears which will apply if the borrower does not co-operate.

[520]See the Code of Conduct on Mortgage Arrears Chapter 3 Provision 25. The Money Advice and Budgeting Service is a private, independent service which is supported by the Irish government and which is publicly funded; see http://www.citizensinformation.ie/en/money_and_tax/personal_finance/debt/mabs_service.html [date of use 15 March 2012].

[521]See the Code of Conduct on Mortgage Arrears Chapter 3 Provision 32.

[522]See the Code of Conduct on Mortgage Arrears Chapter 3 Provision 33. Registered lenders are encouraged to participate in the Deferred Interest Scheme whereby borrowers may be allowed to defer up to 34% of interest payable on a mortgage for a limited period; see *Mortgage Arrears: A Consumer Guide to Dealing with your Lender 2011* issued by the Central Bank of Ireland

The Code of Conduct on Mortgage Arrears prohibits a lender from applying to the courts to commence legal action for repossession of the borrower's primary residence until every reasonable effort has been made to agree on an alternative arrangement with the borrower or his nominated representative.[523] It also provides that, where a borrower co-operates with the lender, at least twelve months must elapse, from the date on which the borrower entered the MARP, before the lender may apply to the courts to commence legal action for repossession of a borrower's primary residence.[524]

7.7.2.3 The proposed Family Home Bill 2011

It may be noted that the Fianna Fáil Working Group on Mortgages and Personal Debt has proposed further legislative reform reflecting policy initiatives which "put the protection of the family home at the centre of the State's approach to mortgage arrears and personal debt", on the basis of its belief that "keeping people in their family home makes for good social policy, and also makes sound financial sense".[525] It has proposed for enactment the Family Home Bill 2011. This Bill contains a provision precluding a lender from commencing legal proceedings to repossess a person's family home unless it certifies, in writing, to the court that it has complied with the Code of Conduct on Mortgage Arrears. The lender must also provide an independent report from the Money Advice and Budgeting Service on the borrower's ability, or lack of it, to pay, as well as copies of mortgage documentation.[526] Further proposals consist of modifications, including the addition of greater specificity, to the range of possible court orders which

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http://www.centralbank.ie/regulation/processes/consumer-protection-code/documents/consumer%20booklet%20-%20final%20feb%202011.pdf [date of use 2 September 2011]. The Deferred Interest Scheme was recommended by the expert group on Mortgage Arrears and Personal Debt in its report which led to the current, revised version of the Code on Mortgage Arrears. For further information, see Irish Government's Department of Finance website http://www.finance.gov.ie/viewdoc.asp?DocID=6583 [date of use 3 September 2011].

[523] See the Code of Conduct on Mortgage Arrears Chapter 3 Provision 46.

[524] See the Code of Conduct on Mortgage Arrears Chapter 3 Provision 47 provides that the 12-month period excludes certain periods such as, for instance, where the borrower is complying with the terms of any alternative repayment arrangement agreed with the lender.

[525] See Introduction to Fianna Fáil's *Protecting Family Homes, Reforming Personal Debt*.

[526] See ss 1-2 of the Family Home Bill 2011, contained in Fianna Fáil's *Protecting Family Homes, Reforming Personal Debt*.

may currently be issued as alternatives to an order for repossession.[527] A further, significant, proposed provision is to give the court the power to reduce the principal sum in a fair manner, provided the court grants the mortgagee an appropriate share in the mortgagor's equity in the home.[528]

Fianna Fáil's proposed Family Home Bill 2011 also contains a provision which will give the court the power to rescind the mortgage agreement if the credit was granted in an unlawful or reckless manner, taking into consideration the borrower's financial position at the time.[529] Another proposal entails a court refusing to grant an order for repossession but, instead, where appropriate, ordering that the borrower remain in the family home as a "court approved tenant of the lender for a rent and on terms to be fixed by the court." This proposal envisages the mortgagee being entitled to apply for the setting aside of the court approved tenancy in the event of a change in the financial circumstances of the mortgagor which would enable the latter to pay an increased rent or to recommence mortgage payments.[530] It also proposed that, where a mortgagor is in arrears, the mortgagee should not have to follow the required process before it may obtain a court order for possession of the family home, if arrangements could readily be made to provide reasonable, long term, alternative living accommodation to the mortgagor. This might occur either by way of a local authority tenancy, the mortgagor's own resources, or the proceeds of the mortgagor's equity in the family home.[531] Presumably, it is submitted, the underlying intention is that, by making the process more convenient for a mortgagee, it might encourage the latter to opt for this. The result would be that the mortgagor would not be rendered homeless and could retain his family home where his financial position allows it.

[527]These include an order for: payment of interest only for a period of up to four years; an extension of the mortgage period by up to 20 years; the deferment of all payments for a period of one year; an adjustment to the interest rate; and deferred interest payments, in terms of the Deferred Interest Scheme.
[528]See s 6(1) of the Family Home Bill 2011.
[529]See s 6(2) of the Family Home Bill 2011.
[530]See s 6(3) of the Family Home Bill 2011.
[531]See s 7 of the Family Home Bill 2011.

7.7.3 Proposed insolvency reform

The Irish Law Reform Commission, in its *Report on Personal Debt Management and Debt Enforcement*,[532] has made far-reaching recommendations, based on the premise that any debt enforcement mechanism should leave the debtor and his dependants with a minimum standard of living.[533] Its recommendations include the reform of the judicial insolvency processes contained in the Bankruptcy Act 1988.[534] The report contains a draft Personal Insolvency Bill 2010 which proposes a new, non-judicial process, called Debt Settlement Arrangement.[535] In terms of this process, a debtor may conclude a legally binding agreement[536] with his creditors to pay them a certain amount over a period of five years, at the end of which the debtor will be discharged from liability for the unpaid balance.[537] A debtor may prevent the enforcement of any debt during the debt settlement arrangement process.[538] Registration of a concluded Debt Settlement Arrangement will have the effect that a creditor may not present a bankruptcy petition against a debtor,[539] no creditor may commence legal proceedings for the recovery of a debt covered by the arrangement, and no action may be taken by an enforcement officer to enforce a judgment debt owed by a debtor.[540] The Law Reform Commission's approach is that, "subject to the provisions of other areas of the law, the ability of a creditor to exercise his or her security should not be affected by the Debt Settlement

[532]Mentioned at 7.6.1, above.
[533]See the *Report on Personal Debt Management and Debt Enforcement* Introduction Part G(3) par 25.
[534]*Report on Personal Debt Management and Debt Enforcement* Chapter 3.
[535]To be administered by a new Debt Settlement Office, and a panel of licensed Personal Insolvency Trustees. Debt Settlement Arrangement will apparently perform a similar function to the Individual Voluntary Arrangement, in England and Wales, and the protected trust deed, in Scotland.
[536]Under s 14(1) of the Personal Insolvency Bill 2010, a majority of 60% in value will be required.
[537]See s 10(1)(b) of the Personal Insolvency Bill 2010.
[538]See s 13 of the Personal Insolvency Bill 2010 which provides for the debtor to apply for a "protective order".
[539]However, s 19 of the Personal Insolvency Bill 2010 does propose to allow for a bankruptcy petition to be brought in the event of it being terminated by a creditor, which may occur on a number of grounds, for instance, where the debtor fails to comply with it, or in the event of its failure.
[540]See s 16 of the Personal Insolvency Bill 2010.

Arrangement procedure".[541] Therefore, the proposed provisions complement the ordinary principles applicable to secured creditors' claims.[542]

Although a submission had been received suggesting that "equity in the debtor's home that is uneconomical to realise" should not be required to be sold as part of a Debt Settlement Arrangement, the Law Reform Commission decided not to incorporate a "low equity" home exemption in the proposed provisions.[543] This, it stated, would be in line with its policy not to specify exempt assets in the draft Personal Insolvency Bill 2010, but rather to leave that for inclusion in secondary legislation or codes of practice. A further reason was to retain flexibility, for appropriate agreements to be reached in relation to repayments which would leave the debtor with a reasonable standard of living, according to the circumstances of each case.[544] The Law Reform Commission pointed out that, for a debtor to retain a reasonable standard of living, a Debt Settlement Arrangement should make allowance for the debtor's secured debt obligations, and that "[t]he debtor's reasonable living expenses should obviously include the costs of accommodation, in the form of either payments of rent or mortgage repayments".[545] It explained that creditors, voting on a proposed arrangement, could decide whether to permit the debtor to retain a certain level of income towards mortgage payments[546] or whether it might be more appropriate for the debtor to find less expensive accommodation. In the latter case, the home would be sold and any equity which the debtor had in it would be available for distribution to creditors.[547]

The Personal Insolvency Bill 2010 also proposes the introduction of a new, low-cost, non-judicial procedure for "no income, no assets" debtors, in terms of which the Debt Settlement Office may make a Debt Relief Order which will discharge the debtor from

[541] See the *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(7)*(a)* par 1.315.
[542] *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(7)*(b)* pars 1.317-1.323. See also s 12 of the Personal Insolvency Bill 2010 for the options available to a secured creditor.
[543] *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(4) pars 1.283 and 1.284.
[544] *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(4) par 1.295.
[545] *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(7)*(c)*(i) par 1.325.
[546] *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(4) par 1.296.
[547] *Report on Personal Debt Management and Debt Enforcement* Chapter 1 Part F(7)*(c)* pars 1.325-1.326.

liability for all unsecured debt.[548] Where a Debt Relief Order is made, a mortgagee's claim, in respect of a debtor's family home, would remain enforceable and the mortgagee would have to follow the prescribed mortgage debt enforcement process, as discussed above.[549] It may be recalled that Fianna Fáil's[550] proposed Family Home Bill 2011, discussed above,[551] envisages a solution, in such circumstances, for a mortgagor who has fallen into arrears. It provides that the proposed prescribed process will not be applicable if "arrangements can readily be made to provide reasonable long term alternative living accommodation to the mortgagor whether by way of a local authority tenancy, the mortgagor's own resources, or the proceeds of the mortgagor's equity in the family home."[552] However, it is submitted that the circumstances in which a Debt Relief Order is likely to be made are not such that the mortgagor would have his own resources, or that he would have any significant amount of equity in the home. Therefore, it is submitted, the local authority will more likely be called upon to provide accommodation for the mortgagor and his family. It goes without saying, it is submitted, that Fianna Fáil's proposed Bill evidently anticipates co-ordinated governmental support, either in the form of supplementation of mortgage interest[553] to assist debtors to remain in their mortgaged homes, or through the provision of state housing.[554]

7.7.4 Comment

Significant developments have occurred, and others have been proposed, in Ireland, in relation to protection of the family home against the claims of creditors. It is submitted

[548]See ss 33, 34(1) and 37 of the Personal Insolvency Bill 2010.
[549]See 7.7.2.2, above.
[550]The Fianna Fáil Working Group on Mortgages and Personal Debt, in *Protecting Family Homes, Reforming Personal Debt* par 4, supports adoption of the Law Reform Commission's report and its proposed Personal Insolvency Bill 2010 and other bankruptcy legislative reform recommendations.
[551]See 7.7.2.3, above.
[552]See s 7 of the Family Home Bill 2011.
[553]The Fianna Fáil Working Group on Mortgages and Personal Debt also supports recommendations made by the Department of Social Protection for reform of the Mortgage Interest Supplement Scheme; see http://www.welfare.ie/EN/Schemes/SupplementaryWelfareAllowance/Pages/default.aspx [date of use 15 March 2012].
[554]Housing, in Ireland, is administered, largely through the local authorities, by the Department of Environment, Community and Local Government, which works in collaboration with the Department of Finance, in relation to mortgage interest relief. See the stated policy at http://www.environ.ie/en/DevelopmentHousing/Housing [date of use 15 March 2012].

that, evidently, human rights considerations and fairness to both debtors and creditors are in the forefront of these developments and proposed reforms. They signify a commitment to repossession of homes occurring only after specific consideration of all the relevant circumstances, including the personal circumstances of the debtor and, ultimately, as a last resort.

It would appear that the proposed Debt Settlement Arrangement, posed as an alternative to bankruptcy within the bankruptcy legislative framework, is envisaged as playing a significant role, as equivalent provisions do in other jurisdictions, in allowing a debtor to retain his home, where appropriate.

7.8 Other developments within the EU

Comparable recent developments in relation to treatment of a debtor's family home have occurred in various other member states of the European Community. In 2009, the European Commission recognised the severe consequences that mortgage foreclosures may have on individual homeowners in default and "for society as a whole, through their impact on financial and social stability". In an effort to ensure that mortgage foreclosures are avoided wherever possible,[555] the European Commission services[556] compiled a working paper examining measures already taken in this regard by member states, at national level. It formulated a proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property.[557] The proposal focuses, primarily, on the promotion of responsible lending

[555]See *Communication for the Spring European Council* COM(2009) 114 final, 4 March 2009 Vol 2 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0114:FIN:EN:PDF [date of use 15 March 2012].
[556]See *Commission Staff Working Paper National measures and practices to avoid foreclosure procedures for residential mortgage loans* SEC(2011) 357 final (31 March 2011) http://ec.europa.eu/internal_market/finservices-retail/docs/credit/mortgage/sec_2011_357_en.pdf [date of use 15 March 2012], hereafter referred to as "the Working Paper".
[557]*A proposal for a Directive of the European Parliament and of the Council on credit agreements relating to residential property* COM(2011) 142 final, 2011/0062 (COD), 31 March 2011, hereafter referred to as "the EC services proposal", par 1 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0142:FIN:EN:PDF [date of use 15 March 2012].

and borrowing practices with the aim of creating a lower level of credit risk and thus reducing the need for recourse to foreclosure against debtors' homes.[558]

The Working Paper reveals that, in certain member states of the European Community, creditors have voluntarily adopted certain internal practices to avoid foreclosures while, in others, certain measures have been imposed on them.[559] In Belgium, the Netherlands, and Hungary, creditors are obliged to explore alternative solutions before they may institute proceedings for foreclosure.[560] A number of member states, such as France, for example, rely on specialised mediation mechanisms.[561] A number of member states provide for modification of mortgage loan terms. For example, in France, the court may suspend a borrower's payment obligations at his request, for a maximum period of two years. In Cyprus, the Committee of Cooperative Credit Institutions may extend the loan repayment period if there are reasonable arguments for doing so. In Belgium, the borrower may ask the judge to allow him to pay lower instalments over a longer period. In Romania, the parties involved are encouraged to discuss solutions, such as modifying the amount of the instalments, delaying payment, reducing the interest rate for a given period, changing the type of interest rate, capitalisation of arrears, or refinancing the loan, prior to institution of any measures for mortgage enforcement. In Finland, the applicable legislation provides examples of envisaged modifications, such as consolidation of different loans, a moratorium, or changes in the reference rate, in order to bring down the borrowing rate. In Italy, members of the Italian Banking Association have signed the "Piano Famiglie", committing to considering suspensions of mortgage instalments for families in difficulty under certain circumstances.[562]

The European Commission services note that to require a minimum period to lapse, before a creditor may initiate foreclosure proceedings, provides the opportunity for conciliation, mediation, and loan term modifications to occur and may even assist

[558] See the Working Paper par 1 and the EC services proposal par 1.
[559] See the Working Paper par 3.
[560] See the Working Paper par 3.1.
[561] See the Working Paper par 3.2.
[562] See the Working Paper par 3.3.

borrowers to settle outstanding payments. The Working Paper reflects that, in Italy, the Banking Code requires the borrower's payment to have been "delayed" at least seven times and for between one and six months to have elapsed, before a foreclosure can be launched. In the Netherlands, in terms of the Code of Conduct on Mortgage Credit, foreclosure proceedings cannot commence unless there has been consultation with the borrower and two months have elapsed since the borrower defaulted.[563]

In the Working Paper, final considerations expressed were that it is essential for member states to introduce, where appropriate, rules aimed at either preventing foreclosures or limiting their social and economic impact. It was observed that several steps and initiatives may be attempted before opting for repossession and that, where it is clear that a borrower is entering into difficulties, "a dialogue should take place with the lender either bilaterally or through a mediator … to explore alternative repayment measures … [such as] a renegotiation of the loan terms and/or duration."[564] It was observed that creditors "have an interest in avoiding expensive foreclosure procedures, the proceeds of which are almost always lower than from an unforced sale" and that "foreclosures should constitute a measure of last resort for a lender."[565]

7.9 Conclusion

Comparative analysis reveals that there are largely two approaches. One is to adopt a formal statutory home exemption, which may be capped, such as in the United States of America[566] and Canada.[567] The other is to have a combination of legislative provisions and rules, such as in England and Wales, and in Scotland, which protect occupiers against each other, as opposed to third parties, and, in relation to claims by third parties, provide for the delay of the sale of the home, in appropriate circumstances.[568] In a number of systems, modifications to the substantive and procedural requirements

[563] See the Working Paper par 3.4.
[564] See the Working Paper par 5.
[565] See the Working Paper par 5.
[566] See 7.2, above.
[567] See 7.3, above.
[568] See 7.5 and 7.6

have been introduced as emergency measures to deal with the high rate of foreclosures, or repossessions, as they are referred to in various jurisdictions, as a result of the recent global recessions.[569] It is submitted that the traditionally clear distinction between the two approaches has diminished, largely in light of these modifications as, for example, in some states of the United States of America, pre-action conferences and negotiation are now required. On the other hand, in other systems which have traditionally provided statutory protection for an occupier spouse's interests and for the delay, where appropriate, of the sale of the home in insolvency, now types of home exemption are also beginning to feature. A provision which bars the sale of a "low equity" home has been introduced in England and Wales[570] and an eminently more far-reaching home exemption has been proposed for Scotland.[571]

Concerning the power of the court to delay the forced sale of the home, in appropriate circumstances, in England, in the individual debt enforcement process, considerations to be taken into account by the court involve the debtor's ability to repay the arrears and to fulfil the contractual obligations.[572] In Scotland, legislation requires a court to take the personal circumstances of the debtor into account and the reasons for the default.[573] In England, the Mortgage Conduct of Business Rules and the Pre-Action Protocol require the creditor to make reasonable efforts to accommodate the debtor by negotiating alternative payment arrangements, in order to ensure that forced sale occurs only as a last resort.[574] Scotland has included similar pre-action requirements in legislation.[575] This, it is submitted, is an indication that they have become a permanent part of the civil process. In Ireland, the proposed Family Home Bill 2011 is predicated on the mortgage arrears resolution process having been followed before commencement of repossession proceedings by a creditor.[576] It is submitted that similar compulsory pre-action requirements and procedures should be implemented in South Africa. A more

[569] See 7.2.4, 7.5.4, 7.6.2, 7.7.2.2 and 7.8, above.
[570] See 7.5.3.3 (d) (ii), above.
[571] See 7.6.4, above.
[572] See 7.5.3.2, above.
[573] See 7.6.2, above.
[574] See 7.5.4.2 and 7.5.4.5, above.
[575] See 7.6.2, above.
[576] See 7.7.2.2 and 7.7.2.3, above.

explicit process is required to be mapped out for practitioners and for courts to follow, as is done by the English Pre-Action Protocol, through its tool, the Mortgage pre-action checklist.[577] It is submitted that a similar checklist ought to be compiled for use, and applied, in South Africa.

A common feature is that, as a rule, the home exemption does not affect the claim of a mortgagee but is only effective against the claims of unsecured creditors. In jurisdictions where there is an exemption of equity in the home, it is often insufficient for the debtor to retain the home but the proceeds of the sale of the home, up to the exempted limit, are available to purchase other, more affordable, accommodation or to contribute towards payment of rent.[578] What is often more useful, from a practical point of view, is for the debtor to resort to a debt repayment plan, often spanning a period of up to five years, and to maintain mortgage payments during that period. Some jurisdictions make provision for the refinancing of the home in order for the benefit of any equity, accumulated during the period of the payment plan, to be transferred to the unsecured creditors. This is a feature of Chapter 13 bankruptcies, in the United States of America,[579] consumer proposals, in Canada,[580] an Individual Voluntary Arrangement, in England and Wales,[581] and the grant of a trust deed, in Scotland.[582] In Ireland, Debt Settlement Arrangement[583] has been proposed and, presumably, it would serve as a means for the debtor to retain his home.

In all of the foreign jurisdictions considered, these alternative debt relief mechanisms, involving repayment plans, form part of their bankruptcy legislation. A mortgagee's claim is not included in the payment plan which should cater for payment of the required regular mortgage instalment to the mortgagee. Indeed the success of the plan depends on sufficient income being left with the debtor to meet his and his dependants' needs. Significantly, typically, before the debtor completes the payment plan, he is required to

[577] See Annexure A to this thesis manuscript.
[578] See, for example, 7.2.2, above, with reference Ferriell and Janger *Understanding Bankruptcy* 430-431.
[579] See 7.2.3 and 7.2.5, above.
[580] See 7.3.4 and 7.3.5, above.
[581] See 7.5.3.3 (d) (iv), above.
[582] See 7.6.3.2, above.
[583] See 7.7.3, above.

provide the unsecured creditors with the proceeds of any equity, or at least some of it, and when the debtor completes the payment plan, he receives a measure of discharge from his debts in line with the policy of affording him a "fresh start".[584]

Comparing these systems with the South African position, we see that the process most equivalent to this is not, as one might expect, the composition process which is provided for in the Insolvency Act, but the debt review process under the NCA. Further, more significant even than the fact that it is not an insolvency process and does not form part of the insolvency regime, is that these two pieces of legislation do not cater for one another and, what is more, there is confusion about the interaction between their respective provisions. Under the Insolvency Act, a debtor ultimately receives discharge from liability for pre-sequestration debt. In contrast, a debtor who resorts to debt review in terms of the NCA must satisfy all of his debts in full, over an extended period, with no discharge whatsoever.[585]

A significant difference between the position in South Africa and in other jurisdictions is that the debt review system, in terms of the NCA, allows modification of terms of the mortgage bond in respect of the debtor's primary residence without the consent of the mortgagee. On the other hand, in the United States of America, the Chapter 13 bankruptcy process does not allow this and, when it was sought to introduce cram down provisions to Chapter 13, this was very contentious.[586] Thus, a debtor will often have to rely on the lender voluntarily "forgiving" part of the capital sum and interest. It may be noted that, in practice, this occurs quite frequently in order for the lender to qualify for federal government financial support. In England and Wales, the Insolvency Act 1986 provides that an IVA may not contain terms which affect the rights of secured creditors to enforce their security, or the treatment of preferential creditors, unless they expressly consent to the specific modification of their rights.[587] It may be noted that government-backed mortgage assistance schemes also operate in England and Wales and this may

[584]See 7.2.3 and 7.5.3.3 (d) (iv), above.
[585]See 4.5, 6.2 and 6.10, above.
[586]See 7.2.4, above.
[587]See 7.5.3.3 (d) (iv), above.

tend to favour specific consent by lenders to modification of mortgage bond terms. However, South Africa does not have any similar government-backed mortgage modification incentive schemes and government forbearance initiatives which would ameliorate the situation of the mortgagee in the event of the modification of mortgage bond terms. It is submitted that modification by a court of a debtor's mortgage bond repayment obligations, without the express consent of the mortgagee, as the NCA permits, reduces the efficacy of its debt review and restructuring process as an alternative debt relief option. Certainly, it bars its functioning as a tool, in the same way as repayment plans are used in overseas jurisdictions, to prevent the forced sale of a debtor's home.

Another notable difference concerns the entitlement of a creditor to obtain an order for the sequestration of the debtor's estate while the latter is subject to a debt rearrangement order. In South Africa, a creditor is not precluded from obtaining an order for the sequestration of the estate of a debtor who is under administration in terms of section 74 of the Magistrates' Courts Act.[588] Further, although there is no specific provision in the NCA regulating the position, in *FirstRand Bank v Evans*, the KwaZulu-Natal High Court granted a provisional order of sequestration after a debt rearrangement order had been made even though the debtor had allegedly been complying with it.[589] By contrast, in the United States of America, for example, in a Chapter 13 bankruptcy, the creditors are precluded from bringing an application for a Chapter 7 liquidation process to be instituted against the debtor. This may only occur if the debtor defaults in respect of the Chapter 13 repayment plan, or if it cannot be completed, or if, for some other reason, it is converted to a Chapter 7 bankruptcy.[590] Likewise, in England and Wales, an approved IVA will ordinarily provide for a stay on debt enforcement proceedings by individual creditors during the operation of the payment plan. Further, the Insolvency Act 1986 imposes clear restrictions so that a court may allow a bankruptcy petition to be brought against the debtor only where he has committed a breach in respect of the required payments, or some other obligation,

[588]See s 74R of the Magistrates' Courts Act.
[589]See 6.10.3, above.
[590]See 7.2.3, above.

in terms of the payment plan.[591] It was submitted, in earlier chapters, that legislative provisions along the lines of section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill should be implemented in South Africa. In the circumstances, it is submitted that comparative analysis tends to confirm that this might bring about more effective protection of the debtor's home from forced sale and at the same time consider the rights of a mortgagee.[592]

There are interesting parallels to be drawn in relation to the law and its application, in England and Wales, and in South Africa, from which we may learn. An important feature is the application of the European Convention on Human Rights, in England and Wales, through the Human Rights Act 1998. This means that similar issues apply, in English law, in relation to the First Protocol to the Convention, and in South Africa, in relation to section 25, the property clause. Interestingly, there has been the same tendency to shy away from decisive pronouncements on the applicability of these rights to the issue of forced sale of a debtor's home. The striking similarities are apparent in relation to Article 8 of the Convention, which affords every person respect for his home and family life, and in relation to section 26 of the South African Constitution, which gives every person the right to have access to adequate housing. Although the basis for protection is not identical, nevertheless there are lessons to be learnt from England and Wales, and the European Court of Human Rights, in relation to recognition of a person's rights to a home, or accommodation.[593] The English courts' interpretation of "exceptional circumstances", for the purposes of sections 335A, 336 and 337 of the Insolvency Act 1986, in their evaluation of whether the sale of the family home by a trustee should be delayed, especially in light of the Human Rights Act 1998, provides useful pointers for potential application in the South African context.

For England and Wales, the lesson is that there is a need to acknowledge more dimensions of the right to respect for the home as a socio-economic right.[594] For South

[591] See 7.5.3.3 (d) (iv), above.
[592] See 4.4.3.6, 4.7.4, 5.6.8, 6.4.3, 6.10.6 and 6.12, above.
[593] See 7.5.2 and 7.5.3.3 (c), above.
[594] See 7.5.5.2, above.

Africa, there is a need to recognise the need for modification of social security and housing programmes to accommodate persons affected by forced sale of their homes, both inside and outside of the insolvency context. Bearing in mind the Constitutional Court's approach in *Blue Moonlight Properties* (CC),[595] ideally, a more systematic approach is called for in South Africa, with the inclusion in housing policies and programmes of indigent debtors and insolvent persons who lose their homes through forced sale. It is submitted that such an approach should become part and parcel of the effective application of the state's duty to provide adequate housing, as recognised by the Constitutional Court in *Grootboom*.

A current tendency, apparent in all of the jurisdictions considered in this chapter, is to regard it as important even in insolvency to save the debtor's home from sale, where possible. The clear purpose is to ensure that forced sale of a person's home occurs only as "a last resort". These precise words have been employed in the South African jurisprudence. The Constitutional Court, in upholding section 26 of the Constitution, as recognised in *Grootboom*, held, in relation to the forced sale of an unmortgaged home in *Jaftha v Schoeman*, that "[e]very effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort".[596] In relation to execution against the home of a mortgagor in *Gundwana v Steko*, the Constitutional Court stated "[i]f the judgment debt can be satisfied in a reasonable manner without involving these drastic consequences that alternative course should be judicially considered before granting execution orders."[597]

Thus, commonality of purpose is evident in South Africa and in jurisdictions abroad. It is submitted that emulating practices, methods, processes, and mechanisms employed in overseas systems to provide appropriate protection for a debtor's home against the claims of creditors, suitably modified, where necessary, for application in the local context, may address inadequacies in our system in order more effectively to achieve the balance sought between the competing interests of all concerned.

[595] See 3.3.1.4 (c), above.
[596] See 5.2.3 and 6.12, above, with reference to *Jaftha v Schoeman* par 59.
[597] See 5.6.2.3 and 6.12, above, with reference to *Gundwana v Steko* pars 53-54.

CHAPTER 8

CONCLUSION

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

8.1 The status quo

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

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

[1]See 4.4.3.4 and 4.4.4.4.
[2]See 6.3.1 and 6.5.
[3]See 2.2.2, 2.3.2, 4.4.3.3 and 4.4.4.3.

court order declaring the immovable property specially executable.[4] Legislation and rules of court became applicable which empowered a registrar of a high court and a clerk of the magistrate's court to grant default judgment against a debtor who did not respond to a summons or who did not enter an appearance to defend the matter.[5] Legislation and rules of court also empowered a registrar of the high court to issue a writ of execution and a clerk of the magistrate's court to issue a warrant of execution, without an order of court, in respect of the immovable property of a judgment debtor against whom default judgment had been granted.[6]

The introduction of a new constitution, including a bill of rights, brought about fundamental reform to South African jurisprudence and its legal system. This led to changes, in the individual debt enforcement process in relation to execution against a debtor's home, through the recognition of the impact of everyone's right to have access to adequate housing, provided for in section 26 of the Constitution that forms part of the Bill of Rights. The right to have access to adequate housing did not feature in the interim Constitution, which came into operation in 1994, but was introduced for the first time in section 26(1) of the Constitution of 1996 as one of the justiciable socio-economic rights enacted to facilitate the transformation of South African society. Section 26(3) provides that no one may be evicted from their home without an order of court made after considering all the relevant circumstances. Section 26(2) obliges the state to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of everyone's right to have access to adequate housing. The Housing Act and PIE, as well as other statutes, were enacted in furtherance of this obligation and the National Housing Code was issued in terms of the Housing Act.[7]

The Constitutional Court interpreted and applied section 26 for the first time in *Grootboom*, a case that concerned the eviction of a community from private land. The court stated that subsections (1) and (2)are related and must be read together. The

[4]See 4.3.3.
[5]See 4.4.3.2 and 4.4.4.2.
[6]See See 4.4.3.3 and 4.4.4.3.
[7]See 1.1 and 3.3.1.

effect is that section 26(2) imposes a qualified, positive obligation on the state to devise a comprehensive and workable programme to meet its responsibilities in relation to the provision of housing. Further, at the very least, section 26(1) places a negative obligation on the state and all other persons to desist from preventing or impairing the right of access to adequate housing. This negative aspect of the obligation was viewed by the court as being further spelt out in section 26(3) that prohibits arbitrary evictions.[8]

It was only in the latter part of 2004 that the Constitutional Court's judgment in *Jaftha v Schoeman* heralded implications of section 26 for execution against a debtor's home. *Jaftha v Schoeman* concerned execution through the magistrate's court process against the state-subsidised homes of two indigent debtors in actions to obtain satisfaction of trifling extraneous debts, that is, where the homes had not been mortgaged in favour of the judgment creditors. The Constitutional Court held that execution against a debtor's home may constitute an unjustifiable infringement of the right to have access to adequate housing, provided for in section 26 of the Constitution. It concluded that section 66(1)(*a*) of the Magistrates' Courts Act was unconstitutional in that it was sufficiently broad to allow sales in execution to proceed in circumstances where they would not be justifiable in terms of section 36 of the Constitution. It directed certain words to be read into section 66(1)(*a*) with the effect that, where insufficient movables were found to satisfy a judgment debt, the creditor would need to approach a court to seek an order permitting execution against the immovable property of the judgment debtor. A court was required to consider all the relevant circumstances to evaluate whether, in the circumstances, execution would be justifiable in terms of section 36.[9] The Constitutional Court stated that, in the absence of an abuse of court procedure, execution should ordinarily be permitted where a debtor had mortgaged his home to secure a debt.[10] It also stated that balancing the parties' interests in accordance with section 36 should not be "an all or nothing process" but that there was a need to find

[8]See 3.3.1.1 with reference to *Grootboom* pars 21, 34 and 38.
[9]See 4.4.3.3 and 5.2,with reference to *Jaftha v Schoeman* pars 44 and 55.
[10]See 5.2.3,with reference to *Jaftha v Schoeman* par 58.

"creative alternatives" which allow for debt recovery but which use the sale in execution of a debtor's home "only as a last resort."[11]

A period of confusion followed *Jaftha v Schoeman*. The effect of the judgment was that, in the magistrates' courts, judicial oversight was required in cases where execution was sought against a debtor's home. However, no substantive and procedural requirements were spelt out and there was a lack of clarity as to when execution would constitute an unjustifiable infringement of the debtor's right to have access to adequate housing. There were discrepancies between the applicable statutory provisions in the magistrates' courts and the high courts. Creditors frequently chose what was for them the more convenient high court process to obtain default judgment and orders declaring debtors' mortgaged homes specially executable, although the claim fell within the magistrate's court's jurisdiction. This created jurisdictional issues from which contradictory judgments emanated in different divisions of the high court. Controversy also surrounded whether and, if so, in what circumstances a mortgaged home ought to be protected from execution. Although the Supreme Court of Appeal settled some controversial issues in *Standard Bank v Saunderson*, it provided little clarity in this regard.[12]

During the period after *Standard Bank v Saunderson*, the judgment of Bertelsmann J, in *ABSA v Ntsane*, is noteworthy for the court's refusal to grant an order of special executability in respect of the mortgaged home of the judgment debtors. This was on the basis that it was regarded as an abuse of the court process to seek execution against a person's home in respect of a trifling arrear amount of R18,46. The court had *mero motu* initiated an investigation into the circumstances of the matter by appointing *amicus curiae* to present argument representing the interests of the absent debtors. Bertelsmann J observed that it might not always be feasible for a court to conduct such an in-depth evaluation and expressed the need for "a compulsory arbitration process" to be established with a tribunal to which courts could refer matters in which the arrear

[11]See 5.2.3, with reference to *Jaftha v Schoeman* par 59.
[12]See 5.3 and 5.4.

amount is very low for "informal and speedy resolution".[13] *FirstRand Bank v Maleke* also stands out during this period. In this case, the court refused to grant default judgment and orders of special executability against four mortgaged homes, regarding it as being more appropriate for the then recently introduced debt relief measures provided by the NCA to be explored as an alternative before execution was permitted against the defendants' homes.[14] Generally, however, reported judgments show a lack of consistency in the application of the provisions of the NCA in cases where execution is sought against a debtor's home.[15] In addition, given the difficulties experienced in the implementation, interpretation and application of the NCA, it has thus far not proved itself as an effective or satisfactory solution for debtors and creditors.[16]

Generally, inconsistencies in judgments reported during this period tend to indicate that the parameters of the effect of *Jaftha v Schoeman* required clearer definition.[17] In late 2010, rules 45 and 46 of the High Court Rules were amended to bring the high court process into line with that in the magistrates' courts, *post-Jaftha v Schoeman*. It may be noted that this is the only development thus far, since the enactment of section 26 of the Constitution, which was *not* brought about through a court judgment following litigation, although the amendment may be regarded as stemming from the decision in *Jaftha v Schoeman*. A proviso contained in rule 46(1) requires a *court*, not a registrar, to issue a writ of execution against the primary residence of a judgment debtor and only after it has considered all the relevant circumstances. Unfortunately, however, the amended rule 46(1) has been drafted in such a way that the proviso applies only to subrule 46(1)(a)(ii), and not subrule 46(1)(a)(i). The result is that there are still discrepancies between the applicable rules and, consequently, between the requirements and procedures in the magistrate's court, as opposed to the high court. Further, conflicts have already arisen in judicial interpretation of rule 46(1).[18]

[13] See 5.5.2.2, with reference to *ABSA v Ntsane* par 97.
[14] See 5.5.4.3.
[15] See 5.5.5.
[16] See 4.5.4 and 4.5.5.
[17] See 5.5.1.
[18] See 4.4.4.3 and 5.6.8.

The effect of the judgment in *Gundwana v Steko* is that now, in every case in which execution is sought against a person's home, including where it has been mortgaged, a court is required to undertake an evaluation, considering "all the relevant circumstances", to determine whether execution should be permitted.[19] The Constitutional Court stated that due consideration should be given to the impact that execution might have on judgment debtors who are poor and at risk of losing their homes. It also stated that, before granting execution orders, courts should consider whether the judgment debt may be satisfied by reasonable alternative means.[20]

Thus, given that, prior to *Jaftha v Schoeman* and *Gundwana v Steko*, a creditor's, especially a mortgagee's, right to execution against the debtor's immovable property had been regarded largely as unassailable, these were groundbreaking changes effected by the Constitutional Court in upholding constitutional imperatives. However, because developments have occurred on a casuistic basis, no established framework of substantive and procedural requirements exists for the determination of whether execution against a debtor's home is justifiable. Further, the precise circumstances in which execution against a debtor's home will, or will not, be permitted are unclear. It was anticipated that the judgment in *Gundwana v Steko* would provide much-needed clarity. However, subsequently reported judgments in *Nedbank v Fraser*, *FirstRand Bank v Folscher* and *Standard Bank v Bekker* reveal that already the courts have applied a variety of interpretations of aspects of the judgment in *Gundwana v Steko* and that a consistent approach by the different branches of the high court is still lacking. Further, the Supreme Court of Appeal's judgment in *Mkhize v Umvoti Municipality* (SCA) tends to cast doubt on whether current practice directives and logistical arrangements in certain high courts conform to the requirements laid down in *Gundwana v Steko*.[21]

Courts have consciously avoided enunciating what would constitute "all the relevant circumstances" for consideration in the required judicial evaluation[22] and no provision is

[19]See 5.6.2.
[20]See 5.6.2.3, with reference to *Gundwana v Steko* par 53.
[21]See 5.6.7.
[22]See 5.2.3, 5.6.2.3, 5.6.3 and 5.6.6.

made for the manner in which pertinent information should be obtained by the court nor for the course which must be adopted where information is lacking. It is unclear to what extent the factors relevant to such evaluation are the same as those relevant to applications for the eviction of persons from their homes, regulated in some instances by the provisions of PIE that was enacted specifically to protect unlawful occupiers' section 26 rights.[23] PIE requires a court to make a just and equitable order by considering the circumstances of all occupiers of the home, "including the rights and needs of the elderly, children, disabled persons, and households headed by women".[24] However, it may be noted that no judgment has been reported in which the rights and needs of persons, other than the debtor, who reside with him in his home, have been considered in the judicial evaluation of whether execution by a creditor against the debtor's home should be permitted. Yet surely, this should be required? On the other hand, the question may be raised whether the fact that the requirements of PIE must be met, if a debtor and his family whose home is sold in execution opt not to vacate it but to "hold over", before they may be evicted, constitutes sufficient protection of their right to have access to adequate housing? It is submitted not. However, greater clarity is required.[25]

Housing, and the concept of home, are highly emotive issues. On the other hand, so are other interests at stake in this context. Courts have stated that the principle of sanctity of contract, as reflected in the maxim *pacta sunt servanda*, and mortgagees' rights to execution against the mortgaged property of a defaulting debtor, should remain intact. This is lest the security of the mortgage bond, an important tool in the acquisition of home ownership and access to finance, should be undermined which, in turn, might lead to reluctance on the part of lenders to provide finance.[26] Similar thinking is evident in *Jaftha v Schoeman*, where the Constitutional Court viewed the notion of an exemption of a debtor's home from sale in execution as potentially creating a "poverty

[23]See 3.3.1.4 and 5.6.8.
[24]See 3.3.1.4 (b).
[25]See 3.3.1.4 (b).
[26]See 5.4.1 and 5.6.6.

trap" if poor homeowners are unable to access capital using their homes as security.[27] However, uncertainty as to circumstances in which execution will, or will not, be permitted by a court leads to a lack of predictability. This, and the lack of clear substantive and procedural requirements for a creditor to be entitled to execute against a debtor's home, may tend in any event to create a potential "poverty trap".

The required judicial evaluation to be carried out, in terms of section 36 of the Constitution, entails balancing the rights and interests of all affected parties.[28] Therefore, not only the rights and interests of debtors and their dependants, and the significance of the loss of their home, ought to be considered but also those of the specific creditors, as well as creditors generally, if, more particularly, real rights of security are not upheld. This would also affect broader commercial interests of property owners and investors and, in turn, on the economy. The state has a duty, in terms of section 26 of the Constitution, to provide persons with access to adequate housing. Therefore, homeless, or potentially homeless, persons place a burden on public funds.[29] To this extent, the interests of the wider community are also relevant.

The Constitutional Court has chosen to confine the basis of its reasoning, in matters concerning execution against a debtor's home, to the latter's right to have access to adequate housing. This has meant that reported judgments lack meaningful analysis of the position in terms of a range of potentially relevant constitutional rights of all parties concerned where the forced sale of a debtor's home occurs. These include the right to dignity that also underlies persons' contractual rights[30] and the right to property.[31] There is a glaring absence in all of the judgments of any consideration having been given to children's rights.[32] To the extent that analogies may be drawn between the forced sale of a debtor's home and the eviction of a person from his home, the right to life, the right to equality and the right to access to courts, which have featured in eviction cases, are

[27] See 5.2.3.
[28] See 3.2.3.
[29] See 3.3.1.4 (c).
[30] See 3.3.2, with reference to s 10 of the Constitution.
[31] See 3.3.4, with reference to s 25 of the Constitution.
[32] See 3.3.3, with reference to s 28(1)(*c*)of the Constitution.

also relevant. Failure on the part of the courts to deal with all of these rights, as well as to address the crucial issue of access to justice,[33] has created *lacunae* in the current dispensation.

Thus far, courts have not considered the potential infringement of section 26 and other constitutional rights posed by the realisation of an insolvent debtor's home by the trustee of an insolvent estate in terms of the Insolvency Act. Realisation of the home occurs automatically in the sequestration process without any specific evaluation of the housing needs of the insolvent or his dependants.[34] It is probably only a matter of time before this state of affairs will be subjected to constitutional challenge. It is also a matter of concern that, when a debtor resorts to statutory debt relief mechanisms available as potential alternatives to the liquidation of assets following sequestration in terms of the Insolvency Act, this does not preclude a creditor from applying for, or obtaining, an order for the sequestration of his estate. This is expressly provided for in section 74 of the Magistrates' Courts Act that regulates administration orders and, although the NCA does not make specific provision in this regard, the courts have held that this is the position where a debtor has applied for debt review.[35] This undermines the potential for debt review and debt rearrangement, in terms of the NCA, to constitute reasonable alternative means for satisfaction of an obligation to avert the forced sale of the debtor's home, particularly where it has been mortgaged.

In Chapter 1, it was posited that legal certainty requires the enactment of appropriate legislative provisions to regulate the forced sale of a person's home in both the individual debt enforcement process and the insolvency process in South Africa. It was also stated that legislation should contain criteria to be met, for forced sale to be permitted, in order to facilitate the balancing of the interests of, on the one hand, the debtor and his dependants and, on the other, the creditor and, in a broader context, the commercial and economic interests of the wider community.

[33] See 3.3.5, with reference to ss 11, 9 and 34 of the Constitution.
[34] See 6.2.
[35] See 6.10.

In terms of section 8(3), where no legislation, or existing common-law rule, applies to give adequate effect to a right, or where a common law rule is deficient, the court is obliged to develop the common law to give effect to the right. Further, the effect of section 39(2) is that, when interpreting any existing legislation, and when developing the common law, a court "must promote the spirit, purport and objects of the Bill of Rights."[36] The state also has a duty, in terms of section 7(2) of the Constitution, to "respect, protect, promote and fulfil" the rights in the Bill of Rights.[37] Section 39(1)(*a*) requires a court, when interpreting the Bill of Rights, "to promote the values that underlie an open and democratic society based on human dignity, equality and freedom." The Constitutional Court has recognised the significance of *ubuntu*, in this context, as one of the values that section 39(1) requires to be promoted.[38] When deciding a constitutional matter, a court also has the power, in terms of section 172(1)(b) of the Constitution, to make any order that is just and equitable.[39] In light of these provisions, one may ask why there is a need for specific legislation to regulate the forced sale of a debtor's home.

An answer is that the need for clarity and predictability, in relation to forced sale of the home is too significant and too urgent for the slow process which casuistic development of the law by the courts unavoidably entails.[40] Further, uniformity and consistency is required to resolve the ongoing divergent approaches of differently constituted courts and practices in various branches of the high court.[41] Constitutional litigation and complex limitation analysis require specialist skills that pose a challenge for many persons performing judicial, legal, administrative, and non-governmental advisory functions within the present system and process. A coherent, streamlined process will facilitate the handling of matters. There is also the question of optimal utilisation of valuable court time. The way in which the Promotion of Access to Information Act 2000 and the Promotion of Administration of Justice Act 2000 have enhanced the

[36]See 3.2.1.
[37]See 3.2.1.
[38]See 3.2.2.
[39]See 3.3.1.4 (b) and 3.4.
[40]See 3.2.3 and 3.3.1.2.
[41]See 5.6.8 and 5.7.

adjudication of matters concerning sections 32 and 33 of the Constitution bears testimony to the merits of statutory regulation.[42] A most important consideration is that poor homeowners, who do not usually know their rights, also do not have the wherewithal, as Mokgoro J so aptly expressed it in *Jaftha v Schoeman*,[43] to instruct attorneys and advocates and to fund litigation in a bid to defend their rights and protect their homes against the claims of creditors. There is an urgent need to enhance their access to justice in this context.

A study of the treatment of the home of a debtor in other jurisdictions reveals that in some legal systems legislative provisions, codes and protocols apply to regulate and, where appropriate, to afford protection against, the forced sale of the home. Comparative analysis of these systems provides useful insights and guidance on ways in which to address current problems and issues that have arisen in the local context. Their legislative provisions give valuable pointers in relation to mechanisms that could be modified appropriately for introduction in South Africa to resolve weaknesses and *lacunae* in, and to enhance, our system and processes.

The purpose of this thesis is thus to identify and discuss the problems arising, and the inadequacies, in the South African law relating to forced sale of a debtor's home. The purpose is also to compare the position in other jurisdictions that provide for statutory regulation of forced sale of the home and to propose that legislative intervention should occur in both the individual debt enforcement process and the insolvency process in South Africa. The research undertaken will be outlined and the principal findings that have significance for the thesis will be set out. Finally, proposals will be made for future treatment of cases concerning the forced sale of a debtor's home by suggesting considerations to be taken into account in the formulation of legislation which, it is submitted, ought to be enacted to regulate the position.

[42] See 3.3.1.2.
[43] See 5.2.3, with reference to *Jaftha v Schoeman* par 19.

8.2 Research undertaken and principal findings

8.2.1 Historical insights

In Roman times, originally, the harsh consequences for defaulting debtors included imprisonment, slavery, and possibly even death. The developed law permitted execution against assets. The home was never exempted from execution. However, a Roman person's home held not only socio-economic but, more importantly, religious significance for it housed not only the living residents but also the spirits of the ancestors as well as the household gods and it included the mandatory hereditary altar.[44] For these reasons, Roman debtors would very likely have avoided the loss of their home at all costs. A common way of doing so was to "work off the debt" in a servile relationship arising out of a contract of *nexum* with the creditor.[45] Patron-client relationships often formed between a creditor and his debtors. Patronage also commonly developed between third parties and debtors when the former came to the aid of the latter by paying their debts on their behalf, thus forming an obligation, in a broader sense, between them. The concept of *amicitia*, between persons of equal status, might also have formed the basis of a third party paying the debt or intervening on the debtor's behalf. These relationships not only arose out of, but also contributed to, the complex but cohesive and, in a large measure, mutually supportive fabric of Roman society.[46]

Two observations may be made. First, submission in a servile relationship to one's creditor to escape the consequences of default, including execution against one's home, could be regarded as *contra bonos mores* in contemporary South African law, as indicated by the Appellate Division in *Sasfin v Beukes*. Secondly, although modern societal structures are very different from those in Roman times, there are discernible parallels between aspects of mutual interdependence and support in the concepts of patronage and *amicitia*, and the concept of *ubuntu*, part of the fabric of South African

[44]See 2.2.6.
[45]See 2.2.2.
[46]See 2.2.6.

law and society, as acknowledged in this "post-Bill of Rights" era.[47]

In the time of Justinian, a debtor could avoid execution against his home by obtaining the grant of a moratorium through a majority vote by creditors[48] or by the emperor.[49] With the development of the legal concept of mortgage, Justinian put protective mechanisms in place to allow for the delay of foreclosure by a creditor for at least two years after judgment and, in appropriate cases, for foreclosure to occur only by judicial decree and, later, only by imperial decree. In the event of foreclosure, a debtor could redeem the property within a two year-period *after* ownership had been transferred to the creditor by paying the outstanding debt and other charges.[50] This, it is submitted, must have influenced a defaulting debtor's ability to retain or redeem his home.

Under the Roman-Dutch law, procedural rules promoted personal service of summonses, requiring a process server specifically to explain the exigency of a summons to the defendant. Where a debtor did not appear in court, before default judgment could be granted in matters that concerned immovable property, four defaults and successive summonses were required to be issued, with substantial intervals between them.[51] A creditor was not entitled to levy execution upon immovable property of great value for small debts unless the property was indivisible. Rules applicable in the complex high court process imposed exacting requirements to maximise the price obtained at a judicial sale of immovable property. These features of Roman-Dutch law are absent from contemporary South African law which is discussed in Chapters 4 and 5. However, it is interesting to note that most of these aspects have received attention recently. For example, rules pertaining to default judgment were reformed by *Jaftha v Schoeman*[52] and by an amendment to rule 46(1) of the High Court Rules[53] as well as by *Gundwana v Steko*.[54] Another example is that *Jaftha v Schoeman* established

[47]See 3.2.2.
[48]See 2.2.4.
[49]See 2.2.3.
[50]See 2.2.5.
[51]See 2.3.2.
[52]See 5.2.3.
[53]See 4.4.4.3.
[54]See 5.6.2.1.

precedent to the effect that execution may not be levied against a person's home in respect of a trifling debt.[55] Further, research is being conducted into ways in which prices obtained at auction sales, held in the process of execution against immovable property, may be regulated.[56] To this extent, related aspects of the Roman-Dutch law may be viewed as being in line with a "post-Bill of Rights" approach.

Debt relief measures available in Roman-Dutch law included composition between a debtor and his creditors with local ordinances regulating the requisite majority of votes. *Remissio* led to a partial discharge of debt.[57] In both the individual and the collective debt enforcement processes, extra-judicial negotiation and compromises between parties were encouraged. For example, as Roman-Dutch law developed, because litigation was complex, necessitating representation by attorneys and advocates, and expensive, a plaintiff was required first to claim payment from his debtor in a friendly manner before he could institute action by serving a summons. In the high court, the parties were required to appear before a commissioner in an attempt to reach a compromise before a summons was issued.[58] In terms of the Amsterdam Ordinance of 1777, which was an important source of South African insolvency law, the commissioners' first duty was to try to make an arrangement with creditors before calling a meeting of creditors for sequestrators to be appointed. Once the sequestration process began, a debtor had one month within which to reach a composition with creditors. This was encouraged by the commissioners.[59] The effect of these features of the Roman-Dutch law must have provided at least some protection for a debtor in the process of the sale in execution of immovable property that constituted his home. They also tend to suggest a policy that forced sale of a debtor's property should occur only as a last resort.

From 1652 onwards, Roman-Dutch law was applied in the Cape. The British revised the judicial system by the two Charters of Justice, in 1828 and 1834, to make it conform to

[55]See 5.2.3.
[56]See 4.4.3.3.
[57]See 2.3.5.1.
[58]See 2.3.2.
[59]See 2.3.3.

English structures, mechanisms and procedures. However, the second Charter of Justice effectively provided for Roman-Dutch law to be retained as the law of the Cape Colony. The "mixed" nature of the South African legal system is evident in this context. Sanctity of contract, expressed in the maxim *pacta sunt servanda*, regarded as "the first premise of contract law", derives from the Roman-Dutch law[60] and the principles applicable in relation to mortgage are based firmly in the Roman law and Roman-Dutch law.[61] It may also be observed that the ways in which settlement, or a compromise, might be reached between debtor and creditor, according to the common law, are derived from Roman law and Roman-Dutch law.[62] However, the specific aspects, mainly procedural rules identified above, of the Roman-Dutch law that might in effect have provided a measure of protection for a debtor's home are not evident in the South African law and procedural rules because English procedures had been adopted in the Cape. It may also be noted that developments in the treatment of a debtor's home, in English law, discussed in Chapter 7, occurred only *after* the English law influences were experienced in the Cape. This would therefore explain why none of the English protective mechanisms is evident in the South African common law or applicable legislation.[63]

In the result, it is submitted that these aspects of Roman and Roman-Dutch law, which effectively protected the debtor's home from forced sale, have not only historical value as sources of South African law but also significant comparative value. They were aspects of legal systems, which operated in another society, and in another time, but which had at least some similar needs and priorities.

8.2.2 Constitutional considerations

The right to have access to adequate housing must be viewed in its broader context as a justiciable socio-economic right. Section 26(2) of the Constitution obliges the state to

[60]See 1.1, 2.3.5.3, 3.1, 3.3.2 and 4.3.
[61]See 2.2.5 and 2.3.4.
[62]See 2.2.4, 2.3.5.3, 3.3.2 and 4.3.2.
[63]See 2.4.

take reasonable legislative and other measures within its available resources to achieve the "progressive realisation" of this right. In *Grootboom*, the Constitutional Court held that section 26(2) imposed on the state a qualified, positive, obligation to devise comprehensive programmes capable of facilitating the realisation of the right. It envisaged that the state should over time lower legal, administrative, operational, and financial hurdles so that housing is "made more accessible not only to a larger number of people but to a wider range of people as time progresses".[64] The negative duty imposed by section 26(1) on the state and private persons to desist from preventing or impairing the right of access to adequate housing was fundamental to the decision in *Jaftha v Schoeman*.[65]

"Progressive realisation" of the right to have access to adequate housing logically entails not only providing persons who are currently homeless with access to adequate housing, but also taking reasonable steps to counter persons with existing access to adequate housing from becoming homeless.[66] As acknowledged by the Supreme Court of Appeal, in *Ndlovu v Ngcobo*, and as indicated by the facts of *ABSA v Murray*, even erstwhile mortgagors are vulnerable to homelessness if they lose their home through forced sale[67] and may increase the burden on the state by requiring it to provide for their housing needs. An argument may therefore be made that there is a duty on the state to provide an appropriate regulatory framework within which the forced sale of persons' homes may occur.

PIE was enacted specifically to protect unlawful occupiers' section 26 rights. In *Ndlovu v Ngcobo*, the Appellate Division held that PIE applies to erstwhile mortgagors.[68] Therefore, where the debtor's home is sold in execution, if he does not vacate his home but instead "holds over", the new owner – and this would include a mortgagee who "buys in" at the sale in execution – will be obliged to meet the substantive and procedural requirements contained in PIE before the debtor and his family may be

[64]See 4.2.1, with reference to *Grootboom* par 45.
[65]See 3.3.1.2.
[66]See 3.3.1.2.
[67]See 3.3.1.4 (a) and (b), 6.3.2 and 6.6.3.
[68]See 3.3.1.4 (b).

evicted. The effect of PIE, in this context, is to delay the enforcement of the new owner's right to possession until a court has determined whether eviction of the previous owner would be just and equitable and, if so, a date on which he should vacate his home.[69] Therefore, in effect, PIE offers a measure of protection to a debtor against being rendered homeless by the sale in execution of his home. However, it is submitted that such protection is unsatisfactory and insufficient, in the circumstances, as it will avail only those debtors who are aware of the provisions of PIE and who have sufficient knowledge of the legal process or access to sound legal advice. The reality is also that, in this context, a debtor's reliance on PIE triggers judicial evaluation of the position at a very late stage in the process, only *after* he has lost ownership of his home and when it may be too late to undo everything that has gone before.[70]

Thus far, except for the amendment to rules 45(1) and 46(1) of the High Court Rules, all developments in the context of execution against a debtor's home in the individual debt enforcement process have occurred through court judgments. At the beginning of this chapter, in the discussion of the *status quo*, the question was raised why specific legislation should be necessary to regulate the position and why courts should not be left to develop the law further as sections 7(2), 8(3), and 39 of the Constitution oblige them to do.[71] The response to this question will be elaborated upon at this point. As mentioned above,[72] clarity and predictability are urgently required. There is also a need for uniformity and consistency to resolve the differences in approach that continue to emerge in judgments in different branches of the high court as well as in differently constituted courts in the same province. High court practices and logistical arrangements vary across the country.[73] The disadvantages of development of the law by the courts have been highlighted by constitutional law specialists such as Botha, Liebenberg, van der Walt and Woolman. These include that it is a protracted process, that courts often adopt an over-cautious, casuistic, incrementalist approach that stifles

[69] See 3.3.1.4 (b), 4.4.4.3 and 5.2.2.
[70] See 5.2.3 and 5.6.2.3, with reference to comparable reasoning in *Jaftha v Schoeman* pars 47 and 49 and *Gundwana v Steko* pars 50 and 58.
[71] See 3.2.1 and 3.2.2.
[72] See 8.1.
[73] See 5.6.8 and 5.7.

the transformative potential of the Constitution and that outcomes often reflect unavoidable, subjective influences of judicial officers.[74]

A further argument in favour of the enactment of specific legislation laying down substantive and procedural criteria is that the constitutional limitation analysis and proportionality assessment that must be carried out in terms of section 36 of the Constitution entail a complicated, nuanced process that is often a challenge for non-constitutional law specialists. In practice, reported judgments often reflect confused terminology and incorrect application of the criteria and required process.[75] Another complicating factor, as pointed out by Liebenberg, is that positive duties imposed by socio-economic rights are subject to "reasonableness review", whereas the negative duties are subject to the limitation clause in section 36 of the Constitution. One cannot anticipate such a sophisticated level of constitutional and limitation analysis and expertise from lower courts, practitioners, creditors, debtors, or advice centre staff who do not necessarily have specialised constitutional litigation knowledge and skills. Commentators have called for a more structured, rigorous, sequential enquiry and clearly articulated rules that would facilitate not only everyone's anticipation of what limitations would or would not be constitutionally acceptable, and their understanding of how to adapt their actions accordingly, but also the application of limitation analysis by the lower courts.[76] It is particularly important to enhance access to justice for poor homeowners, to minimise costs to litigants and to utilise court time optimally.[77] As occurred to enhance the adjudication of section 32 and section 33 rights,[78] it is contended that appropriately drafted legislation is called for in this context as well.

Besides the debtor's right to have access to adequate housing, other constitutional rights potentially affected by the forced sale of a debtor's home include his dependants' right to have access to adequate housing and his, and his dependants', right to

[74]See 3.2.3 and 3.3.1.2.
[75]See 3.3.1.2.
[76]See 3.2.3 and 3.3.1.2.
[77]See 5.2.3, with reference to *Jaftha v Schoeman* par 19.
[78]See 3.3.1.2 and 8.1.

dignity,[79] the rights of any children who reside with him,[80] and the right to property.[81] In *Gundwana v Steko*, and subsequent high court judgments, connections were made, and analogies drawn, between the forced sale of a debtor's home and the eviction of a person from his home.[82] Therefore, constitutional rights that have featured in eviction cases, including the right to life, the right to access to courts, and the right to equality,[83] may also be pertinent. However, aside from the right to dignity, which is inherent in the right to have access to adequate housing, courts have not specifically addressed these other rights in the reported judgments. The lack of judicial attention to children's rights, in this context, is of great concern and our courts are open to criticism in this regard. Thus far, courts have been reluctant to formulate any analysis of the position relating to execution against debtors' homes on the basis of property rights that would necessarily entail consideration of, *inter alia*, the debtor's rights of ownership of his home as well as the real rights of security of a mortgagee.[84] It would be advisable for any legislation drafted to regulate the position to be formulated in such a way as also appropriately to address other applicable rights of debtors and their dependants who reside with them to obviate any potential constitutional challenge on this basis.

In light of analogies that have been drawn between eviction cases and matters in which execution is sought against a person's home, reported judgments in eviction cases provide useful pointers as well as valuable insights into the courts' construction of "relevant circumstances" for the purposes of section 26(3) of the Constitution and section 4 of PIE.[85] An issue that needs to be resolved is that, in relation to execution against a person's home, courts are restricting "relevant circumstances" to *legally* relevant circumstances. This occurred in both *FirstRand Bank v Folscher*[86] and in *Standard Bank v Bekker*[87] following precedent established by the Supreme Court of Appeal's decision, in *Brisley v Drotsky*, concerning section 26(3) of the Constitution. In

[79] See 3.3.2.
[80] See 3.3.3.
[81] See 3.3.4.
[82] See 3.3.1.4.
[83] See 3.3.5.
[84] See 3.3.4.
[85] See 3.3.1.4.
[86] See 5.6.4.2 (b).
[87] See 5.6.6.

that case, it was held that only *legally* relevant circumstances are required to be taken into account and that these did not include the personal circumstances of the lessee facing eviction.[88] This apparently overlooks the judgments of the Constitutional Court, in *Port Elizabeth Municipality* and *51 Olivia Road* (CC), delivered since *Brisley v Drotsky*, in light of which it appears that "relevant circumstances" should no longer be regarded as being confined to legal grounds justifying eviction under the common law. In line with the Constitutional Court's direction that elements of grace and compassion should be infused into the formal structures of the law, in eviction cases, courts have stated that what is required is individualised consideration of occupiers' personal circumstances, including their accommodation needs, and to treat everyone with dignity, care and concern.[89]

ABSA v Murray concerned an eviction application brought in terms of PIE by the mortgagee, after its purchase of the mortgagors' home at the auction sale held at the instance of the trustee of their insolvent estate. In this case, the court took into account the personal circumstances of the insolvent spouses and their family in determining that it would be just and equitable to grant the eviction order.[90] The nature of the evaluation which is required in cases concerning execution against a debtor's home, as explained in *Gundwana v Steko*, tends to suggest that personal circumstances of the debtor should also be considered.[91] However, clarity is required in this regard. It is submitted that any legislation which may be enacted to regulate the position should make specific provision for consideration of the personal circumstances of the debtor and his dependants.

A significant development has been courts' insistence upon "meaningful engagement" between parties before adjudicating upon eviction applications. In *Port Elizabeth Municipality*, the Constitutional Court regarded the lack of any attempt at mediation as a

[88] See 3.3.1.4 (a).
[89] See 3.3.1.4 (d).
[90] See 6.3.2.
[91] See 3.3.1.4 (a) and 5.6.2, with reference to *Gundwana v Steko* pars 43, 49 and 50.

"relevant circumstance".[92] The introduction of such a requirement in the individual debt enforcement process would be in line with an approach, as envisaged by the Constitutional Court in *Jaftha v Schoeman* and *Gundwana v Steko*, that execution against a person's home should occur only as a last resort, where it cannot be avoided by reasonable alternative means. It is also reminiscent of the compulsory mediation process suggested by Bertelsmann J in *ABSA v Ntsane*.[93]

As to who should supply the required information pertaining to "all the relevant circumstances", the judgments in *Port Elizabeth Municipality*, *51 Olivia Road* (CC) and *Shulana Court* (SCA) suggest that it is the duty of the court to devise ways to obtain it. In *Shulana Court* (SCA), the Supreme Court of Appeal held that the court *a quo* had failed to comply with its constitutional obligations by granting an eviction order while in possession of insufficient information about the personal circumstances of the occupiers and the availability of alternative accommodation. It held that the court *a quo* had not considered "*all* the relevant circumstances" as required by sections 4(6) and 4(7) of PIE and that it was clear, from the scant information that *was* available to the court *a quo*, that there was a real prospect that eviction would result in homelessness for the poor occupiers. The appeal court reasoned that the court *a quo* should have proactively taken steps to ascertain all relevant information in order to enable it to make a just and equitable decision.[94]

Thus, this unanimous judgment of the Supreme Court of Appeal reflects a departure from the stance adopted by the majority, in the earlier case of *Ndlovu v Ngcobo*, that the onus was on the occupiers to place before the court information about circumstances that were relevant to the exercise of its discretion.[95] However, no specific reference was made in the judgment in *Shulana Court* (SCA) to this aspect of *Ndlovu v Ngcobo*. After *Jaftha v Schoeman*, Van Heerden and Boraine had expressed concerns about burdening a creditor seeking execution against the home of a debtor with the task of

[92] See 3.3.1.4 (d), with reference to *Port Elizabeth Municipality* par 45.
[93] See 3.3.1.4 (d) and 5.5.2, with reference to *ABSA v Ntsane*.
[94] See 3.3.1.4 (d).
[95] See 3.3.1.4 (d), with reference to *Ndlovu v Ngcobo* par 19.

obtaining information that lies exclusively within the knowledge of the debtor.[96] Similar concerns were expressed in *Nedbank v Fraser*,[97] *FirstRand Bank v Folscher* and *Standard Bank v Bekker*. In the last two judgments, specific reference was made to the *dictum* of Harms JA in *Ndlovu v Ngcobo* that in the context of PIE "it cannot be expected of an owner to negative in advance facts not known to him and not in issue between the parties".[98] In *FirstRand Bank v Folscher*, the approach of the court was that, when seeking a writ of execution after obtaining default judgment, the creditor should set out the circumstances of which it is aware or is able reasonably to establish and that "the court will have to consider those facts that are available – the known relevant facts."[99] This contradicts the stance in *Shulana Court* (SCA).

In *Standard Bank v Bekker*, the court stated that it is ordinarily up to the defendant to alert the court to any facts or circumstances that implicate his section 26 rights. However, it also stated that the court would have a duty to "act proactively to obtain whatever additional information might appear relevant … if … some or other feature of the matter flashes warning signals" as it observed had occurred in *ABSA v Ntsane*.[100] Where a plaintiff has insufficient knowledge of the relevant facts to be able to make such an allegation, then, the court stated, this should be stated in the summons.[101] No mention was made of the *dicta* issued in this regard by the Supreme Court of Appeal in *Shulana Court* (SCA).[102] Thus, this issue needs to be resolved. Perhaps a compulsory mediation process, as suggested by Bertelsmann J in *ABSA v Ntsane*, would provide the answer.[103] Indications are that clear, uniformly applicable steps ought to be devised to facilitate information pertaining to "all the relevant circumstances" being made available to the court as a matter of course.

[96] See 5.3.3.
[97] See 5.6.3, with reference to *Nedbank v Fraser* pars 44 and 45.
[98] See 5.6.4.2 (g), with reference to *Ndlovu v Ngcobo* par 19.
[99] See 5.6.4.2 (g), with reference to *FirstRand Bank v Folscher* par 44.
[100] See 5.6.6, with reference to *Standard Bank v Bekker* par 25.
[101] See 5.6.6, with reference to *Standard Bank v Bekker* par 27 and *FirstRand Bank v Folscher* par 54.
[102] See 5.6.4.2 (g) and 5.6.6.
[103] See 3.3.1.4 (d) and 5.5.2.

In eviction cases, courts are sometimes prepared to postpone the execution of an eviction order for a reasonable period in order to render it just and equitable. Similarly, it is submitted that it may be appropriate for a court to postpone the forced sale of a debtor's home in order that he might arrange alternative accommodation. In *Standard Bank v Saunderson*, it was anticipated that a court might delay execution where there is a real prospect that the debt might yet be paid. It is submitted that, from the creditor's perspective, it would make little difference whether the reason for the delay was to enable the debtor to arrange finance or alternative accommodation for himself and his dependants.[104] As things stand, in the absence of specific statutory provision regulating the position, a court could justify an order postponing a sale in execution on the basis that it is just and equitable, in terms of section 172(1)(b) of the Constitution.[105] Another aspect of eviction cases which may be pertinent, albeit contentious, is the duty on the state, in line with the recent judgment of the Constitutional Court, in *Blue Moonlight Properties* (CC), to provide emergency accommodation for a debtor and his dependants, particularly his children, who are "desperately poor and … in a crisis", where execution will render them homeless.[106]

8.2.3 Applicable law and policy forming background to the reported cases

8.2.3.1 Housing

South African housing law and policies are contained mainly in the Housing Act and the National Housing Code. These were enacted and issued in accordance with the state's duty, imposed by section 26(2) of the Constitution, to take reasonable legislative and other measures to achieve the progressive realisation of every person's right to have access to adequate housing. In *Jaftha v Schoeman*, the rule in the National Housing Code which provided that only a first-time homeowner could benefit from a state housing subsidy was pivotal to the outcome of the case. This was because the sale in execution of the homes of the indigent appellants disqualified them from obtaining a

[104] See 3.3.1.4 (b), with reference to *Standard Bank v Saunderson* par 20, and 5.7.
[105] See 3.3.1.4 (b).
[106] See 3.3.1.4 (c).

subsidy ever again without which, the court acknowledged, they would be unable to acquire another home. Therefore, execution against their homes amounted to a breach of the negative duty that rests on the state and private individuals not to infringe their existing access to adequate housing.[107]

The National Housing Code has since been amended in a number of respects but the rule remains that a person may not receive a state housing subsidy more than once. As explained in Chapter 4, according to current housing law and policy, apparently, the most state assistance available for a person who has lost his home through its sale in execution, regardless of whether its purchase had been subsidised by the state, is the provision of a vacant serviced site or low-rent leased accommodation.[108] The loss of a home through forced sale not only affects the debtor, who is rendered ineligible for any state housing subsidy in the future, but it also places additional strain on other state housing programmes. A comprehensive approach, providing non-homeowners with access to housing and at the same time allowing existing homeowners, despite being over-indebted, to retain their homes, wherever possible, will serve the broader community and state interests and assist in combating homelessness.

The effect of section 10B of the Housing Act is that, in the event of forced sale by a creditor, including a mortgagee, of a state-subsidised home, it must first be offered to the provincial housing department at a price not exceeding the amount of the original government subsidy that was provided. Ownership cannot pass to the purchaser unless this requirement has been met. In the event of forced sale, the debtor will never again be eligible for a housing subsidy. The Housing Amendment Bill, published for comment in 2006, proposes to introduce a new subsection which will have the effect that the provincial housing department's pre-emptive right will not apply when a mortgagee exercises its rights under a mortgage bond passed over the property upon default by the mortgagor. The thinking behind this proposal may be not to undermine a mortgagee's rights lest this might reduce the ability of owners of state-subsidised homes

[107] See 4.2.1, with reference to *Jaftha v Schoeman* par 34.
[108] See 4.2.1.

to access credit. This was emphasised by the Constitutional Court, in *Jaftha v Schoeman*, in the course of its rejection of the notion of an exemption from sale in execution of state-subsidised houses.[109] However, the effect of the proposed provision tends to ignore the wasted expenditure by the state of public funds if the original subsidy amount were simply to be forfeited. It is hoped that this issue will be thoroughly interrogated, before any amendment is enacted.[110] It is suggested that, after the sale in execution of a subsidised home, as long as the state has recouped its initial subsidy investment, the previous homeowner should be eligible nevertheless to receive future housing assistance in one form or another. Another consideration might be that a person who has previously owned an entirely self-funded home should be eligible nevertheless to receive a subsidy. These issues, as well as the desirability and feasibility of introduction of an exemption from sale in execution of a state-subsidised home, as advocated by Van Heerden, Boraine, and Evans, should receive proper, policy-based consideration by appropriate bodies in an endeavour to find a balanced solution holistically considering all affected interests.[111]

8.2.3.2 The debt enforcement process and consumer debt relief mechanisms

Chapter 4 dealt with the rules applicable in the individual debt enforcement process, in the magistrates' courts and in the high court, as well as consumer debt relief mechanisms that are available at common law and in terms of section 74 of the Magistrates' Courts Act and the NCA. Changes in the law prompted by the cases discussed in later chapters were explained and discussed.

Section 66(1)(a) of the Magistrates' Courts Act has still not been formally amended to reflect the words which the Constitutional Court, in *Jaftha v Schoeman*, directed should be read in. The Magistrates' Courts Rules and the High Court Rules were amended to bring them into line with *Jaftha v Schoeman* and *Standard Bank v Saunderson*. However, a lack of uniformity continues to subsist with existing, as well as newly

[109] See 3.3.1.1 and 5.2.3, with reference to *Jaftha v Schoeman* par 51.
[110] See 4.2.2.
[111] See 3.3.1.1, 4.2.3, 4.4.3.4, 5.2.3, 5.6.8, 6.6 and 6.11.

created, discrepancies between the contexts within which the rules apply. Section 66(1) of the Magistrates' Courts Act is not restricted to immovable property that constitutes the home of the judgment debtor and there is no provision made for judicial oversight in decisions where a mortgagee seeks special execution against the mortgaged immovable property of a mortgagor.[112] Further, the amended rule 46(1) of the High Court Rules has been poorly drafted. The proviso requiring judicial oversight, where the property sought to be attached is the primary residence of the judgment debtor, applies only to subrule (ii) which relates to a declaration by a court that immovable property is specially executable or where a registrar has granted default judgment in terms of rule 31(5). As currently worded, the proviso requiring judicial oversight does not apply to situations where insufficient movables have been found to satisfy a judgment debt, as section 66(1) of the Magistrates' Courts Act covers in the magistrates' courts process. Thus, rule 46(1) requires further amendment.[113]

While it was anticipated that application of the precedent established by *Gundwana v Steko* would introduce a greater measure of uniformity and consistency, already, differences in interpretation of the judgment have emerged and divergent practices have been adopted in the different branches of the high court. What is more, the judgment of the Supreme Court of Appeal, in *Mkhize v Umvoti Municipality* (SCA), has already exposed a problem in relation to logistical arrangements in some of the high courts. It has cast doubt on whether a registrar, or other administrative official, may compile the court rolls by differentiating between matters in which judicial evaluation is required and those that a registrar may handle. In *Mkhize v Umvoti Municipality* (SCA), the court held that the statement of the Constitutional Court, in *Gundwana v Steko*, that it is for a court to determine whether a "matter is of the Jaftha-kind", means that it is the court which must determine whether section 26(1) rights come into play or not. Therefore, logistical arrangements and practices in the various courts will have to be reconsidered in light of this judgment.[114]

[112]See 4.4.3.3.
[113]See 4.4.4.3.
[114]See 4.4.4.3 and 5.6.5.

Since June 2007, a mortgagee who seeks to enforce a debt secured by a mortgage bond passed over the debtor's home has had to comply with the requirements of the NCA.[115] A mortgagor and, for that matter, any over-indebted homeowner with debt arising out of credit agreements may, in response to a section 129 notice or on his own initiative, apply for debt review with the object of having his debts restructured. This provides a potential means whereby a debtor may avoid execution being levied against his home. However, despite initial impressions, it does not necessarily achieve such purpose given the scale of difficulties experienced thus far in relation to the implementation, application, and interpretation of the NCA.[116]

Drawbacks of debt rearrangement, in terms of the NCA, include that its duration is unlimited and it does not provide the debtor with any measure of discharge from liability for debt in order to give him a "fresh start", in accordance with universally acknowledged recommendations.[117] The practical effect is that a debtor might be "locked into" paying off his debts for a considerable number of years. This situation is reminiscent of that identified by the court in *Sasfin v Beukes*, in relation to the illegality of requiring a person to work solely to service his debt,[118] and of the Roman practice in terms of which a debtor would work off his debt to escape the otherwise drastic consequences of default.[119] It may also be borne in mind that even a creditor may prefer more speedy resolution of the matter with earlier payment of less than is due.[120] For similar reasons and, more particularly, by reason of the applicable R50 000 debt limit and the exclusion of *in futuro* debts, an administration order in terms of section 74 of the Magistrates' Courts Act also does not pose a practical solution for a debtor seeking to avert the sale in execution of his home.[121]

The effect of the decision in *Collett v FirstRand Bank* is unsatisfactory from a debtor's perspective. This is because a mortgagee may terminate debt review held in terms of

[115]See 4.5.
[116]See 4.5.4 and 4.5.5.
[117]See 4.5.5.
[118]See 4.5.5, with reference to *Sasfin v Beukes* 13H-I.
[119]See 2.2.2.
[120]See 4.5.5.
[121]See 4.4.3.6.

the NCA, institute legal proceedings to enforce the agreement and execute against the mortgaged property, where the debtor is in arrears in respect of mortgage payments, where 60 business days have elapsed without the court having heard the matter.[122] There is a need for an explicit stay against enforcement of the terms of the mortgage bond, in circumstances where the delay is beyond the control of the debtor, particularly in view of ongoing delays, bottlenecks in the system and backlogs in the finalisation of matters. Another drawback is that only debts arising out of credit agreements are covered by the NCA. In the circumstances, the NCA does not appear to provide a ready solution and a more appropriate consumer debt relief mechanism must be sought which averts execution against the debtor's home yet gives sufficient recognition to the creditor's, including a mortgagee's security, rights. In Chapter 4, it was tentatively suggested that a mechanism along the lines of the pre-liquidation procedure contained in section 118 of the working draft of the document proposing an Insolvency and Business Recovery Bill, compiled in 2010, posed a potential solution.[123]

8.2.4 Treatment of the debtor's home in the individual debt enforcement process

Chapter 5 traced and analysed the case-by-case development of the position in the individual debt enforcement process from the sale in execution, in August 2001, of the state-subsidised "RDP" homes of Maggie Jaftha and Christina van Rooyen, for debts of R250 and R190, respectively, to the ruling in respect of the mortgaged home of Elsie Gundwana, in April 2011. It also covered subsequent cases in which the judgment in *Gundwana v Steko* was interpreted and applied and in which other related issues featured, until December 2011.[124] A fair amount of detail has already been provided in the depiction of the *status quo*, at the beginning of this chapter.

In *Jaftha v Schoeman*, the Constitutional Court rejected an argument that section 67 of the Magistrates' Courts Act was unconstitutional for its lack of exclusion from execution of a person's home below a certain value. It considered a "blanket exemption" to be

[122]See 4.5.4.
[123]See 4.4.3.6.
[124]See 5.1 to 5.7.

inappropriate in that it created a potential "poverty trap" which would prevent "many poor people from improving their station in life because of … incapacity to generate capital of any kind". It would also pay insufficient attention to the interests of creditors as it might prevent a creditor from recovering debts owing by "owners of excluded properties".[125] In *Standard Bank v Saunderson*, the Supreme Court of Appeal confirmed the importance of mortgagees' real rights of security being upheld in this context.[126]

Although, since *Gundwana v Steko*, it is now trite that judicial evaluation is required in every case in which execution is sought against a debtor's home, including one that has been mortgaged, still no clear substantive and procedural requirements have been established. As explained above, uncertainty followed *Jaftha v Schoeman* as a variety of problems emerged including jurisdictional issues, given discrepancies between the requirements in the magistrates' courts and the high court, respectively, as well as divergent practices and approaches in the various branches of the high court. Even after *Standard Bank v Saunderson*, which settled some issues, the judgments reveal inconsistency. The courts' proactive approaches in *ABSA v Ntsane* and *FirstRand Bank v Maleke* differ markedly from that of the Supreme Court of Appeal in *Standard Bank v Saunderson*.[127] Further inconsistencies are evident in relation to the impact of the NCA in cases concerning execution against a debtor's home, with courts' approaches vacillating between debtor-orientated approaches, such as in *FirstRand Bank v Maleke* and *FirstRand Bank v Seyffert*, as opposed to the creditor-orientated approach, in *Standard Bank v Hales*.[128]

It is evident from the judgment and the outcome, in *FirstRand Bank v Meyer*, that application of rule 46(1) will not necessarily prevent execution against a debtor's home, nor the family being rendered homeless, despite ill health or desperate personal circumstances.[129] However, a distinctly debtor-orientated approach was adopted, in the same, although differently constituted, court only three months earlier, in *FirstRand*

[125] See 5.2.3, with reference to *Jaftha v Schoeman* par 51.
[126] See 5.4.1, with reference to *Standard Bank v Saunderson* par 3.
[127] See 5.5.
[128] See 5.5.4.
[129] See 5.5.4.6.

Bank v Siebert.[130] Thus, different approaches are evident which may be attributed, not only to changes in the law and the different practice directives applicable in various branches of the high court, but also, it is submitted, to the subjective perspectives of the particular court, as it is constituted, within the context of the available information in each set of circumstances.[131]

It was anticipated that the Constitutional Court's decision, in *Gundwana v Steko*, would provide much-needed clarity and establish a base for uniformity, consistency, and predictability in relation to treatment of a debtor's home in the individual debt enforcement process.[132] However, as mentioned above,[133] recent judgments of the high court and the Supreme Court of Appeal in which *Gundwana v Steko* has been interpreted and applied reveal that confusion, or at best a lack of clarity, remains, particularly with regard to the application and practical implementation of the precedent which it established.[134] Further, in each of *Nedbank v Fraser*, *FirstRand Bank v Folscher* and *Standard Bank v Bekker*, the court regarded the circumstances that are relevant in eviction cases and where execution is sought against a person's home, respectively, as being the same. However, there is little evidence of considerations applicable in eviction cases informing the courts' treatment of matters in which execution is sought against a debtor's home.[135] It is submitted that the rationale adopted in decisions such as *Port Elizabeth Municipality*, *Shulana Court* (SCA) and *51 Olivia Road* (CC) as well as *Blue Moonlight Properties* (CC), has significant implications for the conduct of cases in which execution is sought against a person's home. Whether the same approach applies as in eviction cases urgently needs to be clarified.[136]

Post-*Gundwana v Steko*, significant differences in interpretation and approach emerge from the judgments. These include *Nedbank v Fraser*, a judgment of the South Gauteng High Court, and *FirstRand Bank v Folscher*, a full bench decision of the North Gauteng

[130]See 5.5.4.5.
[131]See 5.5.5.
[132]See 5.6.2.
[133]See 8.1.
[134]See 5.6.3 - 5.6.8.
[135]See 8.2.2.
[136]See 5.6.8.

High Court, specifically constituted to provide a practice directive. Also included is *Standard Bank v Bekker*, a decision of the full bench of the Western Cape High Court. In this case, the court was specifically called upon to resolve difficulties arising out of the lack of consistency between individual judges' approaches in relation to procedural requirements. Clarity was sought as to whether the creditor or the debtor was "responsible for ascertaining and placing evidence as to the relevant circumstances before the court, and the manner in which this should be done."[137] Ironically, this judgment reflects additional perspectives. Clearly, a uniform approach is called for.

In *Jaftha v Schoeman*, the Constitutional Court stated that execution should not be permitted where it would constitute an abuse of the process. It also stated that, where the debtor's home has been mortgaged in favour of the creditor, ordinarily, and in the absence of any abuse of process, execution should be permitted.[138] In *Jaftha v Schoeman*, the abuse of the court process that was identified consisted in execution against indigent debtors' homes in order to satisfy trifling extraneous debts.[139] Since then, in *ABSA v Ntsane*, *Nedbank v Fraser* and *FirstRand Bank v Folscher*, the courts have adopted and applied a variety of conceptions of "an abuse of the process" which has consequently acquired an extended meaning in this context.[140] The concept now lacks optimal clarity of definition in this context, as does the newly introduced concept of "extraordinary circumstances" defined loosely as it is with reference to "an abuse of the process".[141] In Chapter 5, concern was expressed that this could contribute to obfuscation of the two stages of constitutional limitation analysis, as discussed in Chapter 3, and could thus render the practical application of the rules and the exercise of judicial discretion even more of a challenge for courts and practitioners, especially in the lower courts.[142]

Another issue is whether "relevant circumstances" extend to those of a non-owner

[137]See 5.6.6, with reference to *Standard Bank v Bekker* par 11.
[138]See 5.2.3, with reference to *Jaftha v Schoeman* par 58.
[139]See 5.2.3, with reference to *Jaftha v Schoeman* pars 30, 43.
[140]See 4.4.3.3, 4.4.4.3, 5.5.2.2, with reference to *ABSA v Ntsane* pars 79-80, 84-85, 5.6.3, with reference to *Nedbank v Fraser* pars 21 and 24, and 5.6.4.2 (d), with reference to *FirstRand Bank v Folscher* par 40.
[141]See 5.6.4.2 (c), 5.6.4.2 (d) and 5.6.8.
[142]See 3.2.3 and 5.6.4.3.

whose home is constituted by the debtor's immovable property in question. Rule 46(1) applies in respect of "the primary residence of the judgment debtor" whereas the ruling, in *Gundwana v Steko*, referred specifically to "the sale in execution of the home of a person".[143] Opposing standpoints are evident in *Nedbank v Fraser* and *FirstRand Bank v Folscher*.[144] It must surely be a constitutional imperative that, in addition to the section 26 rights of the judgment debtor, the rights of his family members and dependants, including children, ought specifically to be addressed.[145]

In *Jaftha v Schoeman*, the Constitutional Court provided guidance regarding the balancing of the various interests involved but, in view of the need to retain sufficient flexibility, it was reluctant to try to delineate all of the circumstances in which a sale in execution would not be justifiable.[146] Since then, courts have provided a range of factors that might constitute "relevant circumstances", depending on the facts of each case, but have also deliberately left these flexible. In *Nedbank v Fraser*, the court was not prepared to "fossick about" in a quest for a "check list" of relevant circumstances.[147] On the other hand, in *FirstRand Bank v Folscher*, the court compiled a useful list of factors to be considered[148] but without any practically orientated direction as to how they should be applied in the required judicial evaluation. In *Standard Bank v Bekker*, the court stated that "relevant circumstances" are incapable of more clear definition or explanation than that emanating from *Jaftha v Schoeman* and *Gundwana v Steko* because they will depend on the facts of each case and the information which is available to the court.[149] However, inevitably, such flexibility has contributed to uncertainty and a lack of predictability. This is not only in relation to the factors which should be applied, in any given circumstances, but also whether they have a bearing on whether execution would infringe section 26 rights or whether they are factors which must be considered in the balancing process, in terms of section 36 of the

[143]See 4.4.4.3 and 5.6.2.1, with reference to *Gundwana v Steko* par 65.
[144]See 5.6.3, with reference to *Nedbank v Fraser* par 12, 5.6.4.2 (a), with reference to *FirstRand Bank v Folscher* par 32, and 5.6.8.
[145]See 5.6.8.
[146]See 5.3.
[147]See 5.6.3, with reference to *Nedbank v Fraser* par 16.
[148]See 5.6.4.2 (e), with reference to *FirstRand Bank v Folscher* par 41.
[149]See 5.6.6.

Constitution.[150] As mentioned above,[151] an issue that requires urgent correction, in this context, is that, according to more recent Constitutional Court decisions, "relevant circumstances" are not confined to those that are *legally* relevant but include the personal circumstances of affected persons.

Mindful of the complexity of constitutional limitation analysis, the importance, for potential creditors and investors, of predictability, the protracted and inconsistent casuistic development of this area of law, as well as the high cost of litigation, it was submitted, in Chapter 5, that the time is ripe for the legislature to devise legislation to regulate the position. A variety of mechanisms is suggested for application depending on the circumstances of each case. Suggestions include a comprehensive "check list" to facilitate the gathering of relevant information. Recommendations relating to its content are contained in Chapter 5.[152] Specific proposals and recommendations are summarised, below.[153]

8.2.5 Treatment of the debtor's home in the insolvency process

There is no exemption, or provision for special treatment, of the debtor's home in South African insolvency law. Realisation of the home of an insolvent by the trustee happens as a matter of course and there is no formal requirement, as there now is in the individual debt enforcement process, that a court should specifically consider any relevant circumstances.[154] The notion that realisation of the home should occur only as last resort and that a reasonable alternative should be sought, simply does not come into it. Indeed, an application for sequestration is often brought for the very reason that the debtor owns a home which, when realised, will yield a benefit for creditors. And yet it is conceivable that there will be instances where the insolvent and his dependants are rendered homeless, with no access to resources or alternative accommodation, after the trustee has realised the home, and could well be persons who are "desperately

[150] See 3.2.3.
[151] See 8.2.
[152] See 5.7 and 5.8.
[153] See 8.3, below.
[154] See 6.3.1.

poor" and who find themselves "in a crisis".[155]

Various aspects of South African insolvency law may adversely affect the housing position of the insolvent and his dependants. For example, the fact that an inheritance forms part of the insolvent estate means that an insolvent will lose an inherited "family home". Where spouses are married in community of property, even where one spouse inherited the home on the basis that it should be held separately from the joint estate, such separate property may be realised by the trustee to satisfy the claims of creditors of the insolvent joint estate.[156] Where spouses are married out of community of property and the estate of one of them is sequestrated, all of the property of the solvent spouse also vests in the trustee of the insolvent estate, in terms of section 21(1) of the Insolvency Act, as if it were property of the sequestrated estate. A "spouse", for these purposes, includes a husband, a wife, a cohabitant in a heterosexual relationship, and a registered civil union partner. Where the spouses' home is registered in the name of the solvent spouse, it is for the latter to prove, on a balance of probabilities, entitlement to its release by the trustee, failing which it may ultimately be realised to satisfy the creditors' claims against the insolvent estate.[157] Clearly, these provisions do nothing to assist the insolvent and his family members and dependants to retain their home and tend possibly to counter such an outcome.

The absence of any provision in the applicable insolvency law for consideration of the housing rights of the insolvent and his dependants may be explained by the fact that the Insolvency Act, and most of the amendments to it, were enacted well before the introduction of our modern constitution with its Bill of Rights.[158] The South African Law Reform Commission's report on its review of the law of insolvency, completed in February 2000, prior to *Grootboom* and *Jaftha v Schoeman*, did not include any proposal for change in relation to treatment of the home of an insolvent.[159] Neither does

[155]See 3.3.1.4 (b), with reference to *Ndlovu v Ngcobo* pars 16-17, 3.3.5, with reference to *Blue Moonlight Properties* (SCA) par 59, and 6.3.2. See, also, 8.2, above.
[156]See 6.6.1 and 6.7.
[157]See 6.7.
[158]See 6.3.1.
[159]See 6.6.3.

the most recent unofficial working draft of a proposed Insolvency and Business Recovery Bill, despite the developments that have taken place in the individual debt enforcement process, from *Jaftha v Schoeman* onwards. What is more, its section 25, in relation to voidable dispositions made to "associates", similar to the South African Law Reform Commission's clause 22A of the Draft Insolvency Bill of 2000, appears to be more draconian in effect than section 21 of the current Insolvency Act that it is proposed to replace.[160] In the circumstances, in light of the developments in the individual debt enforcement process and the potential infringement of constitutional rights of the insolvent and his dependants, the lack of any current initiatives for legislative reform regarding the home of the insolvent is surprising.[161]

Thus far, the section 26 rights of the debtor and his dependants have not been raised as an issue in insolvency matters. This may be because an applicant in a voluntary surrender, and a respondent in a friendly sequestration, would be giving up his home "willingly" and would most likely have made alternative accommodation arrangements in anticipation of the effect of the sequestration order that he seeks. However, it is conceivable that a spouse, married to him or her out of community of property, and his or her dependants might be averse, and wish to intervene in opposition, to the sequestration of the estate with the consequent liquidation of estate assets, including their home. In such circumstances, a pertinent question might be the likelihood of their finding alternative adequate housing.[162] The right of the insolvent and his dependants to have access to adequate housing, and any children's rights, may also become an issue in compulsory sequestration proceedings where the parties are dealing at arm's length with one another, and, especially, where a spouse, partner, and children, or disabled or elderly persons, rely on the insolvent for shelter and for maintenance.[163]

Another issue may arise as whether different treatment is required where the debtor

[160]See 6.7.
[161]See 3.3.1 and 6.3.1.
[162]See 6.3.2.
[163]See 6.3.2.

mortgaged his home in order to acquire funds to purchase it,[164] or whether he mortgaged it in order to provide security for the debts of, or to acquire working capital for, a business which is a separate legal entity. In the latter situation, the debtor and his family may be exposed to the risk of homelessness where the business fails and is liquidated as insolvent. In the individual debt enforcement process, it is not clear whether differential treatment of the position is required depending on the purpose for which the home was mortgaged.[165] An issue might also be, where a corporate entity owns a house which a director, a member, or an employee of that entity uses as their home, whether the housing position of the latter ought specifically to be addressed in the course of liquidation of such entity's assets in the event of its insolvency. There are conflicting decisions as to whether, in the event of the sale in execution of a house owned by a corporate entity, the section 26 rights of a director, a member or an employee who uses the property as his home, require judicial evaluation.[166]

A reason that the insolvent's section 26 rights have not yet been raised in an insolvency matter may be that, from a practical perspective, generally applications for voluntary surrender are not brought by, and applications for compulsory sequestration are not brought against, apparently indigent debtors for whom, typically, access to "adequate housing" would be an issue. Ironically, the reality is that it is only more "affluent" debtors who can afford to be declared insolvent, given that, in terms of the Insolvency Act, advantage of creditors is required and it entails the cost of a high court application. In addition, in light of the fact that the home is often the most valuable asset in the estate, the situation could well be that, if the home is not sold, sequestration will not be shown to be to the "advantage of creditors".

ABSA v Murray shows how PIE offers a measure of protection for the section 26 rights of an insolvent debtor. However, it also highlights the fact that, if an insolvent wishes to rely on his section 26 rights, his only option would be to "hold over" and to wait until an application is brought for his eviction. In this process, in terms of the provisions of PIE,

[164] See 2.3.4 and 4.3.3.
[165] See 5.6.3 and 5.6.6.
[166] See 5.6.3 and 5.6.4.2 (a).

his personal circumstances and others who reside with him will be considered. Thus, the insolvent mortgagor who with his family vacates their home immediately after the sequestration of his estate, and who becomes homeless as a result, receives less statutory protection than one who "holds over" and resorts to the protection offered by PIE. The point may also be made that it is the most vulnerable who cannot afford to engage in litigation in order to protect their rights.

It is submitted that formal recognition should be given to the significance of section 26 and section 28 rights of an insolvent and his dependants as well as any of their other constitutional rights that may be relevant in this context. Essentially, the issue is whether realisation of the insolvent's home, in accordance with the provisions of the Insolvency Act, constitutes any infringement of the constitutional rights of the insolvent debtor and his dependants. If it does, the question is whether it is justifiable, in terms of section 36 of the Constitution, given the debt collection and other purposes served by the sequestration process and other insolvency law mechanisms. The next question which arises, where realisation of the home of the insolvent will indeed constitute an unjustifiable infringement of constitutional rights, is what should be done to avert, or to remedy, this.

As Evans, as well as Stander and Horsten, point out, in a situation where the insolvent has a duty of support towards his children and other dependants, such support would include the provision of accommodation.[167] If the insolvent is not in a financial position to provide such support, the burden will fall on the state. This, as well as the minimal level of housing subsidy and support available, in the national housing programmes,[168] for persons rendered homeless after falling on hard times supports an argument for allowing funds to go towards the accommodation of the insolvent and his dependants, or at least some form of exemption for the home.[169] Commentators, including Evans, Van Heerden, and Boraine, have suggested an exemption of "low value" and state-subsidised homes to be applied in both the individual debt enforcement and insolvency

[167]See 6.3.2 and 6.6.3.
[168]See 4.2.
[169]See 6.3.2.

processes.[170] Despite the Constitutional Court's rejection, in *Jaftha v Schoeman*, of the notion of a blanket exemption from execution, for a debtor's home, this may merit careful consideration, especially in light of recent developments. Evans advocates that it should become entrenched policy completely to exclude "low value" homes from the reach of creditors in general and he goes further to suggest that the passing of mortgage bonds over "low value" homes, in order to access capital, should be prohibited.[171] It should be noted that, if this change in the law is considered, the proposed amendment to sections 10A and 10B of the Housing Act, mentioned above,[172] would also need to be revisited.

The effect of an introduction of a type of home exemption, in the insolvency process, would be to shift part of the burden to the creditors because whatever is exempted from the insolvent estate shrinks the assets available for realisation for the satisfaction of the insolvent person's debts. On the other hand, the nature and level of exemptions permitted will logically have a bearing on the generosity of the level of any discharge that the insolvent ultimately obtains. As Boraine, Kruger, and Evans explain, exemptions must be viewed within the context of the law of insolvency being the result of a "compact" to which the debtor, his creditors, and society are all parties.[173]

The main controversy exists where the home of the insolvent has been mortgaged in favour of a creditor. The interests of the mortgagee weigh heavily against the notion of the exemption of the insolvent's home, or a limited portion of the proceeds of its sale, from the insolvent estate, especially in light of the adverse effect that it would have on the economy generally, if real security rights are not upheld.[174] This may justify different treatment of the insolvent's home, depending on whether or not it has been mortgaged as security for the payment of a debt. A possibility might be to leave a secured creditor's right intact but to allow an exemption of a portion of any equity which a debtor holds in his mortgaged home. A preferred option might be for a court specifically to be

[170] See 5.2.3, 6.3.2, 6.6.3, and 6.11.
[171] See 6.6.3 and 6.11.
[172] See 4.2.2 and 8.2.3.1.
[173] See 6.6.3.
[174] See 5.2.3, 5.4.1 and 5.6.6.

empowered to grant a moratorium on the realisation of the home by the trustee, in order to allow a period of grace within which alternative accommodation might be arranged for the insolvent and his dependants. This should apply, especially, in cases concerning children, particularly with special needs, the elderly, and the infirm.[175] A delay in the realisation of the home by the trustee of an insolvent estate might even provide the insolvent with an opportunity to reach a mutually satisfactory statutory composition with his creditors or to arrange to refinance the home or even for a family member to purchase it from the insolvent estate.[176]

Evans submits that "this housing issue cannot be addressed without a well considered policy in respect of estate assets". He has argued convincingly that, in South Africa, insufficient attention has been directed to formulating coherent exemptions policy, both in the individual debt enforcement process, and in the insolvency process.[177] Exemptions are generally based on policies, formulated to reflect the result of weighing up the competing interests of the debtor, the creditors, and society. They are designed to fulfil one or more of a variety of purposes. These include: to provide the debtor with property necessary for his survival and maintenance; to protect the debtor's family from the adverse consequences of impoverishment; to preserve the debtor's dignity; to enable the debtor to rehabilitate himself financially, sometimes referred to as providing the debtor with a "fresh start"; to earn income in the future and to make a positive contribution to society; and to avoid the state, or society, from having to bear the burden of providing for the debtor and his family with minimal financial support.[178]

Evans has proposed that measures should be put in place for the housing position of the debtor, and his dependants who share his home, to be considered prior to an application for sequestration. This would be preferable, especially in circumstances where, if the home, often the most valuable asset, were to be placed beyond the reach of creditors, sequestration would not be to the advantage of creditors and, therefore, the

[175]See 6.3 and 6.6.3.
[176]See 6.6.3.
[177]See 6.6.2 and 6.6.3.
[178]See 6.6.3 and 6.11.

sequestration order should not even be granted. It is agreed that consideration of the section 26 and section 28 rights of the debtor and his family should occur as early as possible in the process, but it should also be borne in mind that often not all relevant circumstances are known, at the application stage, but are only revealed after the trustee has commenced his duties. It is therefore important that the evaluation by the court should not be completed until all relevant factors have been ascertained but also, obviously, that it should occur before the home is realised by the trustee.[179]

As in the individual debt enforcement process, *judicial* oversight would be required and, therefore, neither the Master of the High Court, nor the trustee, should determine whether, or when, an insolvent's home may be realised by the trustee of an insolvent estate. By "relevant circumstances" is meant circumstances of the same kind as those referred to in judgments concerning execution against a person's home, in the individual debt enforcement process,[180] taking into account, where appropriate, any differences which exist in the purposes served by the ordinary civil process, as opposed to the insolvency process. During the balancing process in terms of section 36 of the Constitution, in the insolvency context it is important to acknowledge the differences in the weighting of the interests of secured, preferent, and concurrent creditors, respectively, in relation to the interests of the insolvent and his dependants. It is anticipated that there may be circumstances in which, after evaluation of a mortgagee's security interests, where the insolvent is not indigent but has access to at least some resources and, perhaps, some equity in his home, that the sale of the home may be justifiable, in relation to the mortgagee.[181] However, hypothetically, applying the required limitation analysis, where there is no counter-balancing real right of a mortgagee to include in the complex matrix of factors, may lead to the conclusion that it would not be justifiable to sell the home and thereby deprive the insolvent of his equity in the property, for the benefit of unsecured creditors.[182] Thus, it may be a more

[179]See 6.11.
[180]See 5.6.8, 5.7 and 6.11.
[181]See 6.11.
[182]See 5.2.3, with reference to *Jaftha v Schoeman* par 58, and 5.6.2.3, with reference to *Gundwana v Steko* par 50.

practical solution to introduce an exemption of a limited amount of equity, to be retained by or returned to the insolvent, rather than exempting the home itself.

In the insolvency context, it is not only the interests of the applicant creditor, or the mortgagee of the home, that must be balanced with those of the debtor, but the interests of the general body of creditors. In addition, sequestration, in itself, may be regarded as the "last resort" if, through it, a creditor seeks satisfaction of a debt. Where a creditor has failed to obtain payment through the individual debt enforcement process, it might be argued that there are no less restrictive alternative means by which the debt might be satisfied thus rendering justifiable any infringement of the constitutional rights of the debtor and his dependants. However, one should not lose sight of the fact that, even in a situation where a debtor is technically insolvent, consumer debt relief measures may offer an alternative to sequestration. They may also hold the potential to avert the forced sale of a debtor's home, in appropriate circumstances, where the debtor has a regular income that will allow him to service his debt over a longer period.[183]

Consideration of debt review and debt restructuring, in terms of the NCA, as an alternative to sequestration, reveals that it does not provide a realistic solution in this regard.[184] A problem is the lack of a clearly defined interface between insolvency law and the debt review process, as evidenced by *Ex parte Ford*, *Investec v Mutemeri*, *Naidoo v ABSA* and *FirstRand Bank v Evans*.[185] The effect of these decisions is that a mortgagee may bring an application for the compulsory sequestration of a mortgagor's estate while the matter is pending debt review, and even after confirmation of a debt rearrangement plan by the court. This leaves the homeowner debtor in a vulnerable position and undermines the efficacy of the NCA's consumer debt relief measures and its capacity to protect a debtor's home from forced sale.[186]

Another drawback of the NCA's debt review and rearrangement process is that only

[183]See 6.6.3.
[184]See 4.4.3.6, 4.5.5, 6.10.1, 6.10.6 and 6.11.
[185]See 6.10.
[186]See 4.5.4 and 6.10.

debts arising out of credit agreements are included. Most significantly, the fact that the effect of the NCA is that a magistrate's court has the power to impose amended payment obligations on a secured creditor, such as the mortgagee of the debtor's home, to which it has not agreed. The resultant restructured payment terms may be unsatisfactory, or even untenable, from the perspective of the mortgagee who would tend simply to opt for an application for the sequestration of a defaulting mortgagor's estate in order to avoid the application of the NCA's provisions. This might also tend towards abuse of the sequestration process by mortgagees.[187] Mindful of the fact that the NCA was not enacted with the specific objective of protecting a debtor's home against forced sale, indications are that a more appropriate statutory mechanism should be devised to regulate the position in order to achieve a workable, balanced solution.[188]

For years, academic commentators have emphasised that the South African insolvency regime lacks provision for an effective, easily accessible, consumer debt relief mechanism as an alternative to the sequestration, or liquidation, process provided for by the Insolvency Act. They have called for a mechanism which balances the interests of both debtors and creditors, and society generally, by, *inter alia*, allowing the rearrangement of obligations over a reasonable, limited period and, at the end of it, a measure of discharge from liability supporting a policy of providing an "honest" consumer debtor with a "fresh start". They have also expressed the desirability of a legislative and administrative framework that facilitates "single portal access" to the consumer debt relief system.[189] Cases such as *Ex parte Ford*, *Investec v Mutemeri*, *Naidoo v ABSA*, and *FirstRand Bank v Evans* tend to confirm such a need. A study of these cases also reveals that the NCA's consumer debt relief mechanisms fall short, in a number of respects, of contemporary, internationally endorsed recommendations such as those contained in the INSOL International *Consumer Debt Report II*, published in November 2011.[190]

[187]See 6.10.5.
[188]See 6.10.3.3.
[189]See 6.2 and 6.4.1, 6.4.3 and 6.10.6.
[190]See 6.10.6.

It was within this context, as discussed in Chapter 6,[191] that it was submitted that a suitably revised and modified version of the pre-liquidation procedure contained in section 118 of the working draft of a proposed Insolvency and Business Recovery Bill, initially referred to in Chapter 4,[192] holds the potential to be the alternative debt relief mechanism envisaged by commentators. It may also provide the key to a solution for over-indebted homeowners who wish to avert the forced sale of their homes and who have at least some regular income with which they may service their debts, even if this must occur over a longer period than that for which the parties originally contracted. In terms of the proposed section 118, the claims of secured and preferent creditors remain unaffected, unless they consent in writing to an amendment of their obligations, but a debtor may have his debts to concurrent creditors restructured. It was submitted that this aspect of the proposed provision would tend to counter the nature, and level, of opposition to debt restructuring, especially by a mortgagee of the debtor's home, as was encountered in *FirstRand Bank v Evans*, as long as the terms of the restructuring orders are feasible.[193]

An advantage of the proposed section 118 is that it would apply in respect of all types of debts and not only those arising from credit agreements, as is the position, in terms of the NCA. This would rule out the anomaly, alluded to by Boraine and Van Heerden and by Wallis J in *FirstRand Bank v Evans*, that would arise if it were to be held that a credit provider is barred from applying for the sequestration of a debtor's estate after the latter has applied for debt review, in terms of the NCA.[194] Further, in terms of the proposed section 118, where the composition procedure has been successfully completed, the debtor stands to benefit by a measure of discharge from liability. This would address criticisms of the current system and bring it more into line with internationally recognised consumer debt relief policies.[195] Further, an appropriately modified provision could allow the court to determine, within the framework of a single insolvency statute, whether the composition process or the liquidation process would be more appropriate in the

[191] See 6.4.3 and 6.10.6.
[192] See 4.4.3.6.
[193] See 4.4.3.6 and 6.4.3, 6.10.3.3 and 6.10.6.
[194] See 6.10.3.2.
[195] See 6.10.6.

particular circumstances of the case. Provision could also be made for simple, streamlined conversion between the two processes, the need for which might arise, for instance, where the debtor fails to comply with the terms of the composition.[196]

As things stand, in the absence of specific legislative provisions applicable to the treatment of an insolvent person's home, it is possible that a court could exercise its discretion to dismiss an application for a sequestration order,[197] in order to protect the section 26 and section 28 rights of an insolvent and his dependants. In constitutional matters, a court also has the power, in terms of section 172(1)(b) of the Constitution, to make any order that is just and equitable.[198] Theoretically, in the case of a mortgaged home, or where other debts arise from credit agreements, if there is an allegation of over-indebtedness, a court could resort to section 85 of the NCA, with a view to having its debt relief provisions applied to ameliorate the position of an over-indebted person. This might enable him and his family to remain in their home while complying with a debt rearrangement order.[199] However, in light of the apparently creditor-orientated approach adopted by courts in cases, such as *Ex parte Ford*, *Investec v Mutemeri* and *FirstRand Bank v Evans*, in the course of exercising their discretion whether or not to order sequestration, it is doubtful that courts will tend towards assisting financially distressed homeowners in this way.[200]

In the circumstances, it was submitted in Chapter 6 that there is an urgent need for legislative intervention not only to clarify the relationship between the NCA and the Insolvency Act but also more effectively to balance the interests of creditors, especially secured creditors, and consumer debtors in the debt restructuring process by providing more workable alternatives to sequestration. It was the duty of the commissioners of the *Desolate Boedelkamers*, in terms of the Amsterdam Ordinance of 1777, to try to make arrangements with the creditors before sequestration occurred. Therefore, a policy requiring modern-day administrators of the insolvency process first to consider, or even

[196] See 6.10.6.
[197] See 6.4.1 and 6.4.2.
[198] See 3.3.1.4 (b) and 3.4.
[199] See 6.10.4.
[200] See 6.10.

encourage, debt rearrangement, in an endeavour to avert the liquidation of an insolvent estate, may be viewed as being firmly embedded in the historical roots of our system.[201] What is more, it would be in line with the spirit and purport of our modern constitution and commensurate with a post-*Gundwana v Steko* approach to seek reasonable alternative means of satisfying a mortgagee's claim in order to save the debtor's home from forced sale. It would also bring South Africa a step closer to conforming to internationally recognised principles and policies for statutory consumer debt mechanisms and systems.[202]

8.2.6 Comparative observations

8.2.6.1 General

A study of the treatment of the home of the debtor in other jurisdictions provides useful insights and guidance on ways in which to address current problems and issues that have arisen, locally. Traditionally, two approaches are discernible. A formal statutory home exemption has applied for more than a century, in the United States of America[203] and in Canada.[204] On the other hand, a combination of legislative provisions and rules apply in England and Wales, and in Scotland, which grant family members occupation rights and which protect such occupiers against each other, as well as in relation to claims by creditors against the homeowner. In both the individual debt enforcement process and the insolvency process, various provisions also provide for the delay of the sale of the home, where appropriate.[205] Recent developments indicate a blurring of these two, traditionally distinct, approaches. England and Wales now have a "low equity" home exemption in insolvency[206] and a far-reaching home exemption has been proposed for application in both the individual debt enforcement and the insolvency

[201] See 2.3.3.
[202] See 6.10.6.
[203] See 7.2.
[204] See 7.3.
[205] See 7.5 and 7.6
[206] See 7.5.3.3 (d) (ii).

processes in Scotland.[207] Further, the introduction of modifications to the required debt enforcement procedures, entailing mandatory pre-action conferences, mediation procedures and pre-action protocols, in various jurisdictions across the globe, including the United States of America, England and Wales, Scotland, Ireland and various member states of the EU, has brought about greater commonality between the treatment of a debtor's home, in practice. Another common feature, as identified in Chapter 7, is that debtors are able to avert the forced sale of their homes by means of repayment plans for which provision is made in the applicable bankruptcy, or insolvency, legislation.[208]

Summaries of findings in respect of the main aspects of treatment of the debtor's home, in foreign jurisdictions, will follow. Thereafter, brief consideration will be given to features, especially of the English and the Scottish systems, which may be useful for modification, to suit the local context, and application in South Africa. Finally, some proposals and recommendations will be tabled.

8.2.6.2 Home exemption

Home exemptions applicable in the legal systems considered in Chapter 7 commonly do not apply to the home itself but in respect of *equity* that the debtor holds in the home. Therefore, as a rule, they offer no protection against the claim of a mortgagee, or a lien holder, but are effective only against the claims of unsecured creditors.

The amount of the home exemption, in each jurisdiction, varies, usually reflecting differences in purpose. For example, in Canada, the amounts exempted vary according to property values in the respective provinces and territories. In Manitoba, in Canada, a house may not be sold unless it has the statutorily prescribed value and, if so, that amount must be paid to the debtor before anyone may be put in possession of the

[207] See 7.6.4.
[208] See 7.2.3, 7.2.5, 7.3.4, 7.3.5, 7.5.3.3 (d) (iv), 7.6.2 and 7.6.3.2.

home.[209] The "low equity" home exemption, applicable in England and Wales, has the effect that a trustee in bankruptcy may not realise the home of the insolvent debtor where the minimal proceeds and resultant benefit to the creditors generally would not justify its sale. However, the exceedingly low value of £1000, set for this exemption, renders the level of protection virtually meaningless.[210] In certain states of the United States of America, the reality is that the amount of equity exempted is often insufficient to prevent the sale of the home and to allow the debtor to retain it. However, where the home is sold, at least the proceeds, up to the exempted limit, are available to the debtor for the purchase of amore affordable home or for application towards the cost of rented accommodation.[211] A significant proposal, in Scotland, is to exempt the debtor's home from forced sale where he has equity in an amount which is less than £200 000 and, where he has equity of more than £200 000, to exempt such amount so that the debtor may acquire an alternative residence.

No home exemption of any sort applies in South Africa and, in *Jaftha v Schoeman*, the Constitutional Court dismissed the notion. However, commentators have suggested the introduction, in both the individual debt enforcement and the insolvency processes, of an exemption from sale of a debtor's home which is of low value and the acquisition of which was subsidised by the state.[212]

8.2.6.3 Postponement of forced sale of the debtor' home

In the individual debt enforcement process, in England and Wales, a court may delay the sale of the home after taking into account the debtor's ability to repay the arrears and to fulfil the contractual obligations within a reasonable time.[213] In Scotland, recently enacted statutory provisions have the effect that a court must consider the personal circumstances of the debtor and his family and, in the process, the need for a delay in the exercise of a court order for the sale of their home. This must occur in all actions in

[209] See 7.3.2.
[210] See 7.5.3.3 (d) (iii).
[211] See 7.2.2, 7.3.1, 7.3.2, 7.4.1 and 7.6.4.
[212] See 4.2.2, 5.6.8, 6.3, 6.6.1, 6.6.3, 6.11 and 6.12.
[213] See 7.5.3.2.

which the forced sale of the debtor's home is sought by a creditor and not, as used to be the position, only at the instance of the debtor.[214] In Canada, the right to redeem, and rules of civil procedure applicable in various provincial and territorial jurisdictions, place restrictions on the enforcement of a mortgagee's remedies, effectively allowing for a stay of foreclosure proceedings and affording the mortgagor an opportunity to remedy his default within the redemption period or a period specified by the court.[215] Where an acceleration clause operates upon the mortgagor's default, he may apply for a court order to stay foreclosure proceedings commenced by the mortgagee, provided he cures his default and pays arrears and applicable costs within a period specified by the court.

In the insolvency process in England and Wales and in Scotland, respectively, statutory provision is made for a court, in its discretion, to postpone the realisation of the debtor's home by the trustee, in certain circumstances. The provisions applicable in each jurisdiction are not identical but there are common features. Upon consideration of the interests, including the needs and the personal circumstances of the debtor and his dependants, especially children with special needs and, in Scotland, the elderly, the court has unfettered discretion to postpone the realisation of the home of the insolvent for a period of up to one year, in England and Wales, and three years, in Scotland. After a year, in England and Wales, there is a rebuttable presumption that the interests of the creditors outweigh those of the debtor and his dependants, although it is possible for the court to postpone, even further, the realisation of the home by the trustee in deserving cases.[216]

In South Africa, there is no specific statutory provision, in the individual debt enforcement process, for postponement of execution against, nor in the insolvency process, for any delay in the realisation of, the debtor's home. However, *dicta*, in *Standard Bank v Saunderson*[217] and *ABSA v Ntsane*,[218] tend to support an argument in

[214]See 7.6.2.
[215]See 7.3.3.
[216]See 7.5.3.3 and 7.6.3.
[217]See 3.3.1.4 (b), with reference to *Standard Bank v Saunderson* par 20, and 8.2.2.
[218]See 5.5.2.2, with reference to *ABSA v Ntsane* par 69.

favour of a statutory provision permitting a court to delay the forced sale of the home where appropriate.

8.2.6.4 Forced sale as a last resort

A current tendency, apparent in all of the jurisdictions considered in Chapter 7, is to endeavour to save the debtor's home from forced sale wherever possible. The clear purpose, in the European Commission's recent proposal for a Directive of the European Parliament, in recognition of the severe consequences of the recent mortgage foreclosure crisis, is to ensure that forced sale of a person's home, even in insolvency,[219] occurs only as "a last resort".[220] Evidence of this is also seen in the Mortgage Conduct of Business Rules and the Pre-Action Protocol, applicable in England and Wales. These require the creditor to make reasonable efforts to accommodate the debtor by negotiating alternative payment arrangements. In Scotland, the Home Owner and Debtor Protection (Scotland) Act 2010 prescribes pre-action requirements, without any need for the debtor or other affected person to initiate consideration of the specific circumstances, before a court will entertain an application by a creditor for an order for the sale of the debtor's home.[221] Similar, mandatory, pre-action debt settlement conferences, mediation, and negotiation processes and other rules and directives apply, for example, in Ireland, some states in the United States of America and various countries in Europe.[222] These compulsory pre-action procedures often require a minimum period to lapse before a creditor may initiate foreclosure proceedings.[223]

Thus, these requirements ensure that parties earnestly engage with one another in an endeavour to seek alternatives to the forced sale of the debtor's home. Where realisation of the home is unavoidable, the requirements have the effect of delaying it,

[219] See 7.2.4.
[220] See 7.5.4.1, 7.7.2.3 and 7.8.
[221] See 7.5.5 and 7.6.2.
[222] See 7.2.4, 7.5.4, 7.6.2, 7.7.2.2, 7.7.2.3 and 7.8.
[223] See 7.8.

thus affording the debtor and his family a period of grace within which to arrange alternative accommodation.[224]

8.2.6.5 Debt repayment plans

In practice, often the most useful means by which a debtor may avoid the forced sale of his home is by resorting to a statutory debt repayment plan, or a "rehabilitation procedure", as it is referred to in the INSOL International *Consumer Debt Report II*. This is provided for in the form of a Chapter 13 bankruptcy in the United States of America,[225] a consumer proposal in Canada,[226] an Individual Voluntary Arrangement in England and Wales,[227] and the grant of a Debt Arrangement Scheme, or a protected trust deed, in Scotland.[228] In Ireland, Debt Settlement Arrangement[229] has been proposed and, presumably, this would serve a similar purpose.

Typically, a statutory debt repayment plan spans over a period of up to five years. Its success depends on the debtor retaining sufficient income to meet the subsistence needs of himself and his dependants. It is important to note that, in all of the systems considered in Chapter 7, the claim of a mortgagee of the debtor's home would generally remain unaffected unless it specifically agreed to modification of the terms of the obligation.[230] Recently, in the United States of America, contentious proposals for legislation to permit "cram down" modification to mortgagees' claims in the Chapter 13 bankruptcy process were ultimately thwarted by Senate.[231] Thus, a claim by the mortgagee of the home is not included in the statutory repayment plan the terms of which are ideally based on the debtor satisfying any mortgage arrears within a short period and maintaining regular mortgage bond instalments according to the original

[224]See 7.2.4.
[225]See 7.2.3 and 7.2.5.
[226]See 7.3.4 and 7.3.5.
[227]See 7.5.3.3 (d) (iv).
[228]See 7.6.2 and 7.6.3.2.
[229]See 7.7.3.
[230]See, for example, 7.5.3.3 (d) (iv).
[231]See 7.2.4.

agreement.[232] Another typical provision is to require the debtor, before he completes the plan, to refinance the home in order to provide the unsecured creditors with the proceeds of equity that he has acquired in it. In addition, typically, when the debtor completes the payment plan, he receives a measure of discharge from his debts, in line with the policy of affording him a "fresh start".[233] By contrast, in South Africa, the NCA's debt review and debt rearrangement process, which is the closest equivalent to repayment plans applicable in other legal systems, allows modification by a magistrate of terms of a mortgage bond without the consent of the mortgagee. There is also no measure of discharge from liability for a debtor who completes a debt rearrangement scheme under the NCA.[234]

Also significant is that, in all of the foreign jurisdictions considered in Chapter 7, with the exception of Scotland's Debt Arrangement Scheme, the alternative debt relief mechanisms which provide for repayment plans form part of their bankruptcy, or insolvency, legislation. Further, where a debtor is subject to a confirmed repayment plan, the applicable legislation regulates explicitly the circumstances in which a creditor may apply for the liquidation of the debtor's estate. For example, in the United States of America, this may only occur if the debtor defaults in respect of the Chapter 13 repayment plan, or if it cannot be completed, or if it is converted for some other reason to a Chapter 7 bankruptcy.[235] Likewise, in England and Wales, an approved IVA will ordinarily provide for a stay on debt enforcement proceedings by individual creditors during the operation of the payment plan. The Insolvency Act 1986 imposes clear restrictions so that a court may allow a bankruptcy petition to be brought against the debtor only where he has committed a breach of the terms of the payment plan.[236]In Scotland, a protected trust deed in favour of creditors prevents them from thereafter applying for the debtor's sequestration.[237]

[232]See 7.2.3, 7.3.4, 7.5.3.3 (d) (iv), 7.6.3.2 and 7.7.3.
[233]See 7.2.3 and 7.5.3.3 (d) (iv).
[234]See 4.5.5 and 6.10.6.
[235]See 7.2.3.
[236]See 7.5.3.3 (d) (iv).
[237]See 7.6.3.2.

By contrast, in South Africa, as mentioned above,[238] a creditor is not precluded from obtaining an order for the sequestration of the estate of a debtor who has applied for debt review and, even, where a debt rearrangement order has been confirmed and the debtor is complying with it.[239] This undermines the efficacy of debt rearrangement, in terms of the NCA, as a valuable mechanism for avoiding the forced sale of debtors' homes.[240] In the circumstances, it is submitted that comparative analysis tends to confirm submissions, in preceding chapters, that implementation of legislative provisions along the lines of those contained in section 118 of the working draft of a proposed Insolvency and Business Recovery Bill would be advisable in South Africa. Suitably modified, it could more effectively protect the debtor's home against forced sale, where appropriate, and, at the same time respect the rights of a mortgagee.[241]

8.2.7 Aspects providing useful lessons from abroad

Given the numerous essential similarities between the English and the South African debt enforcement and insolvency laws, it is submitted that features of the system that applies in England and Wales would be particularly appropriate to consider for adoption in South Africa. Aspects of the applicable Scots law, similar in many respects to the English law, but also forming part of a so-called "mixed legal system", as we have in South Africa, also provide valuable guidance. However, we should consider only features which are appropriate for the South African context in the sense that they are in keeping with the "local culture" and system[242] but develop, or add to, it by filling a *lacuna* or addressing an issue which it is necessary, or desirable, to resolve.

In England and Wales, the variety of statutory mechanisms that potentially protect the debtor's home against the claims of creditors has the advantage that different options are available for appropriate application, depending on each different set of circumstances. Ordinary rules of civil procedure, supported by principles, policies and

[238] See 4.4.3.6, 4.5.4, 6.10 and 8.2.5.
[239] See 6.10.3.
[240] See 6.10.6 and 7.9.
[241] See 4.4.3.6, 4.7.4, 5.6.8, 6.4.3, 6.10.6 and 6.12.
[242] See Rajak "Culture of Bankruptcy" 25.

protocols, implemented by government and regulatory bodies, provide the framework within which the forced sale of a debtor's home, whether mortgaged or not, is permitted only as a last resort. The Pre-Action Protocol, applied through the employment of a "Mortgage pre-action checklist", attached as Annexure A to this manuscript, makes explicit, for all concerned, the steps required before a court will consider an application for an order for possession or sale of a home. Where the debtor has been declared bankrupt, specific statutory provisions, contained in the Insolvency Act 1986, apply, requiring the trustee in bankruptcy to obtain an order of court before he can sell the bankrupt's home. Where appropriate, the bankruptcy court may delay the sale of the home. The Insolvency Act 1986, as amended, also places restrictions on the way in which the trustee may deal with the bankrupt's home. As mentioned above, a significant provision is that the trustee may not sell a debtor's home where the latter holds equity of less than £1000.[243] Another restriction is that the trustee is obliged to deal with the debtor's home within three years.[244]

Gravells, writing before the Insolvency Act 1986 was enacted in England, identified that "… what English law requires, in particular, is certainty for both creditors and debtors" and stated that "it is possible to confer a discretion on the courts which permits a sufficient degree of flexibility without generating uncertainty and unnecessary litigation."[245] This statement, it is submitted, is equally apposite to South Africa, today. However, despite the apparent success of the present system in England and Wales, it may be noted that it is nevertheless the object of criticism. Commentators have stated that the framework of rules, in England and Wales, lack legal standing and that application of the law is too creditor-orientated. On the other hand, others view the courts as leaning too far in favour of the debtor's family.[246] This, it is submitted, underscores the challenge inherent in balancing the interests of all interested parties. It also alerts one to potential problems and inadequacies for which solutions should be sought before adopting similar mechanisms and it serves as a *caveat* against simply

[243]See 7.5.3.3 (d) (ii) and 8.2.6.2.
[244]See 7.5.3.3. (d) (iii).
[245]See 7.5.5.1.
[246]See 7.5.5.1.

importing foreign provisions into the South African legislative framework. Some of the criticisms are mentioned below.

Fox has criticised the position, in England and Wales, for providing insufficient protection for the individual occupiers in their homes, including single adults and cohabiting couples, regardless of gender, as the emphasis has been on the *family*. However, it may be noted that the interests of child occupiers of homes are required specifically to be taken into account both in section 15 of the TLATA and in section 335A of the Insolvency Act 1986. On the other hand, however, the provisions of the Insolvency Act 1986 do not require specific consideration of aged persons or ailing adults who occupy the home.[247] While the same criticisms do not arise in South Africa, with the focus thus far having been on the section 26 rights of the individual debtor, the criticisms of the English system do tend by contrast to underscore the lack of attention paid, in South Africa, to the debtor's family and other dependants. Thus far, no regard has been had for the rights of children who reside at the debtor's home. Whether the Constitutional Court's decision, in *Gundwana v Steko*, in terms of which a court must consider all the relevant circumstances before an order is made for the sale in execution of the "home of a *person*",[248] effectively requires that the interests of *all* occupiers of the home should be taken into account, requires enunciation.

Commentators on the English system question the validity of arguments that, if creditors' rights were curtailed by extending more effective remedies against possession and sale to home occupiers, lenders would simply not lend money and that this would adversely affect the availability of finance credit, capital investment and the property market. A contrary view has been expressed that the risk of default is inherent to the nature of the business of lending money and that creditors are in a position to protect their own interests.[249] Bearing in mind similar assumptions made in judgments, in South

[247] See 7.5.5.1.
[248] See 5.6.2.1, with reference to *Gundwana v Steko* pars 49 and 65.
[249] See 7.5.5.2.

African cases,[250] these remarks may also be pertinent, in the local context. It is also interesting to note that concerns raised, in the *Cork Report*, are similar to statements made by Mokgoro J in *Jaftha v Schoeman* in relation to a home exemption constituting a potential "poverty trap" and its implications for the mortgage industry, the property market, and the economy.[251] Evans advocates a policy of excluding "low value" homes from the reach of creditors and he suggests that the passing of mortgage bonds over "low value" homes, in order to access capital, should be prohibited.[252] It may be recalled that originally, in New Zealand, the Home Protection Act 1895, which provided protection against creditors' claims for a home that was "settled" upon a spouse, prohibited the settling of mortgaged homes although this prohibition was later modified in the Joint Family Homes Act 1950.[253] It may also be noted that, in Ireland, although consideration was given by the Irish Law Reform Commission to a "low equity" home exemption, it was not included in the draft Personal Insolvency Bill 2010 because the Law Reform Commission preferred to retain flexibility for appropriate arrangements to be made in the circumstances of each case.[254]

If such an exemption is considered for implementation in South Africa, valuable insights may be gleaned from the exemption applied in Manitoba, Canada, in terms of which a debtor's home may not be sold unless it has a prescribed minimum value.[255] One may also learn from the English experience, in relation to the restriction on the sale of a "low equity" home, imposed on the trustee in bankruptcy by section 313A of the Insolvency Act 1986, introduced by the Enterprise Act 2002. Bearing in mind criticisms that, set at £1000, the amount is too low, it would be useful to consider the method by which the prescribed level of equity was determined.[256] It would also be useful to monitor considerations that are taken into account in discussions and deliberations held on the

[250]See 7.5.5.2, with reference to *Jaftha v Schoeman* par 58, *Standard Bank v Saunderson* par 3, *ABSA v Murray* par 46, *FirstRand Bank v Seyffert* par 12 and *Standard Bank v Bekker* par 20.
[251]See 7.5.5.2, with reference to the *Cork Report* pars 20, 21, 24 and 25, and *Jaftha v Schoeman* par 51.
[252]See 5.6.6, with reference to *Standard Bank v Bekker* par 23 and *Jaftha v Schoeman* par 58, 6.6.3 and 7.5.5.2.
[253]See 7.4.1.
[254]See 7.7.3.
[255]See 7.3.2.
[256]See 7.5.3.3 (d)(ii).

proposed home exemption in Scotland.[257]

Tolmie suggests that a better balance between concern for the bankrupt's family and respect for the creditors' rights might have been achieved by exempting the bankrupt's home, under section 238(2) of the Insolvency Act 1986, thus rendering it subject to section 308, which would entitle the trustee to claim it if the value of the property exceeded the cost of a reasonable replacement. This is worthy of consideration. In England and Wales, uncertainty exists as to whether section 313A of the Insolvency Act 1986 has the effect of excluding a "low equity" home from the insolvent estate or, on the other hand, exempting it from sale for three years, after which it re-vests in the insolvent debtor.[258] It is submitted that, in light of this, the specific wording of any provision to be proposed for South Africa should be carefully considered, especially in light of Evans' criticism regarding the lack of an appropriate distinction between excluded and exempt property in our insolvency law.[259]

In South Africa, an issue that has arisen, since *ABSA v Ntsane*, is whether, where the mortgage deed includes an acceleration clause, it is the total amount outstanding or only the arrear amount which ought to be taken into account by a court when deciding whether to declare a person's mortgaged home specially executable.[260] The English solution to a similar dilemma was the enactment of section 8 of the Administration of Justice Act 1973. This section, read with section 36 of the Administration of Justice Act 1970, effectively allowed a court, in its discretion, to adjourn proceedings, to stay or suspend execution of any judgment or order, or to postpone the date for delivery of possession for a reasonable period to enable the mortgagor to clear the arrears or to sell the property.[261] In Canada, where an acceleration clause operates, upon the mortgagor's default, he may apply for a court order to stay foreclosure proceedings commenced by the mortgagee, provided he cures his default and pays arrears and applicable costs within a period specified by the court. Notably, in Nova Scotia, such

[257] See 7.6.4.
[258] See 7.5.3.3 (d) (ii) and (iii).
[259] See 6.6.1.
[260] See 5.6.3, with reference to *ABSA v Ntsane* pars 67-82 and *Nedbank v Fraser* pars 28-38.
[261] See 7.5.3.2 (a).

indulgence is afforded to the mortgagor only once.[262] It is submitted that the introduction of similar provisions in South Africa might pose a balanced solution to the problem without adversely affecting the interests of a mortgagee in the event of repeated defaults by the mortgagor, as occurred in *ABSA v Ntsane*.[263]

Another discernible similarity between contentious aspects of the position that have arisen in England and Wales and in South Africa, emerges from the approach of the court, in the English case of *Alliance and Leicester plc v Slayford*. The court held that it is not an abuse of process for a mortgagee, who is unable to exercise a power of sale in the ordinary debt enforcement process, to seek to place the debtor in bankruptcy. The rationale was that all creditors have the right to petition the court where they are owed an amount in excess of the statutory threshold, or a demand for payment has gone unpaid, and such petitions cannot be unreasonably denied.[264] This approach is apparently similar to that which has been adopted in South African law, as reflected in *Investec v Mutemeri*, *ABSA v Naidoo* and *FirstRand Bank v Evans*.[265]

However, it should also be borne in mind that the English Insolvency Act 1986 explicitly regulates the circumstances in which a creditor may bring bankruptcy proceedings in respect of a debtor who is subject to a confirmed IVA.[266] This strengthens the argument for the need, in South Africa, to regulate the relationship between the Insolvency Act and the NCA and the circumstances in which a creditor may apply for the sequestration of the estate of a debtor who is subject to debt review and debt rearrangement. It also tends to confirm that creating, within the applicable insolvency legislation, a debt relief mechanism involving a repayment plan, possibly along the lines of section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, would be more appropriate, from the perspective of both the debtor and the creditor, including a mortgagee.[267] It also supports the contention that, in the insolvency process, what

[262]See 7.3.3.
[263]See 5.5.2 and 7.5.5.2.
[264]See 7.5.5.2.
[265]See 6.10.
[266]See 7.5.3.3 (d) (iv).
[267]See 4.4.3.6, 4.7.4, 5.6.8, 6.4.3, 6.10.6 and 6.12.

should be required, before a trustee may sell the insolvent's home, is a level of specific judicial oversight, including consideration of "all the relevant circumstances", commensurate with that which is required in the individual debt enforcement process before a creditor, including a mortgagee, may execute against the debtor's home.

Parallels are discernible between England and Wales, and South Africa, in relation to constitutional considerations applicable to forced sale of a debtor's home by virtue of the application of the European Convention on Human Rights through the Human Rights Act 1998. Interestingly, the same reluctance may be detected in England and Wales, as in South Africa, to making decisive pronouncements on the applicability of constitutional property rights, provided by the First Protocol to the Convention, to the issue of forced sale of a debtor's home. Similar issues are apparent in each legal system, for example, in relation to the interpretation and application of provisions of the Insolvency Act 1986 in light of Article 8 of the Convention, which affords every person respect for his home and family life, and, in South Africa, the applicable statutory requirements in light of section 26 of the Constitution. Although the basis for protection is not identical, nevertheless there are useful lessons to be learnt from England and Wales and the decisions of the European Court of Human Rights in relation to recognition of a person's rights to a home, or accommodation.[268]

Given the well-established social security system of England and Wales, which provides housing for the needy,[269] there is an obvious point to postponing the sale of the debtor's home for a period, in order for the local authority to arrange appropriate accommodation for the family where the debtor cannot settle his debt.[270] A significant feature of the recently enacted Scottish legislation is that a creditor, a trustee of an insolvent estate and the trustee of an estate transferred in a trust deed are all obliged to serve notice on the local authority if they intend to bring an application for an order for the sale of a debtor's home. This is for timeous arrangements to be made, where necessary, for alternative accommodation for the debtor and other occupants. These provisions

[268]See 7.5.2 and 7.5.3.3 (c).
[269]See, 7.5.4.2.
[270]See, 7.5.3.3, with reference to *Re Haghighat*.

emphasise the stark realities of the lack of state funded housing support available, in South Africa, to a debtor and his family who are rendered homeless by the forced sale of their home.[271] This, it is submitted, reinforces the argument that, in principle, the personal circumstances and the accommodation needs of the debtor and other occupiers are highly relevant to a court's decision whether to declare their home executable. Further, a more systematic approach, with the explicit inclusion, in housing policies and programmes, of debtors and insolvent persons and their families and other dependants who lose their homes through forced sale, would go a long way to meeting the state's obligations as envisaged by the Constitutional Court in *Grootboom* and, more recently, in *Blue Moonlight Properties* (CC).[272] However, given limited state resources and the current shortcomings in housing delivery, realistically, the primary emphasis, in the context of this study, should therefore be on the forced sale of debtors' homes occurring only as a last resort, as envisaged in *Jaftha v Schoeman* and *Gundwana v Steko*.[273]

In this respect, commonality of purpose is evident in South Africa and in foreign jurisdictions. While developments abroad have occurred largely in response to mortgage foreclosure crises during the recent recessions, the substantive and procedural requirements, some of which have already been incorporated as part of national legislation, and the best practice guidelines serve as an excellent model for proper consideration of relevant circumstances before forced sale is sanctioned by a court. There is also ample precedent, in South African eviction cases, for "meaningful engagement" to be required.[274] It is therefore submitted that emulating selected practices, methods, processes and mechanisms employed in overseas systems, suitably modified, where necessary, for application in the local context,[275] may address inadequacies and needs in our system in order more effectively to achieve the balance sought between the competing interests of all concerned.

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[271]See 4.2.1.
[272]See 3.3.1.4 (c).
[273]See 5.2.3, 5.6.2.3 and 6.12, with reference to *Jaftha v Schoeman* par 59 and *Gundwana v Steko* pars 53-54.
[274]See 3.3.1.4 (d) and 5.7.
[275]See 7.1, with reference to Rajak "Culture of Bankruptcy" 25.

8.3 Proposals

Earlier in this chapter, during discussion of the *status quo*[276] and constitutional considerations relevant to the forced sale of a debtor's home,[277] the question was raised why legislation should be necessary. After all, thus far, all developments, from *Jaftha v Schoeman* onwards, have been court-driven. It may be posited that sections 7(2), 8(3) and 39 of the Constitution,[278] as well as section 172(1)(b) which empowers a court, when deciding a constitutional matter, to make any order that is just and equitable,[279] allow sufficient scope for the development by the courts of appropriate protection for a debtor who owns a home. This thesis has drawn attention to a number of disadvantages of, and problems that have arisen out of, the casuistic development of this area of the law thus far. They have been summarised in this chapter.

It is proposed that a variety of legislative reforms should be introduced in South Africa to make a "menu" of options available for appropriate application, depending on the particular facts and circumstances, where forced sale of a debtor's home is sought. The essence of these proposals lies in the recognition:

- that legal certainty and predictability are required in the interests of all concerned;
- that it is the duty of the legislature, and not the judiciary, to formulate policy in this regard;
- that it is the state's duty to achieve the objective of the nation having access to adequate housing, as set out by the Constitutional Court, in *Grootboom*; and
- of the need to establish a workable framework of substantive and procedural requirements, involving minimal cost to parties, occasioning as little burden as possible on court time, and providing mechanisms and processes which are accessible to the poor and indigent. This framework should be devised in order to give effect to the Constitutional Court's rulings, in *Jaftha v Schoeman* and

[276] See 8.1.
[277] See 8.2.2.
[278] See 3.2.1 and 3.2.2.
[279] See 3.3.1.4 (b) and 3.4.

Gundwana v Steko, that the forced sale of a debtor's home should take place only as a last resort and only where no reasonable alternative means exist for the creditor to obtain satisfaction of his debt.

The following legislative intervention is proposed in the individual debt enforcement process.

- *Mandatory pre-action mediation and settlement process*

  A mandatory mediation and settlement process should be introduced as a prerequisite in all matters where execution is sought against a debtor's home. This should be a streamlined, non-judicial process requiring parties to provide relevant, detailed information using a standard "check list", as suggested in Chapter 5,[280] and, where appropriate, sworn affidavits. This would facilitate the compilation of information regarding "all the relevant circumstances" and assist practitioners and other legal advisors, as well as the parties themselves, to appreciate the significance and purpose of providing specific information and properly to present their cases and possible defences. Meaningful engagement between the parties in an earnest endeavour to find alternative means by which the debt may be satisfied and to avoid execution against the debtor's home should be required.

  Should parties be unable to reach a settlement, the completed "check list" will serve as a useful and, it is submitted, necessary source of information for the court in the second, judicial stage of the process, to carry out a properly considered evaluation of "all the relevant circumstances" to determine whether execution against the debtor's home should be permitted. The legislation should provide for a simple, logically sequential process, guiding the court, while leaving its discretion intact, through evaluation of specific factors in order to establish whether execution would infringe any section 26, section 28, or other rights of affected persons and, thereafter, if applicable, whether any such infringement would be justifiable in the circumstances.[281] Essentially, this would involve balancing the respective parties'

[280] See 5.7.
[281] See 4.3.3, 4.5.2 and 4.5.3.

rights including debtors', and their families' and dependants', housing and other constitutional rights, creditors' commercial and security interests, as well as the broader community's economic interests, generally, and its interest in the extension of credit, as well as the enforcement of debt, generally, with proportionality being the key.

As mentioned above,[282] courts have not pronounced upon the implications of execution against a debtor's home for other constitutional rights such as, for example, property rights of the debtor and creditor and children's rights. It is suggested that further research and specific analysis be conducted with a view to formulating appropriate legislative provisions and guidance for judicial officers in this regard.

- *Postponement of execution against debtor's home*

  It is open to the court to postpone execution against a person's home by relying on section 172(1)(b) of the Constitution.[283] However, despite this, it is proposed that the court should specifically be empowered in its discretion to postpone execution against a debtor's home. Legislation should guide the court by drawing its attention to specific circumstances in which this might be appropriate, such as, for example, where there is a need to acquire additional information, or where there is a reasonable possibility that the debt, or arrear amounts owing, might yet be paid.[284] Specific provision should be made, as in English law and Canadian law discussed above,[285] for postponement, where operation of an acceleration clause has rendered a debtor's home susceptible to execution by the creditor, in order to grant the debtor an opportunity to remedy his default and retain his home. Specific provision should also be made for the court to postpone execution against the home where this is unavoidable but where, in light of the personal circumstances of the debtor and his dependants, a period of grace should be afforded to them for alternative

[282] See 8.2.2.
[283] See 3.3.1.4 (b) and 3.4.
[284] See 5.3.2.3, with reference to *FirstRand Bank v Mashiya* par 52, and 3.3.1.4 (b), with reference to *Standard Bank v Saunderson* par 20, and 5.7.
[285] See 8.2.7, with reference to 7.3.3 and 7.5.3.2 (a).

accommodation arrangements to be made.[286]

- *A more effective statutory debt rearrangement mechanism*

  It is proposed that the NCA should be amended to clarify the relationship between it and the Insolvency Act and, more specifically, to preclude sequestration of the estate of a debtor who has applied for debt review as well as a debtor who is complying with a debt rearrangement plan confirmed in terms of the NCA. Appropriate amendments should also be effected to the NCA so that a magistrate's court should not be entitled, as is presently the position, to modify the obligations existing between debtors and secured creditors, including a mortgagee, in the absence of reckless lending on the part of the latter.[287]

  It is also recommended that the Insolvency Act should be amended to include a debt rearrangement process, similar to debt repayment plans that are available in foreign jurisdictions. Consideration might be given to a mechanism along the lines of the section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill. Such mechanism should be specifically devised to offer a workable alternative, where appropriate, to the forced sale of a debtor's home, and the sequestration of an insolvent debtor's estate. This proposal is also discussed, below, in relation to proposals for legislative intervention in the insolvency process.

- *Provision of housing for indigent debtors*

  Provision should be made for a court order to include, where appropriate, a direction that an indigent debtor and his family should be provided with emergency, or temporary, state, or municipal housing pending more permanent accommodation arrangements being made, or access into a formal housing programme.[288] This should occur where the court, having considered all the relevant circumstances, determines that execution cannot be avoided, as no reasonable alternative exists,

[286]See 5.5.2.2, with reference to *ABSA v Ntsane* pars 69, 84 and 97, and 5.5.4.3, with reference to *FirstRand Bank v Maleke* par 8, and 5.7.
[287]See 6.10.3, 6.10.6 and 6.12.
[288]See 3.3.1.4 (c), 6.3.2, and 6.6.3.

and that the circumstances of the debtor and his family are such that execution will render them homeless and that they are "desperately poor and …in a crisis".[289] It is submitted that this would be in line with the state's duty, as recognised by the Constitutional Court, in *Grootboom*, to provide persons with access to adequate housing, and in line with the reasoning in *Blue Moonlight Properties* (CC). While it is acknowledged that this raises further, complex issues, given the shortfall in delivery of housing by the state, thus far,[290] it is submitted that there would be no sense in delaying addressing the impending homelessness of the debtor until the eviction stage. A new provision would necessitate amendment to definitions in existing legislation and regulations and other documents, such as, for example, the National Housing Code,[291] and the interface between it and PIE[292] would have to be spelt out explicitly.

- *Exemption from sale in execution of "low value" and state-subsidised homes*
  Finally, despite the rejection in *Jaftha v Schoeman* of the notion of a so-called "blanket exemption" and criticisms of it in *Standard Bank v Bekker*, it is proposed that earnest consideration should be given to introducing a limited, statutory home exemption to prohibit the sale in execution of homes of "low value" and state-subsidised homes.[293] The purpose would be to avoid execution of such homes rendering persons homeless and consequently imposing an additional burden on the state with regard to the provision of housing. It is acknowledged that this would be a major, and probably controversial, reform, with significant implications, and that this issue will need to receive thorough consideration with in-depth research having to be conducted before its possible introduction. It is suggested that, ideally, consideration of this type of home exemption should form part of comprehensive analysis of exemptions and the formulation of a coherent exemptions policy as advocated, notably, by Evans.[294] Analysis would have to be carried out with regard to an

[289] See 3.3.1.4 (c) and 3.3.5, with reference to *Blue Moonlight Properties* (SCA) par 59, and 6.3.2.
[290] See 4.2.3.
[291] See 3.3.1.4 (c) and 4.2.1, with reference to *Blue Moonlight Properties* (CC) par 47.
[292] See 3.3.1.4 (b).
[293] See 4.4.2, 5.6.8, 5.7, 6.6.3, 6.11 and 6.12.
[294] See 3.3.1.1, 4.2.2, 4.4.3.4, 5.2.3, 5.6.8, 6.6 and 6.11.

appropriate value to be set and, in the case of a state-subsidised home, whether the state ought to be reimbursed the amount of the subsidy investment. Any necessary adjustments to currently proposed amendments to section 10A and 10B of the Housing Act would also need to be reconsidered.[295] Consideration of the introduction of such an exemption should include specific comparative research into home exemptions, as discussed in Chapter 7.

The following legislative intervention is proposed in the insolvency process.

- *Specific judicial evaluation of insolvent's housing position*

  It is proposed that statutory provisions should require a court, specifically and invariably, without any need for any person to raise the issue, to address and evaluate the housing position of the insolvent and his family and dependants. Ideally, this should occur before a sequestration order is granted but, if insufficient information is available to the court at that early stage, it should occur thereafter, as long as it happens before the trustee's realisation of the insolvent's home.[296]

  As in the individual debt enforcement process, the purpose of the required judicial scrutiny would be to discern and identify any abuse of process and to ascertain whether realisation of the insolvent's home by the trustee will constitute an unjustifiable infringement of his and his family members' and dependants' rights to have access to adequate housing and other rights. The relevant rights and interests of any children would also need to be addressed. More specifically, the purpose would be to determine whether, in the circumstances, any reasonable alternative to the liquidation of the debtor's estate exists, or any other appropriate means is indicated whereby the loss of their home might be averted. Thus, the object of the judicial evaluation should be not only to prevent the insolvent and his dependants from being rendered homeless as a consequence of sequestration, but also to support a policy, as reflected in the individual debt enforcement process, that realisation of his home should occur only as a last resort, where no reasonable

[295]See 4.2.2, 5.6.8 and 8.2.1.
[296]See 6.3, 6.6.3, 6.11 and 6.12.

alternative exists.[297] It may be noted that a proposal for such policy to be extended to, and applicable in, the insolvency process, is predicated not only upon the circumstances of the insolvent being such that he has the capacity ultimately to fulfil the terms of any alternative arrangement, but also upon the legal system's provision of effective and workable alternatives to sequestration. Some suggestions follow.

- *Debt repayment plan*

  As discussed in Chapter 6, for the NCA's debt review and rearrangement process to become a more effective and satisfactory tool for saving the debtor's home, it should be amended in a number of respects. These include prohibiting a court from being able to restructure an obligation to a secured creditor and regulating the relationship between the NCA and the Insolvency Act, barring sequestration applications in appropriate circumstances.[298]

  Further, as already mentioned above, in relation to the individual debt enforcement process, it is proposed that the Insolvency Act should be amended by introducing an additional statutory consumer debt relief mechanism, providing for a debt repayment plan. Such mechanism should be specifically devised to accommodate arrangements between debtors and creditors that avert the forced sale of the debtor's home. What is proposed is a debt repayment plan that leaves secured creditors' rights intact and, by being located within the applicable insolvency statute, allows for regulated, but streamlined, mobility between the alternative options of sequestration, on the one hand, and a debt repayment plan, on the other, where circumstances require it. Such proposed statutory provision should specifically preclude the bringing of an application for sequestration, with the consequent liquidation of a debtor's assets, while he is subject to, and is complying with the confirmed terms of, a debt repayment plan, unless this occurs with the express permission of the court.[299]

[297] See 6.11 and 6.12.
[298] See 6.10.3, 6.10.4, 6.10.5, 6.10.6, 6.11 and 6.12.
[299] See 6.10.6, 6.11 and 6.12.

As also mentioned above, such a mechanism might be devised along the lines of the proposed pre-liquidation composition procedure, as reflected in section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill.[300] This would however, require appropriate modification to render it more effective as an appropriate tool for averting the forced sale of a debtor's home. Attention would also need to be given to addressing the debate surrounding, and criticisms which were levelled at, an earlier version of it, as reflected in the South African Law Reform Commission's then proposed section 74X of the Magistrates' Courts Act, published as an appendix to the Draft Insolvency Bill, in 2000.[301]

It is envisaged that the proposed required judicial evaluation of the insolvent's, and his dependants', housing position would provide a convenient opportunity for the court to determine whether the liquidation process, or the proposed composition process, or repayment plan, should be adopted. It may be noted that this ties in with insights expressed and recommendations made by Boraine and Roestoff more than a decade ago in relation to the proposed section 74X of the Magistrates' Courts Act. Such a provision would also accord with internationally recognised consumer debt relief principles and policies.[302] In the circumstances, it is proposed that a worthwhile study would be one dedicated to the formulation of an optimally effective version of the pre-liquidation composition, reflected as section 118 in the unofficial working draft of a proposed Insolvency and Business Recovery Bill, for inclusion into South African insolvency legislation. It is submitted that this should be encouraged as necessary future research to be conducted in this field.

- *Postponement of realisation of the home by the trustee*

  It is proposed that a court should be expressly empowered to postpone an application for sequestration for proper consideration of any suitable alternatives to liquidation of the debtor's estate. It is also proposed that a court should be expressly empowered, in its discretion, where it deems it just and equitable, to order the

[300] See 4.4.3.6, 4.7.4, 5.6.8, 6.4.3, 6.10.6 and 6.11.
[301] See 6.10.6.
[302] See 6.10.6.

postponement of the realisation of the insolvent's home for a limited period. This might occur, for example, to allow the insolvent to arrange for the refinancing of the home, or to make alternative accommodation arrangements for himself and his dependants. This might also occur in circumstances where an alternative consumer debt relief process, such as debt rearrangement under the NCA or one along the lines of the proposed pre-liquidation composition process, is *not* indicated as being appropriate. This would also be appropriate, for example, where children, or the elderly, or persons of poor health will be affected by the realisation of the home by the trustee.[303] It may be noted, in this regard, that some overseas jurisdictions permit postponement of realisation of the home, in appropriate circumstances, initially, for a period of up to one year, subject thereafter to evaluation and a possible further extension of time. In Scotland, this period was recently extended to three years.[304]

- *Provision of housing for indigent insolvent and his dependants*
  As was proposed in relation to the individual debt enforcement process, special provision should be made for circumstances in which the liquidation of an insolvent debtor's assets, including his home, cannot be avoided. This would be where the debtor and his family, who will be rendered homeless, are "desperately poor and …in a crisis". The court should be empowered, where appropriate, to direct that an indigent insolvent debtor and his dependants should be provided with emergency or temporary state-funded housing, pending more permanent accommodation arrangements being made, or access into a formal housing programme.[305]

- *Similar exemptions to those applicable in the individual debt enforcement process*
  It is proposed that, if exemptions from sale in execution of "low value" and state-subsidised homes are introduced into the individual debt enforcement process, then provisions having the equivalent effect should be introduced into the insolvency process. An alternative that might also be considered is for a capped amount of the proceeds of the sale of such a home to be exempted. This might allow for a portion

[303]See 6.3 and 6.11.
[304]See 7.1, 7.5.3.3 (a), (b), and (c), and 7.6.3.1.
[305]See 3.3.1.4 (c), 6.3.2, and 6.6.3.

of any equity held by the debtor to be paid to him for application towards obtaining alternative accommodation. A portion of the proceeds could also be transferred to the state, as reimbursement of any subsidy investment originally made.[306] As mentioned, above, in relation to the individual debt enforcement process, any consideration of an exemption of "low value" and state-subsidised homes would require the proposed amendments to section 10A and 10B of the Housing Act to be reconsidered.[307] In the process, consideration might also be given to whether it would be appropriate, even where moderately valued homes are concerned, to allow a portion of any equity in the home to be reserved for the insolvent.[308]

- *Repeal of section 21 of the Insolvency Act*
  Finally, it is recommended that section 21 of the Insolvency Act should be repealed but not replaced with a provision such as clause 22A of the Draft Insolvency Bill of 2000, or section 25 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill, compiled in 2010. The position in relation to the effect of sequestration on the property of the solvent spouse should be fully interrogated, taking into account constitutional imperatives and applying proper policies, as advocated by Evans, which are applicable to, and appropriate for, our modern society.[309]

It is suggested that the enactment of appropriate legislation would create a more coherent contextual framework within which the forced sale of a debtor's home may occur, in both the individual debt enforcement and in the insolvency processes. Legislative amendments, and the introduction of new statutory provisions, should also be directed at establishing effective debt relief mechanisms, as alternatives to the sequestration, or liquidation, process, to constitute reasonable means by which a debtor may satisfy his obligations without necessarily losing his home, in appropriate cases. Establishing viable alternatives to sequestration will facilitate the achievement of the

[306] See 6.6.3 and 6.11.
[307] See 3.3.1.1, 4.2.3, 4.4.3.4, 4.7.1, 5.2.3, 5.6.8, 6.6 and 6.11.
[308] See 6.6.1, 6.6.3 and 6.11.
[309] See 6.7 and 6.12.

position, as envisaged by the Constitutional Court in *Jaftha v Schoeman* and *Gundwana v Steko*, in which forced sale of a debtor's home will indeed occur only as a last resort.

Janus, the Roman spirit of the door,[310] is traditionally depicted as having two faces in order that he might simultaneously guard the home against intrusion from without as well as watch over and protect members of the household within. Casting our eyes abroad, we note that the European Commission services concluded, with regard to forced sale of a debtor's home, that:[311]

> … common sense and humanity should always prevail at all levels … and throughout the whole procedure. In particular, the full economic and social situation of the defaulting borrower should be taken into account, and the implications of a given repossession should be carefully assessed, notably when a primary residence is at stake. For example, losing the family home after having lost one's job has intolerable social and human implications for both borrowers and their families. In these critical economic times our society must put the human dimension at its very heart.

As we return our gaze homewards, we are reminded of the constitutional imperative to "infuse elements of grace and compassion into the formal structures of the law" and the spirit of *ubuntu* is brought home to us as a vital key to the building of our nation.[312]

[310]See 2.2.6.
[311]See 7.8.
[312]See 3.2.2 and 3.3.1.4 (d), both with reference to *Port Elizabeth Municipality* par 37.

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Mortgage pre-action protocol checklist

Name of court	Claim no.
Name of claimant	
Name of defendant	
Mortgage account number	

You must produce two copies of the Checklist on the day of the hearing.

Checklist

1. Is the possession claim within the scope of the Protocol? ☐ Yes ☐ No

2. Have you provided the defendant with the information/notice in the Protocol —

   (a) paragraph 5.1(1) ☐ Yes ☐ No If Yes, date provided: ☐☐/☐☐/☐☐☐☐

   (b) paragraph 5.1(2) ☐ Yes ☐ No If Yes, date provided: ☐☐/☐☐/☐☐☐☐

   (c) paragraph 5.7 ☐ Yes ☐ No If Yes, date of notice: ☐☐/☐☐/☐☐☐☐

3. Do you have evidence that the defendant has made a claim for —

   - Support for Mortgage Interest (SMI) ☐ Yes ☐ No
   - Mortgage Rescue Scheme (MRS), or ☐ Yes ☐ No
   - mortgage payment protection. ☐ Yes ☐ No

   If Yes, please explain why possession proceedings are continuing.

4. Is there an unresolved complaint by the defendant to the Financial Ombudsman Service that could justify postponing the possession claim? ☐ Yes ☐ No

   If Yes, please explain why possession proceedings are continuing.

5. Summarise the number and dates, in the three months prior to the date of this checklist, you attempted to discuss with the defendant ways of repaying the arrears.

6. In the three months prior to the date of this checklist have you rejected any proposals by the defendant to change the date or method of regular payments? ☐ Yes ☐ No

   If Yes, did you respond in accordance with paragraph 5.4 of the Protocol? ☐ Yes ☐ No

   If No, please explain why.

7. Have you rejected a proposal for repayment by the defendant in the three months prior to the date of this checklist? ☐ Yes ☐ No

   If Yes, have you responded in accordance with paragraph 5.5 of the Protocol? ☐ Yes ☐ No

   If No, please explain why.

8. Has the defendant indicated that the property will be or is being sold? ☐ Yes ☐ No

   If Yes, explain why possession proceedings are proceeding.

Statement of Truth

*I believe that the facts stated in this Checklist are true.

*I am duly authorised by the claimant to sign this statement.

Signed _____ Date _____

Full name

Name of claimant's solicitor's firm

Position or office held

*Delete as appropriate

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Guidance for the mortgage pre-action protocol checklist

The Checklist

This guidance is provided for those using the new Mortgage Pre-Action Protocol Checklist. Use of the Checklist came into effect on 1 October 2009 for all claims issued on or after that date in order to provide a uniform format for the provision of information to demonstrate compliance with the Protocol.

This guide must be read with the Mortgage Pre-Action Protocol, the Civil Procedure Rules and Practice Direction 55.

The Checklist (form N123), must be completed by all claimants (lenders) or their representatives making a possession claim. The claimant or their representative should be able to explain to the court the actions taken or not by the claimant, and the reason for issuing a possession claim.

Once the claimant and defendant (borrower) have been notified by the court of the date of the hearing, a Checklist must be completed indicating the action taken by the claimant within the previous three months to reach an agreement with the defendant, and comply with the Protocol.

The claimant must present two copies of the Checklist on the day of the hearing. No additional documents are necessary unless an issue arises.

Claimants can copy this form onto their systems but the form must not go beyond two sides.

Scope

The following mortgages fall within the scope of the Protocol and Checklist –

(i) first charge residential mortgages and home purchase plans regulated by the Financial Services Authority under the Financial Services and Markets Act 2000;

(ii) second charge mortgages over residential property and other secured loans regulated under the Consumer Credit Act 1974 on residential property; and

(iii) unregulated residential mortgages.

Where a potential claim includes a money claim and a claim for possession, these are also within scope.

Q1 – requires confirmation of the type of mortgage and whether it is within scope of the Protocol as indicated above. If the answer is No, there is no need to compete the rest of the form. However, you must be prepared to explain to the court why you consider that the mortgage does not fall within the scope of the Protocol.

If the answer to Q1 is Yes, all the remaining questions must be answered in full.

Q2 – answer the questions Yes or No, as appropriate, and insert the dates where relevant. Where you have not complied with one or more of these requirements, you must be prepared to explain to the court in full why that is the case.

Q3 – answer the questions Yes or No, as appropriate. Where a claim, either for Support for Mortgage Interest (SMI), Mortgage Rescue Scheme (MRS) or under a mortgage payment protection policy, has been made, you must set out clearly and succinctly why you are proceeding with a claim for possession.

Q4 – answer the question Yes or No, as appropriate. If the defendant has an unresolved complaint you must set out clearly and succinctly why you are proceeding with a claim for possession.

Q5 – you should provide here a list of dates and details of the associated media (for example, letter, telephone, etc). Where use has been made of automated diallers, which do not necessarily keep an individual record of each attempted call, you should confirm the number of attempts and frequency that your system is programmed to make.

Q6 – answer the question Yes or No, as appropriate. Where you have answered:

- No, then no further information is required.
- Yes, you must also confirm whether or not you have complied with the requirements of paragraph 5.4 of the Protocol when notifying the defendant of your decision. If the answer to that question is:
    - Yes – then no further information is required on the Checklist but you must be prepared to explain to the court what action you took if requested to do so.
    - No – you should set out your reasons for non-compliance clearly and succinctly.

Q7 – answer the question Yes or No, as appropriate. Where you have answered:

- No, then no further information is required.
- Yes, you must also confirm whether or not you have complied with the requirements of paragraph 5.5 of the protocol when notifying the defendant of your decision. If the answer to that question is:
    - Yes – then no further information is required on the Checklist but you must be prepared to explain to the court what action you took if requested to do so.
    - No – you should set out your reasons for non-compliance clearly and succinctly.

Q8 – answer the question Yes or No, as appropriate. Where the defendant is trying to sell their property you need to explain clearly and succinctly why you are bringing proceedings including, specifically, whether or not the defendant has complied with the requirements of paragraphs 6.2 and 6.3 of the Protocol.

The statement of truth

The statement of truth must be signed and completed by the claimant or representative. This section must be completed in order to validate the information provided.

Service of the Checklist

Two copies of the Checklist must be brought to the hearing.

BIBLIOGRAPHY

ABBREVIATIONS

AHRLJ	African Human Rights Law Journal
ABI Jnl	American Bankruptcy Institute Journal
ABI L Rev	American Bankruptcy Institute Law Review
ABA Jnl	American Bar Association Journal
AL & Ec Rev	American Law and Economics Review
AmULRev	American University Law Review
AS	Annual Survey of South African Law
Ariz L Rev	Arizona Law Review
Boston BJ	Boston Bar Journal
Buff Hum Rights L Rev	Buffalo Human Rights Law Review
Camb LJ	Cambridge Law Journal
Can Bus LJ	Canadian Business Law Journal
Cap Univ L Rev	Capital University Law Review
CBA Record	Chicago Bar Association Record
Col JL& Soc Probs	Columbia Journal of Law and Social Problems
Colum L Rev	Columbia Law Review
Common L World Rev	Common Law World Review
CILSA	Comparative & International Law Journal of Southern Africa
Consumer Fin LQ Rep	Consumer Finance Law Quarterly Report
Conv & Prop Law	Conveyancer and Property Lawyer
Denning LJ	Denning Law Journal
ESR Rev	Economic and Social Rights in South Africa Review
EHRLR	European Human Rights Law Review
Fundamina	Fundamina: A Journal of Legal History
Geo J Pov L & Policy	Georgetown Journal on Poverty Law and Policy
Insolv Intell	Insolvency Intelligence
Insolv Lawr	Insolvency Lawyer
Int Co Comm LR	International Company and Commercial Law Review
Int Insolv Rev	International Insolvency Review
Iowa LR	Iowa Law Review
J Am Hist	Journal of American History
JBL	Journal of Business Law (Juta Cape Town South Africa)
J Bus L	Journal of Business Law (Sweet & Maxwell England)
J Civ Rights & Ec Dev	Journal of Civil Rights & Economic Development
J Corp L Studies	Journal of Corporate Law Studies
JIBFL	Journal of International Banking and Financial Law
JIBL	Journal of International Banking Law
J Int Bus L	Journal of International Business Law
J L & Soc	Journal of Law & Society
J Leg Studs	Journal of Legal Studies

J Rom Studs	Journal of Roman Studies
J Soc Hist	Journal of Social History
J S Pacific L	Journal of South Pacific Law
JBL	Juta's Business Law
J Bus L	Journal of Business Law
JQR	Juta's Quarterly Review
L Hist Rev	Law and History Review (Stanford School of Law)
Law Dem Dev	Law, Democracy & Development
LQR	Law Quarterly Review
Leg Hist Rev	Legal & History Review
Loy J Pub Interest L	Loyola Journal of Public Interest Law
MB	Modern Business Law
Nev LJ	Nevada Law Journal
NLJ	New Law Journal
NYUL Rev	New York University Law Review
NZLR	New Zealand Law Review
NC Bank Inst	North Carolina Banking Institute
NILQ	Northern Ireland Law Quarterly Review
Notre Dame L Rev	Notre Dame Law Review
Osg Hall LJ	Osgoode Hall Law Journal
Ox J L Studs	Oxford Journal of Legal Studies
Pace L Rev	Pace Law Review
PELJ	Potchefstroom Electronic Law Journal
PCB	Private Client Business
Rev Litig	Review of Litigation
Rutgers L Rev	Rutgers Law Review
Santa Clara L Rev	Santa Clara Law Review
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
SAPL	South African Public Law
S M U Sch L	Southern Methodist University School of Law
Sw Hist Q	Southwestern Historical Quarterly
Stell LR	Stellenbosch Law Review
Suffolk U L Rev	Suffolk University Law Review
Temp L Rev	Temple Law Review
Tex L Rev	Texas Law Review
Tul L Rev	Tulane Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir Suid-Afrikaanse Reg
U Colo L Rev	University of Colorado Law Review
U Penn L Rev	University of Pennsylvania Law Review
Utah L Rev	Utah Law Review
Wisc L Rev	Wisconsin Law Review

EU	European Union
EC	European Communities
UNCITRAL	United Nations Commission on International Trade Law

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