Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act

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DECLARATION

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

Reghard Brits, December 2012, Stellenbosch

SUMMARY

The forced transfer of immovable property to enforce judgment debts by way of sale in execution has constitutional implications. Firstly, if the property is residential, section 26 of the Constitution (the housing clause) raises the question whether the current legal framework takes sufficient account of the imperative to respect people's access to adequate housing. Read with section 36 (the limitation clause), the requirement is that someone's home may only be violated if the result is proportionate based on all the relevant circumstances. Secondly, since the home qualifies as "property" for purposes of the section 25 (the property clause), the law that regulates this forced sale may not permit the arbitrary deprivation of property. In other words, it is necessary to also investigate whether the sale in execution of debtors' property satisfies the section 25(1) non-arbitrariness test.

Therefore, the research problem that this dissertation addresses revolves around the implications of sections 25 and 26 of the Constitution for the "normal" sale-in-execution process. More specifically, the scope of the investigation is limited to forced transfers of residential property as a result of mortgage foreclosure. What makes this perspective interesting is that, in addition to the debtor's constitutional rights, the creditor also enjoys constitutional protection by virtue of the limited real right (the mortgage) that is registered over the debtor's home. This real security right is also "property" that is worthy of recognition under section 25. To the extent that the National Credit Act places obstacles in the way of creditors' right to enforce their debts, this interference may also amount to a deprivation of property, which must satisfy the requirements of the property clause.

This dissertation shows that the traditional common law framework of mortgage foreclosure does not give full effect to debtors' sections 25 and 26 rights. Nevertheless, based on the subsidiarity principles, I argue that a development of the common law or the creation of unique constitutional defences is not called for. The reason for this submission is that the debt relief mechanisms of the National Credit Act already provide constitutionally appropriate relief for debtors who face the loss of their properties. The available mechanisms – including debt review, debt rearrangement and the right to reinstate credit agreements – are aimed at resolving the root of mortgage foreclosure, namely over-indebtedness. This approach will ensure that mortgage foreclosures have a constitutionally valid and proportionate effect on the rights of both parties to the mortgage relationship.

OPSOMMING

Die afdwinging van vonnisskulde by wyse van die verkoop in eksekusie van onroerende eiendom is ’n gedwonge oordrag van eiendom met grondwetlike implikasies. Eerstens, waar die eiendom residensieël is, verg artikel 26 van die Grondwet (die behuisingsklousule) dat die huidige regsraamwerk voldoende rekenskap sal gee van die opdrag om mense se toegang tot geskikte behuising te respekteer. Saamgelees met artikel 36 (die beperkingsklousule), mag daar slegs op iemand se reg van toegang tot behuising inbreuk gemaak word indien die impak regverdigbaar is met inagneming van al die relevante omstandighede. Tweedens, aangesien die huis kwalifiseer as “eiendom” vir doeleindes van artikel 25 (die eiendomsklousule), mag die regsreëls wat eksekusieverkope reguleer nie arbitrêre ontnemings van eiendom toelaat nie. Met ander woorde, dit is nodig om ondersoek in te stel of die verkoop in eksekusie van skuldenaars se wonings aan artikel 25(1) se nie-arbitrêrheidstoets voldoen.

Die navorsingsprobleem behels dus die implikasies van artikels 25 en 26 van die Grondwet vir die “normale” verkoop-in-eksekusie proses. Die omvang van die ondersoek is spesifiek beperk tot oordragte van residensiële eiendom as gevolg van die oproep van verbande. Wat hierdie perspektief verder interessant maak, tesame met die feit dat skuldenaars grondwetlike regte het, is die feit dat skuldeisers ook grondwetlike beskerming geniet ten aansien van die beperkte saaklike reg (die verband) wat geregistreer is oor die skuldenaar se huis. Hierdie saaklike sekerheidsreg is ook “eiendom” wat erkenning verdien in terme van artikel 25. Vir sover as wat skuldeisers se vermoë om hul skulde af te dwing deur die Nasionale Kredietwet aan bande gelê word, mag hierdie beperkinge moontlik ook op ’n ontneming van eiendom neerkom. Gevolglik moet hierdie skuldverligtingsmeganismes ook aan die vereistes van die eiendomsklousule voldoen.

Hierdie proefskrif wys daarop dat die tradisionele gemeenregtelike raamwerk vir die oproep van verbande nie ten volle effek gee aan skuldenaars se regte onder artikels 25 en 26 nie. Nietemin, met beroep op die subsidiariteitsbeginsels argumenteer ek dat ’n ontwikkeling van die gemenereg of die skep van unieke grondwetlike remedies nie in hierdie konteks toelaatbaar is nie. Die rede hiervoor is dat die Nasionale Kredietwet se skuldverligtingsmeganismes reeds voorsiening maak vir grondwetlik aanvaarbare verligting vir skuldenaars wat deur die moontlike verlies van hul eiendomme in die gesig gestaar word. Die beskikbare maatreëls – insluitend skuldhersiening, skuldherstrukturering en die reg om

kredietooreenkomste te laat herleef – is gemik daarop om die oorsaak van verbandoproeping aan te spreek, naamlik oorverskuldigdheid. Hierdie benadering sal verseker dat die oproep van verbande ’n grondwetlik geldige en proporsionele effek op die regte van beide partye het.

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I end with a quote from the Holy Bible that perfectly describes my experience during the last couple of years – a truth that will certainly apply in future as well:

> "But by the grace of God I am what I am: and his grace which *was bestowed* upon me was not in vain; but I laboured more abundantly than they all: yet not I, but the grace of God which was with me."
>
> – 1 Corinthians 15:10 (King James Version)

I dedicate this dissertation to my grandmother, Annie Pool (29.12.1933-18.08.2012).

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CHAPTER 1
INTRODUCTION

1 1 Research problem

The calling up (or foreclosure) of mortgage bonds and the ensuing sale in execution of hypothecated immovable properties seems to be a normal every-day procedure for the enforcement of mortgage debt. This apparent normality started to change when the Constitutional Court ("CC") in 2004 delivered a judgment that would forever alter the way we think about the forced sale of homes. The underlying basis for these developments had actually been present since the Constitution of the Republic of South Africa 1996 ("the Constitution") was adopted with both a housing and property clause entrenched in the Bill of Rights.

In the seminal case of *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*[1] ("*Jaftha*") the CC conclusively held that section 26(1) of the Constitution ("Everyone has the right to have access to adequate housing.") also has negative effect and binds private parties as well. That is, when a person is in occupation of "adequate housing", such person may only be deprived of that housing in line with section 36 – the Constitution's limitation clause. Although the CC previously established the negative effect of section 26(1),[2] *Jaftha* confirmed that this principle also applies to cases where homes are lost due to debt enforcement. Although the case was not decided on the property clause (section 25), the CC acknowledged that this clause could add another dimension to the issue. The case specifically dealt with a constitutionally problematic element of section 66(1)(a) of the Magistrates' Courts Act 32 of 1944 ("MCA"). Clerks of the magistrates' courts were previously authorised to issue warrants of execution against residential property in circumstances where the sheriff issued a *nulla bona* return, indicating that there is no or insufficient movables available to satisfy the judgment debt. In other words, in cases falling within the magistrates' courts' jurisdiction, homes could – under default circumstances – be sold in execution without a magistrate evaluating whether it would be justifiable to do so. The procedure made it possible

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1 2005 2 SA 140 (CC), discussed in 3 2 2 below.

2 *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 5 SA 721 (CC) para 46; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) para 34; *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) para 78.

for unscrupulous creditors to abuse the system and to violate debtors' section 26(1) rights without there being judicial scrutiny of the outcome. The CC acknowledged that debt enforcement is generally capable of being a proper justification for having a debtor's home sold, but that the result must be proportionate in terms of the Constitution's limitation clause (section 36). To ensure that unjustifiable violations of section 26(1) would not occur in future, the court found it appropriate to read words into section 66(1)(a) of the MCA, to the effect that only a magistrate (and no longer a clerk) can henceforth issue a warrant of execution in these circumstances. Moreover, the order may only be granted after all the relevant circumstances had been taken into account.

Even though the facts of *Jaftha* concerned the enforcement of insignificant, unsecured debts against homes, the CC implied that the same principle should apply in mortgage cases. In its discussion of possible factors that magistrates should take into account, the CC explained that the sale of homes due to mortgage foreclosure should usually go ahead, unless there was abuse of the process present or if there are alternative ways available to settle the debt. Therefore, it seemed rather clear that a proportionality test is apposite also in mortgage cases that implicate section 26(1) of the Constitution, but that the trite principles of mortgage law and creditors' proprietary rights would undoubtedly also play a big role. However, subsequent courts were not immediately comfortable with the prospect that housing rights should be relevant in "normal" foreclosure cases as well. In 2005 the Supreme Court of Appeal ("SCA") denied the argument that registrars of the high courts should also (like clerks of the magistrates' courts post-*Jaftha*) no longer be able to authorise the execution of mortgaged homes.[3] The court did acknowledge that if section 26(1) rights were indeed impacted (which fact had to be convincingly alleged in each case), a judge – and not the registrar – had to hear the case. Nevertheless, the SCA seemed sceptic of the possibility that section 26(1) could ever prevent the sale in execution of a mortgaged home, save for the abuse-of-process qualification.

The facts of a couple of ensuing high court cases showed that the SCA's scepticism was misplaced. For example, a problematic case arose where the creditor brought an application for sale in execution of a mortgaged home under circumstances where the amount outstanding was only R18,46.[4] Although the technical common law principles of mortgage law entitled the creditor to accelerate the outstanding debt and claim execution even for a

[3] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA), discussed in 3 2 3 2 below.

[4] *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T), discussed in 4 4 3 2 below.

minute default like this, the court refused to allow this state of affairs. In another case, the high court conducted a proportionality-type balancing of the interests of certain historically disadvantaged mortgage debtors and their bank.[5] The conclusion in this case was that a sale in execution would lead to a prejudice for the debtors and a benefit for the bank that would be disproportionate. The court suggested that a restructuring of the debt could easily have avoided the problem in a manner that would be reasonable for both parties to the dispute. Section 26 of the Constitution played a clear role in these courts' reasoning and it became patent that the previous SCA judgment did not contemplate that such situations might occur, which necessitated a greater scope for section 26, also in foreclosure cases. These cases also seemed to indicate a need to develop the common law of mortgage foreclosure.

The SCA's position with regard to the power of registrars was overturned eventually, albeit around five years after *Jaftha*. In late 2010 the High Court Rules ("HCR") were amended to bring them into line with the CC's modification of the MCA. The same principle therefore now applies to the execution procedure in high courts, namely that a judge (and not the registrar) must authorise the sale in execution of a judgment debtor's primary residence and only after all the relevant circumstances was considered.[6] A couple of months later, in 2011, the CC delivered another judgment on the issue in which it confirmed the approach of the amended HCR and found that the previous high court process was unconstitutional to the extent that it allowed registrars to authorise execution against homes.[7] Accordingly, the court verified that its earlier decision in *Jaftha* also applies in the context of mortgage bonds and that judicial oversight over the residential sale-in-execution process was not limited to the kind of factual situations in *Jaftha*.

The result of the above-summarised developments is that courts are henceforth obliged to judicially enquire as to the constitutional compliance of applied-for execution orders. In other words, the impact of the forced sale of the debtor's home must satisfy the proportionality requirement of section 26(1), read with section 36(1), of the Constitution. The politically sensitive and historically disregarded housing rights of people can, consequently, no longer be ignored – even in the mortgage context. In addition, judicial oversight over procedures that compromise peoples' homes is informed by protection against arbitrary evictions under section 26(3) of the Constitution.

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5 *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ), discussed in 4 3 4 7 below.
6 HCR 46(1)(a)(ii).
7 *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC), discussed in 3 2 4 below.

Although very little has thus far been said concerning the impact of section 25 of the Constitution (the property clause), it certainly plays a role to the extent that both parties to the foreclosure dispute have property rights at stake. The crux of this perspective is that, as section 25(1) requires, "[n]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property". When the sheriff, on the strength of a court order, attaches a debtor's home, sells it at auction and transfers it to the purchaser, the result is that the judgment debtor (former owner) is divested of his or her ownership of the property. This forced sale of the home is a state sanctioned deprivation of property in terms of its power (and obligation)[8] to resolve private disputes. In terms of section 25(1), this deprivation of property may not be arbitrary. Accordingly, there must be a sufficient reason for the deprivation, according to the test and the principles enunciated in the leading *FNB* case.[9] It is important to investigate whether the "law of general application" that regulates the sale in execution of homes casts its net in such a way that arbitrary deprivations are not permitted. The law must be interpreted and applied – as far as possible – to prevent deprivations of property that are arbitrary. If the law does not do so, it should be remedied in order to rectify this unconstitutionality. On the other side of the spectrum, the creditor also enjoys the protection of the property clause. Since the right of mortgage as well as the right to receive repayment of the loan qualifies as "property" for section 25 purposes, restrictions on the enforcement of these rights amount to deprivations of property that must be justified in terms of the non-arbitrariness test.

Over and above the housing and property clauses of the Constitution, a third element was introduced that appears to complicate recent developments even further. A new piece of consumer legislation specifically aimed at regulating the consumer credit market, namely the National Credit Act 34 of 2005 ("the NCA"), came into full force during 2007. As will become clear, I argue that the NCA is more significant to the residential foreclosure question than some courts have conceded and than many jurists realise. The enforcement of all consumer credit agreements (which expressly include mortgage agreements) must comply with the requirements of the NCA. Accordingly, almost all consumer mortgage cases have of late been decided in terms of the particulars of the Act. Amongst others, the NCA provides certain mechanisms and remedies that are aimed at supplying debt relief to over-indebted

[8] S 34 of the Constitution – the right of access to courts – obliges the state to assist private parties with the enforcement of private disputes. See 6 3 3 below.

[9] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC), discussed in 6 2 3 1 below.

credit consumers. As part of the Act's debt review process, debtors can obtain debt rearrangement orders that will prevent the cancellation of the agreement and the full enforcement of the debt, even if the debtor is in default.[10] Provided that this option is viable on the facts, a restructuring of the mortgage debtor's obligations can prevent foreclosure and, therefore, save his or her home in a way that was not previously possible.

The NCA also amended the common law rules relating to acceleration clauses, which stated that creditors can accelerate repayment of the full outstanding debt, even if the default in question is small and subsequently purged. The NCA now provides debtors in default with the right to reinstate a credit agreement simply by getting the amounts outstanding (along with certain charges) up to date, thereby preventing the full enforcement of the debt and redeeming their home from the execution process.[11] Although this right is analogous to the common law right of redemption,[12] it goes further in the sense that the debtor in default does not have to pay the full outstanding debt, but only the actual amount in arrears (along with certain interests and charges). In addition to these innovations, the Act also introduced measures to prevent the granting of credit in a reckless manner and to remedy the negative consequences of this prohibited practice.

Therefore, also mortgage law has in recent years been exposed to the influence of the Constitution (particularly sections 25 and 26). Especially section 26 has resulted in significant amendments to the MCA and HCR. Moreover, Parliament has enacted the NCA, which has a noteworthy procedural and substantive impact on the enforcement of mortgage debt. It is consequently necessary for academic and practical purposes to comprehensively analyse how these legal developments have impacted the law relating to the enforcement of mortgage bonds. The question whether and how the fundamental rights to property and access to housing affect the traditional principles of private property law is by no means uncontested or uncomplicated. Creditors and debtors alike are also uncertain as to how these clauses can impact their positions. Hence, this dissertation is aimed at describing how sections 25 and 26 of the Constitution, as well as the NCA, influence the way courts decide (or should decide) whether to grant execution orders against mortgaged homes. When is it justifiable to have a home sold subsequent to mortgage foreclosure? How are courts to make the decision and which factors should play a role? How should courts conduct the proportionality test required by sections 26(1) and 36(1) of the Constitution to determine the

[10] See 4 3 4 (especially 4 3 4 3) below.
[11] See 4 3 2 below.
[12] See 2 4 5 below.

validity of individual sales in execution? Furthermore, what role does the availability of debt relief mechanisms play? These are some of the questions that arise from the general research problem explained above. Below I firstly describe my main hypothesis – consisting of several sub-hypotheses – and then provide an overview of how I aim to address my research problem throughout the chapters of this dissertation.

1 2 Hypothesis

As a whole, the hypothesis of my research revolves around what has been described as the subsidiarity principles. In short, subsidiarity entails that one should only have direct resort to a right in the Bill of Rights if legislation does not give effect to the right in question. However, the Bill of Rights must be used to interpret the legislation and to challenge its constitutional validity. Secondly, subsidiarity prohibits courts from developing the common law to give effect to rights in the Constitution if there is legislation in place to address the issue. More details of the subsidiarity principles and how they impact this dissertation is provided in 3 5 below; these principles are illustrated throughout the chapters that follow. My main hypothesis is that the NCA plays a (or *the*) central role in residential foreclosure cases, rendering both a direct appeal to sections 25 and 26 as well as a constitutionally inspired development of the common law unwarranted. In effect, I anticipate that sections 25 and 26 of the Constitution are sufficiently given effect to through the proper interpretation and application of the NCA. To elaborate on what I expect to conclude, it is necessary to provide a number of sub-hypotheses that will be addressed throughout the chapters of this dissertation.

In the first place, the main hypothesis of chapter 2 is that the right to foreclose a mortgage bond and claim direct execution against the mortgaged property is still the primary incident of the limited real right of mortgage. However, this common law principle may be subject to constitutional scrutiny. During the investigation that I conduct in chapter 3, I expect to find that section 26(1) and (3) of the Constitution are applicable to all residential mortgage foreclosures. Accordingly, the protection against arbitrary evictions (section 26(3)) is broad enough to include any procedure that may, in the normal course of events, lead to an eviction from the debtor's home. This wide interpretation would include sales in execution of homes. Further, my supposition is that "the right to have access to adequate housing" (section 26(1)) will be limited in every case where a procedure leads to the loss of someone's primary

residence (or home). I also presume that the degree to which this right is limited will play a role in the justification enquiry. Since HCR 46(1)(a)(ii) was amended to give effect to section 26, I assume that the all-the-relevant-circumstances test required by the court rule must be interpreted to give effect to the substantive content of section 26. Consequently, courts should analyse whether the sale in execution would amount to a justifiable infringement of the debtor's section 26(1) rights. Also, this justification assessment will amount to a proportionality test, as prescribed by section 36(1) of the Constitution.

A further hypothesis of chapter 3 is that the common law principle that a mortgage creditor is entitled to claim direct execution against the mortgaged home may in certain individual cases be in conflict with the proportionality requirement. The reason for this, I expect, is that in terms of this principle the home would sometimes be sold despite the fact that there may be alternative ways available to settle the debt. Not requiring of creditors to first seek less invasive alternatives before executing against the home might not be constitutionally compliant. This problem may, therefore, indicate that the trite premises of mortgage law should be amended. However, the general hypothesis of chapter 4 is that such a development of the common law is not necessary. In fact, if my interpretation of the subsidiarity principles is correct, a development of the common law would be unjustified, since – as I anticipate finding – the NCA might have already provided for constitutionally acceptable outcomes in foreclosure cases. Hence, the debt relief mechanisms of the NCA – including debt review, debt rearrangement and the right to reinstate credit agreements – provide debtors who face the loss of their homes with sufficient remedies to render development of the common law unwarranted. If these remedies are properly applied and interpreted, they would incorporate the proportionate outcome that the Constitution requires.

During my analysis of the situation in English law in chapter 5, I expect to discover that the proportionality requirement in article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 presented similar difficulties for the continued upholding of certain assumptions in English mortgage law. The prospect that courts might have to start weighing occupiers' personal circumstances (and their "home" interests) against the commercial interests of creditors may be particularly hard to deal with on a conceptual and practical level. My hypothesis in this regard is that the questions being grappled with in South African law are not unique, but that we might be somewhat closer to a constitutionally satisfactory situation than current English law. Unlike their South African counterparts, English courts have not yet expressly extended constitutional housing

considerations to mortgage cases. Nonetheless, the article's influence (in the analogous landlord-tenant context) is likely to spill over to mortgage repossessions in the near future. I expect that my conclusions in this regard will strengthen the argument that the NCA (which goes further than similar protection does in England) provides the solution to potential constitutional difficulties in South African mortgage law.

In the context of constitutional property law, my final sub-hypothesis concerns the impact of section 25 of the Constitution. Since mortgaged homes are also "property" for constitutional purposes, it may be that certain sales in execution violate the non-arbitrariness standard of section 25(1). Moreover, any restrictions on the enforcement of creditors' rights may also have implications from a section 25 standpoint, at least in as far as these rights amount to constitutional "property". Therefore, a balance needs to be struck between protection for debtors and creditors. I assume that a proper collaboration between sections 25 and 26 of the Constitution, as given effect to by means of the NCA, will ensure that the outcomes in mortgage foreclosure cases will be balanced and proportionate. Therefore, both parties' constitutional rights will be respected and, where one of the parties' rights is violated, this will be for a legitimate public purpose and in compliance with the constitutional standards for valid limitations.

In summary, my hypothesis is that it would be unjustified for struggling debtors to try and prevent the sale in execution of their homes without making use of the NCA mechanisms. By attempting to frame defences that would imply a direct appeal to constitutional rights or to constitutionally inspired development of the common law, debtors would be circumventing the debt relief measures that the legislature has put in place. In terms of subsidiarity, such an approach is unacceptable and should be discouraged. In the same vein, I hypothesise that courts should limit their interference with established foreclosure practices to the extent that the NCA provides them with the power to apply the various debt relief options, on condition that the NCA lives up to constitutional scrutiny and is interpreted to promote constitutional values.

The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act") is mainly aimed at the fair and orderly eviction of persons who occupy land unlawfully, either because their occupation has never been lawful or because lawful

occupation has been terminated validly.[13] Even though the PIE Act is also applicable when persons are evicted subsequent to a sale in execution,[14] this dissertation does not investigate that aspect of debtors' rights. Rather, my focus is on the granting of the judgment order and the declaration on executability, followed by attachment and sale in execution. The approach of the NCA is not only to regulate the fair and orderly enforcement of cancelled credit agreements, but – importantly – also to prevent certain credit agreements from being cancelled and, hence, reaching the point of judgment being granted. Debt review, debt rearrangement and the right of reinstatement focus on the stage before judgment is granted and aim to resolve the dispute in such a way that cancellation of the agreement is prevented.

In other words, instead of trying to solve the problem after the debtor had been divested of ownership (rendering him or her an unlawful occupier), my hypothesis is that the NCA approach of trying to prevent and remedy over-indebtedness is preferable. The reason for this is that the NCA can have the effect that the debtor does not even become an unlawful occupier but remains owner of the land. Debt review deals with the root of the foreclosure problem, namely the over-indebtedness that leads to default in the first place. If the problem of default can be prevented or solved in creative and viable ways, the purpose of foreclosure would be avoided and, therefore, there would be no need to sell the home in execution. In other words, instead of providing mere procedural relief to debtors who face eviction, my hypothesis is that the NCA is aimed at providing substantive protection to debtors even before they face eviction.[15]

1 3 Overview of chapters

To address the research problem and hypothesis explained above, this dissertation consists of various chapters that will systematically present my arguments. As a point of departure it is

[13] On evictions under the PIE Act in general, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 247-255 and 652-660. See also G Muller *The impact of section 26 of the Constitution on the eviction of squatters in South African law* (2011) unpublished LLD dissertation Stellenbosch University.

[14] *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 1 SA 113 (SCA).

[15] In the landlord-tenant context, S Maass & AJ van der Walt "The case in favour of substantive tenure reform in the landlord-tenant framework: *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*; *City of Johannesburg Metropolitan Municipality v Blue Moonlight*" (2011) 128 *SALJ* 436-451, for example, similarly argue in favour of special legislation to introduce and regulate substantive protection for insecure residential tenancies. Their argument implies that substantive protection prevents the termination of the tenancy and, therefore, provides a more durable solution than temporary protection against eviction that becomes inevitable once the tenancy has been terminated. In my context, I argue that the NCA already has a substantive effect in that, as I hypothesise in the main text, the NCA is aimed at addressing the problem that leads to debtors becoming unlawful occupiers, namely over-indebtedness.

necessary to lay a foundation concerning the general principles of mortgage law. Therefore, the goal of chapter 2 is to set out the common law principles of mortgage law. To understand the controversies surrounding residential mortgage foreclosures, one must be well versed in the doctrinal structure of mortgage law. The mortgage as a subcategory of limited real rights (more specifically, real *security* rights) is placed in its proper context and, furthermore, defined so as to elaborate on its exact characteristics.[16]

The way that the limited real right of mortgage comes into being is significant.[17] The right must attach to a specific proprietary object and must, moreover, be accessory to a particular principal obligation. In my context, these two elements are a piece of residential immovable property (a home) and the debt that comes into existence as a result of a home loan – often (but not always) concluded to purchase the home in question.[18] The idea is that the capital value of the immovable property serves as security for the underlying debt. The real security right does not come into existence by way of a mortgage agreement alone but, since it is meant to be a real right in land, must be registered to be enforceable against third parties (such as other creditors).[19]

Following on its classification as a registered limited real right, the content, scope and legal nature of the mortgage is subsequently analysed.[20] The purpose is to set out the various incidents of the right of mortgage and to explain how it limits the ownership of the debtor/owner.[21] This analysis builds up to the point where the central element of the mortgage is emphasised, namely the right of the mortgage creditor to call up (or foreclose) the bond when the debtor defaults.[22] This remedy is the strongest entitlement of the mortgage creditor and the rationale for the mortgage bond's popularity as an instrument of security. To analyse how the Constitution and the NCA impact foreclosure, it is necessary to reaffirm the foundation of this remedy.

In the last part of chapter 2, I provide an overview of the procedural aspects of foreclosure, mainly as it functioned prior to constitutional developments.[23] My dissertation does not concern the procedural aspects of the foreclosure remedy as such, but is focused on substantive doctrinal and constitutional issues. However, it is essential to also understand the

16 See 2 2 below.
17 See 2 3 below.
18 See 2 3 2 below.
19 See 2 3 3 below.
20 See 2 4 below.
21 See 2 4 2 below.
22 See 2 4 4 below.
23 See 2 5 below.

execution procedure, especially in as far as it has a direct impact on the substantive proprietary and constitutional rights of the parties. This overview emphasises the role that the sheriff – as state official – plays in attaching the property, selling it at the auction and transferring it by registration to the new owner. The sheriff's actions in this regard are authorised by the warrant of execution that is issued by the court on the strength of the court order that declared the property executable.

After chapter 2's presentation of the general principles of mortgage, chapter 3 introduces the Constitution's housing clause (section 26) into the picture. The first part of the chapter analyses the development that South African law has undergone in recent years to come to the place where judicial oversight over the sale in execution of mortgaged homes is now firmly established.[24] The process started when the CC delivered judgment in *Jaftha*, bringing the MCA in line with section 26.[25] At least with regard to the magistrates' courts' process, judicial oversight was at that point settled as a requirement before a warrant of execution can be issued against a home. Moreover, a substantive element was introduced to the procedure in the sense that magistrates were obliged to take all the relevant circumstances into consideration.

Despite the relative certainty concerning magistrates' courts', it took a couple of years and various court decisions to introduce the same certainty to the high court procedure. As the chapter continues to explain, the initial effect of *Jaftha* on the high court process was, as the SCA held, that registrars could still grant execution orders against mortgaged homes. However, if debtors where to allege violations of their section 26(1) rights, the case had to be referred to a judge.[26] The CC deemed this compromise insufficient to give appropriate effect to section 26 of the Constitution. Therefore, the high court process was declared unconstitutional to the degree that it allowed homes to be sold in execution without court oversight. In the mean time, the HCR was also amended to reflect the Constitution's requirement of judicial oversight.[27] This part of chapter 3 also includes a discussion that illustrates the relationship between the substantive rule of mortgage law (direct execution against the hypothecated immovable property) and the procedural rule of debt enforcement

[24] See 3 2 below.
[25] See 3 2 2 below.
[26] See 3 2 3 below.
[27] See 3 2 4 below.

(execution against immovable property should go ahead only if there is no or insufficient movables).[28]

Chapter 3 continues by examining the exact scope and application of the two relevant subsections of the housing clause, subsections 26(1) and (3).[29] I address the question as to how and when these subsections apply to mortgage foreclosures. It is in the first place necessary to explain why section 26(3)'s reference to evictions should not be so narrowly interpreted that it only includes evictions in the technical sense. I argue that the subsection is broad enough to include any legal procedure that can eventually lead to an eviction. This construction will include sales in execution of mortgaged homes. Therefore, a court order based on an assessment of all the relevant circumstances is a constitutional requirement before a sale in execution of a home continues.[30]

Section 26(3) establishes the constitutionally mandated procedure that must make it possible for substantive arguments to be raised during foreclosure disputes. However, substantive content is given to this assessment by subsection (1) of the housing clause. In this part I explain the scope and content of "the right to have access to adequate housing" for sale-in-execution purposes. I describe which foreclosure cases will be influenced by this subsection and which (if any) will not. Although one could argue for a narrow construction of the concept of "adequate housing" (as some courts did), this approach would render many sales in execution outside the scope of section 26(1) and make it difficult to argue that continued occupation of one's home qualifies as "adequate housing". Therefore, I argue for a wide interpretation of section 26(1), which will include the violation of all home interests, but I also contend that the degree to which the right is dishonoured will determine the level of justification necessary to render the sale in execution constitutionally valid.[31]

In the next part of chapter 3, the application of HCR 46(1)(a)(ii) is analysed in more detail.[32] This court rule – as amended to reflect the *Jaftha* principle – lays down the procedural requirement for issuing a warrant of execution. It entails that courts should exercise a discretion based on all the relevant circumstances before authorising a sale in execution of a judgment debtor's primary residence. However, the rule does not provide any substantive content regarding which relevant circumstances should be taken into account and

[28] See 3 2 5 below.
[29] See 3 3 below.
[30] See 3 3 2 below.
[31] See 3 3 3 below.
[32] See 3 4 below.

how the assessment ought to be made. Hence, section 26 (which clearly underlies the amended HCR) should serve as a platform to give the necessary substantive content to the court's discretion.

In this respect, I explain that there are two issues at stake, namely a broad and a narrow question. The broad discussion entails the more general justification of the principle that homes are constitutionally capable of being sold in execution to enforce mortgage debts. This analysis provides the valid and legitimate public purpose for the procedure that allows homes to be sold in execution.[33] However, after establishing that it is generally justifiable to subject homes to the execution process, it is pertinent to answer a second, narrower question. This enquiry will be case specific and will require of the court to embark on an individualised proportionality test based on the facts of each case. It is in this respect that the common law may fall short of constitutional compliance under certain circumstances.[34] I show how that the common law may be problematic in as far as it does not prevent possibly disproportionate results. In particular, the common law structure of mortgage law does not ensure that the loss of the debtor's home is the last resort, and the sale in execution can consequently take place despite the potential availability of less invasive means. The question, therefore, arises whether the common law should be amended in certain respects. It seems that several courts have resorted to development of the common law – perhaps not explicitly but simply by the manner in which they have decided some cases.

After illuminating the ways in which the traditional principles of mortgage foreclosure might cast the net of sales in execution too wide, I start moving towards my arguments as to how this constitutionally unsound result is to be resolved. Based on the subsidiarity principles, I argue that the legislative innovations presented by the NCA bridge the unconstitutional chasms in the common law of mortgage, at least in so far as housing rights are implicated. Before commencing my analysis of the NCA in chapter 4, I end chapter 3 with an exposition of the subsidiarity principles. These principles form a crucial part of the thesis that this dissertation presents and it is, therefore, essential to provide an explanation of subsidiarity. This exposition explores the relationship between section 26 of the Constitution and the NCA as sources of law that the parties can rely on for defences and that courts rely on to make their decisions. In essence, the question relates to which of these sources of law the parties and courts should have resort to in cases where the validity of a foreclosure is

[33] See 3 4 2 below.
[34] See 3 4 3 below.

challenged. Can the debtor rely directly on section 26 when he or she alleges that foreclosure will violate his or her home, or must the mechanisms of the NCA be the first resort? In this part of chapter 3 I present my argument in this regard.

To establish and prove my arguments with regard to subsidiarity, a general exposition of the NCA and its debt enforcement mechanisms is provided in chapter 4. After discussing the application and interpretation of the Act,[35] I venture into the various debt relief mechanisms the Act provides for over-indebted consumers.[36] One of the innovations that the NCA has introduced is that before a creditor can proceed with debt enforcement litigation, it has to provide the debtor with a compulsory notice of default. Significantly, this notice must include a proposal as to how default can be remedied and it must advise the debtor to approach, amongst others, a debt counsellor. Only if the debtor rejects the proposal or fails to reply within a certain period, can the creditor proceed with suing the debtor. In this section of the chapter I briefly analyse the notice of default and refer to some of the controversies that surround it.[37] I then continue with a synopsis of what the NCA requires for the enforcement procedure in court.[38]

One of the most important developments introduced by the NCA is the right of reinstatement that it provides to debtors in default. By merely getting the amount of the default (along with permitted interests and charges) up to date, the debtor can fully and unilaterally reinstate the credit agreement. Consequently, I emphasise this right as a valuable protection measure for debtors who face the loss of their homes. Although I will make regular reference to the right of reinstatement throughout the dissertation, this part of chapter 4 provides the technical details of the right, with reference to applicable case law.[39]

In the following paragraph, the novel concept of reckless credit is described. I do not focus on the prevention of reckless credit granting as such, nor do I discuss how courts are to determine whether a specific credit agreement was concluded recklessly. Instead, I emphasise the remedies that are available to over-indebted consumers who claim to be the victims of reckless credit granting. Besides the general debt review remedy of debt rearrangement, a debtor who has fallen victim to reckless credit can find relief in the prospect that the force and effect of the credit agreement can be suspended for a certain period. Moreover, there is

35 See 4 2 below.
36 See 4 3 below.
37 See 4 3 1 2 below.
38 See 4 3 1 3 below.
39 See 4 3 2 below.

also the option that certain rights and obligations can be set aside in full or in part.[40] In a later section of the dissertation, I include an analysis of the constitutional implications of these remedies. That enquiry will indicate how courts are to make use of these remedies in a way that also satisfies the constitutional rights of creditors.[41] However, in this part of the chapter I only generally discuss reckless credit and describe under which circumstances which of these remedies is available.

Chapter 4 continues with a discussion of another novel legal concept to South African jurists, namely over-indebtedness.[42] The logical reason that mortgage debtors fall into arrears is the fact that they are over-indebted. They cannot keep up with their monthly obligations and hence they default. Therefore, the legal concept of over-indebtedness and its consequences are central to the foreclosure discussion. Although the Act is aimed at preventing over-indebtedness, it also addresses the problem of consumers who are already over-indebted and it intends to provide remedies in this regard. If the over-indebtedness problem can be resolved, the assumption is that default can be remedied and foreclosure prevented.

The point of entry for any over-indebted consumer who desires debt relief is to apply to a debt counsellor for debt counselling. After providing some information regarding the application for debt review,[43] I explain the major remedy available to over-indebted consumers, namely debt rearrangement.[44] In terms of this mechanism, the court can grant on order (based on the debt counsellor's proposals) to restructure the debtor's monthly obligations. For example, the size of the monthly instalment can be decreased along with a lengthening of the repayment period. Since the debt review process places a moratorium on the enforcement of the creditor's rights, the NCA also makes provision for a mechanism whereby the creditor can terminate a debt review that is taking too long or is merely being abused. Therefore, this chapter includes a discussion of how imperative the termination mechanism is in order to establish an appropriate balance between the rights of debtors and creditors.[45] In addition, I analyse certain problems that have arisen with regard to the exact time period in which the debt review can be terminated.[46]

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40 See 4 3 3 below.
41 See 6 4 6 below.
42 See 4 3 4 below.
43 See 4 3 4 2 below.
44 See 4 3 4 3 below.
45 See 4 3 4 4 below.
46 See 4 3 4 5 below.

Another important aspect that this chapter explores is the question as to what relief is available for debtors who have not applied for debt review within the prescribed time frame provided by the Act. In other words, how can the court grant relief to over-indebted consumers after debt enforcement litigation has commenced? In this regard the NCA provides a mechanism whereby a debtor can allege his or her over-indebtedness during any court proceedings that involves a credit agreement. The court then has a discretion whether to refer the case for debt counselling or to relieve the over-indebtedness there and then by granting a restructuring order. The exercise of this discretion can play a vital role in many foreclosure cases, since a debtor may be able to convince the court to not grant the execution order immediately, but to first refer the matter to a debt counsellor. Hence, I discuss some principles that the courts have developed as to how this discretion should be exercised.[47] One problem that I also address is whether the court should have the power to refer a matter to debt review *mero motu*. This is an important issue in view of the fact that many foreclosure cases before the courts are undefended (often due to a lack of legal and financial knowledge) and, hence, no allegation of over-indebtedness is made. I argue that the court should, in appropriate circumstances, nevertheless be able to refer a case for debt review.[48]

The subsequent part of chapter 4 entails an analysis of the relationship between access to housing (section 26(1) of the Constitution) and the NCA's debt relief mechanisms.[49] The question that I address here is whether the disproportionality that can sometimes befall debtors as a result of the strict application of the common law can be sufficiently prevented by application of the NCA. If this is the case – as I argue it is – then a development of the common law to solve this problem is unnecessary and, in terms of the subsidiarity principles, unjustified. Therefore, I address some of the factual scenarios that might result in the courts' application of the common law being constitutionally problematic. Firstly, I look at the possible situation where the size of the judgment debt is so small that it would be unjustifiable to have the debtor's home sold in execution. I show that the NCA mechanisms of debt review, debt rearrangement and the right of reinstatement provide sufficient answers to remedy this disproportionality.[50]

The next issue I deal with relates not to the size of the full outstanding debt (the judgment debt) but to the actual amount in arrears. Often this amount will be so small that allowing the

[47] See 4 3 4 6 below.
[48] See 4 3 4 7 below.
[49] See 4 4 below.
[50] See 4 4 2 below.

creditor to accelerate repayment of the full debt – and, hence, having the home sold – would be severely disproportionate. This aspect raises some doctrinally difficult questions concerning, for example, whether the court can overturn the creditor's lawful decision to foreclose, effectively preventing the creditor from making use of its contractual right to accelerate repayment of the debt. I argue that the NCA mechanisms also provide the solution to this constitutional conundrum. For instance, a small amount in arrears will be an obvious indication that debt rearrangement would be appropriate. The default can also be purged and, therefore, result in the full reinstatement of the credit agreement.[51]

I conclude chapter 4 with a critical discussion of case law that, in my view, violates the subsidiarity principles. I use the facts of these cases to show that the NCA would have provided the appropriate answer and should, consequently, not have been avoided in favour of a direct reliance on purely constitutional housing arguments.[52] Furthermore, I illustrate how that the current framework for resolving foreclosure disputes does not make it easy to take the debtor's personal circumstances into consideration in that these types of factors are difficult to compare with commercial interests of creditors.[53]

Subsequent to making my argument regarding the relationship between housing rights and the NCA, I move to a comparative analysis, in chapter 5, of similar issues in English law. The first part of the chapter constitutes an explanation of the mortgage enforcement remedies available to mortgage creditors in that jurisdiction.[54] Because of its right to take immediate possession of the property, the English mortgagee's normal point of departure is to evict the debtor and thereby assert possession.[55] When the creditor applies for a possession order, the court has a discretion – either inherently or by virtue of statute – to stay possession under certain circumstances.[56] Especially the statutory power to stay possession is aimed at protecting the debtors' homes. However, the power is limited to situations where the financial circumstances of the debtor justify a postponement of the possession order, for example if he or she can show that the arrears can be repaid within a reasonable time. The purpose of my discussion in this respect is twofold. Firstly, it serves as a platform to investigate the human rights implications in the second part of chapter 5 and, secondly, to show that the way in which English courts have exercised their discretion can afford helpful guidance as to how

[51] See 4 4 3 below.
[52] See 4 4 4 below.
[53] See 4 4 5 below.
[54] See 5 2 below.
[55] See 5 2 2 1 and 5 2 2 2 below.
[56] See 5 2 2 3 and 5 2 2 4 below.

South African law can develop the debt-rearrangement remedy. Moreover, the English academic commentaries concerning the role of "home" in this context is tremendously insightful.[57]

The second part of chapter 5 entails a discussion with respect to how article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("ECHR") is impacting domestic English law regarding possession orders.[58] Quite a number of cases have been decided by the House of Lords (now the United Kingdom Supreme Court) as well as the European Court of Human Rights ("ECtHR"), almost exclusively in the context of local authorities applying for eviction orders against unlawful occupiers.[59] I analyse these cases to show how the House of Lord's approach has developed from resistance against the influence of article 8 to being reasonably in line with the ECtHR's attitude. My aim is to discuss how these developments in the analogous landlord-tenant context may impact mortgage repossession cases. Similar to the position with regard to the South African Constitution's section 26(1), article 8 of the ECHR also requires that a proportionality test be conducted before someone is deprived of his or her home. The case law also illustrates how difficult the English courts find it to apply proportionality tests in individual cases. They are especially resistant to the prospect that the occupiers' personal circumstances can play a role, as opposed to purely financial considerations. The English situation once again exemplifies the value of the NCA in South Africa, which renders case-by-case proportionality assessments less problematic.

In chapter 6 of this dissertation, I do a constitutional property analysis of the entire foreclosure issue and, therefore, bring the various interests together. Section 25(1) of Constitution not only provides constitutional protection to the property of home-owning mortgagors, but it also extends the same protection to the property rights of creditors. The chapter starts with a general discussion of the property clause, including topics such as the structure, purpose and application of section 25, as well as the methodology of a constitutional property challenge.[60] During this analysis, I specifically focus on the arbitrariness test that section 25(1) calls for to justify a deprivation of property, since this test is applied throughout the rest of the chapter.[61] Also, in the event that the deprivation is indeed

[57] See 5 2 5 below.
[58] See 5 3 below.
[59] See 5 3 2 below.
[60] See 6 2 below.
[61] See 6 2 3 2 below.

in conflict with section 25(1), one must ask the next question, namely whether the limitation of section 25(1) rights can be justified in terms of section 36(1) of the Constitution.[62]

Chapter 6 then proceeds with an enquiry that asks whether the sale in execution of debtors' homes complies with the standard set in section 25(1). It is firstly necessary to establish that the debtor's home is "property" for constitutional purposes and, secondly, to describe how sale in execution amounts to a deprivation of property.[63] The next step is to assess whether the deprivation in question satisfies the requirements of section 25(1). Is the deprivation authorised by law of general application; is the deprivation for a valid public purpose; and is the deprivation non-arbitrary?[64] If the requirements of section 25(1) are satisfied, the methodology entails that one should also investigate whether the deprivation amounts to an expropriation. If this is indeed the case, the requirements of section 25(2) and (3) must also be satisfied. However, I argue that a sale in execution does not qualify as an expropriation.[65]

The subsequent section of chapter 6 deals with the other side of the coin, namely the property rights of the creditor.[66] This aspect is important since any restrictions on the enforcement of creditors' rights may have implications for section 25(1). In this respect, therefore, it is necessary to identify the property rights of creditors. After having explained that the mortgage as a limited real right qualifies as constitutional property, I secondly argue that the claim to receive repayment of the debt will probably also amount to property for constitutional purposes.[67]

I consequently investigate whether certain restrictions that the NCA places on the enforcement of creditors' rights satisfy the requirements of section 25(1). After explaining the broad public purpose of the NCA,[68] I firstly analyse two possible consequences of debt review, namely the debt enforcement moratorium that ensues as a result of the ongoing review process and the implications of debt rearrangement.[69] The restructuring of the debt repayment schedule is especially interesting, since it entails a regulation of the creditor's rights in the sense that the satisfaction of its proprietary claims is postponed. A second aspect of the NCA that can have implications for the creditor's section 25(1) rights is the remedial

62 See 6 2 3 3 below.
63 See 6 3 2 and 6 3 3 below.
64 See 6 3 4 below.
65 See 6 3 5 below.
66 See 6 4 below.
67 See 6 4 2 below.
68 See 6 4 3 below.
69 See 6 4 4 and 6 4 5 below.

consequences of reckless credit.[70] The suspension and setting-aside remedies serve a legitimate public purpose, namely to remedy and prevent the over-indebtedness caused by reckless credit granting. However, to the degree that these measures deprive the creditor of what it is entitled to under the mortgage bond, the result of these remedies must comply with the non-arbitrariness standard of section 25(1). After explaining that the deprivations effected by the NCA do not qualify as expropriations,[71] I provide an illustration of how the interpretation of the NCA can be influenced by constitutional property law.[72]

The dissertation concludes with chapter 7, where I discuss the harmony between the various interests protected under sections 25 and 26 of the Constitution. Since both the debtor and the creditor have property rights at stake, I explain how these rights should be balanced against each other. Neither the debtor's immovable property, nor the creditor's limited real right of mortgage (both being property), may be affected by a deprivation in contravention of section 25(1). Therefore, the outcome of any sale in execution case must satisfy the arbitrariness test from both parties' points of view.[73] On another, somewhat more complicated level, both the housing clause and the property clause will be implicated, since the debtor also enjoys constitutional protection of his or her home. Consequently, the court's decision (whether the sale is authorised or not) must comply with sections 25 and 26, which implies that a balance must be struck between the two provisions.[74]

When considering the equilibrium between the interests of the parties to foreclosure disputes, I discuss the implications of Margaret Radin's property-for-personhood theory.[75] Radin argues that certain types of property relationships (for example the one with your home) are more worthy of protection than so-called "fungible" property. The reason for the distinction is that the former category ("personal" property) is constitutive of one's personhood and, therefore, not replaceable in purely monetary terms. I consider how this theory informs the arguments I make in this dissertation.[76] In the context of creditor-occupier disputes, I particularly rely on work that Lorna Fox has done with reference to Radin's theory, regarding the home as a type of property that is worthy of special protection.[77]

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70 See 6 4 6 below.
71 See 6 4 7 below.
72 See 6 4 8 below.
73 See 7 2 2 below.
74 See 7 2 3 below.
75 MJ Radin "Property and personhood" (1982) 34 *Stanford L Rev* 957-1015.
76 See 7 2 4 below.
77 L Fox *Conceptualising home: Theories, laws and policies* (2007) 287ff.

In the last part of the chapter (and the dissertation) I conclude by summarising the arguments that I have made throughout this dissertation and draw my final conclusions as to how the NCA and the property and housing clauses fit together. I argue that neither section 25 nor section 26 finds direct application in residential foreclosure cases, but that the NCA (as interpreted and tested against these constitutional provisions) should be the point of departure.[78] I believe this investigation to be a significant contribution with regard to developing a doctrinally sound and constitutionally compliant system for the sale in execution of mortgaged homes.

[78] See 7 3 below.

CHAPTER 2
GENERAL PRINCIPLES OF MORTGAGE

2 1 Introduction

The purpose of this chapter is to explore the traditional law and doctrine of mortgage. I do not provide a complete and in depth account of the entire field of real security law, but only one form of security, namely the mortgage and especially the process or remedy called mortgage foreclosure. My suggestion is that the post-constitutional development of the property right of mortgage can best be examined by an investigation into the enforcement aspect of mortgage agreements. The focus is on the development of mortgage foreclosure since the Constitution of the Republic of South Africa 1996 ("the Constitution"), which necessitated a fresh perspective on property rights with reference to the relationship between sections 25 and 26 of the Constitution, as well as on the National Credit Act 34 of 2005 ("the NCA").[1]

To determine how private mortgage law has developed and how the transformational setting of the new constitutional era has impacted it, a broad overview of the law prior to these developments is essential. Therefore, it is necessary to revisit the general principles governing mortgage law. This includes the doctrinal principles of mortgage as well as some procedural principles relating to the sales-in-execution process.

The terms "sale in execution", "execution sale" or "forced sale" refer to any judicial sale of property for the purpose of enforcing a judgment debt. The term "mortgage foreclosure" is often used to describe a specific kind of forced sale, namely that of immovable property over which a mortgage bond is registered.[2] In the case of a mortgage, the debtor willingly agrees that this event may occur, should he or she default on the loan repayment. The debtor places his or her property at risk by concluding the mortgage agreement and having the bond registered in the deeds office. However, the judicial sale in execution of the property is forced

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[1] S Scott & E Dirix "Calling up a mortgage bond of immovable property" (2009) 72 *THRHR* 575-598 597 argue that South African security law as well as enforcement proceedings are in need of reform.

[2] It is important to consider that this description is not necessarily the way the concept "foreclosure" is used in foreign jurisdictions (see 5 2 4 below for the English law use of this term). Nevertheless, for purposes of South African law and this dissertation, I refer to "mortgage foreclosure" as the remedy whereby a mortgage creditor calls up the mortgage bond and relies on its right to have the property sold in execution so as to satisfy the outstanding debt. I do not refer to the situation where the creditor – as a result of foreclosure – becomes the owner of the mortgaged property, since such state of affairs is not possible in South African law. See 2 5 1 n 171 below.

in the sense that it is not a consensual sale transaction, but a sale that is imposed on the judgment debtor by an order of court and effected by the sheriff. The sale in execution as such, therefore, brings about what can be called – for constitutional property purposes – a forced transfer of property or a deprivation.[3] The foundational principles of mortgage and mortgage foreclosure are explained throughout the chapter. Moreover, the controversies surrounding these principles are expounded upon throughout this dissertation.

The registration of a mortgage bond creates a limited real right and it is important to identify the definition, content and scope of this right and the implications it has for the various parties involved. The enforcement of a mortgage is probably the central reason for its existence as well as the strongest entitlement of its holder. The central element of a mortgage is the fact that it provides its holder – the mortgagee – the right against its grantor – the mortgagor – to enforce it under certain circumstances. This right to enforce the mortgage (or to foreclose it) is regulated by certain procedural and substantive rules. Even prior to the Constitution, the enforcement of mortgages was not unlimited or unregulated. As is the case with all property rights, there are certain inherent limitations on the mortgage and its enforcement. Consequently, the right to enforce is not absolute insofar as it is limited and regulated by legislation or the common law.

This chapter focuses firstly on substantive rules implicit in the definition and creation of the right of mortgage itself. These principles establish the content and nature of the mortgage and the circumstances under which foreclosure is allowed. It also provides the general justification for the practice of having hypothecated property sold in execution of the debt it secures. The chapter provides an overview of the definition and creation of the mortgage.[4] It then proceeds to the content, scope and legal nature of the mortgage.[5] The aim is to emphasise the main entitlement of the mortgagee, namely the right to call up the bond (or to foreclose it).

Secondly, the spotlight falls on the method by which the mortgage is legitimately enforced.[6] I summarise the basic procedural elements of sale in execution with the purpose of illustrating how procedural law regulates the right to foreclose. Since the focus of this research is not on the civil procedural rules of sale in execution as such, procedural aspects

[3] See 6 3 3 below.
[4] See 2 3 below.
[5] See 2 4 below.
[6] See 2 5 below.

are only discussed to the extent that they are relevant for an investigation into the substantive property rights.

The context of my research can be explained as two sides of the same coin. The one side relates to protection measures available for mortgagors who face the loss of their homes. The other side relates to how such homeowners' protection impact the property rights of mortgagees. Therefore, this chapter serves as a foundation for discussing the developments that have taken place as a result of the Constitution and the NCA.[7]

2 2 Mortgage in general

2 2 1 Context

The mortgage is a real right and finds its home in the field of property law.[8] Since the mortgage exists as a sub-category of property rights, this context helps define and give content to the right. In broad terms, property law is that area of law governing the relationships between persons and property,[9] also known as real relations.[10] Property law largely concerns real rights (*iura in rem*), in other words rights over property that are enforceable against the world at large (*erga omnes*), as opposed to personal rights (*iura in personam*) that are generally only enforceable against persons who are party to a particular obligation.[11]

Real rights are divided into two categories, namely ownership and limited real rights. The right of ownership (*dominium*) is the right that a person has in property belonging to him or

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[7] S Scott "A step towards a more sympathetic credit security dispensation in South Africa" (2008) 71 *THRHR* 473-482 473 agrees that the Constitution has "undeniably had a huge impact on the law of credit security" and specifically refers to the influence of the right of access to adequate housing (s 26(1)) and the right of access to courts (s 34). The author applauds "the courts' attempts to address the hardships suffered by indigent people". See further S Scott "The persistent meanness of banks transforms judge into praetor: *FirstRand Bank Ltd v Soni*" (2009) 21 *SA Merc LJ* 249-259 250, where, even though the author welcomes and values the intervention of courts in order to protect the interests of debtors, she is of the opinion that the ways in which courts go about doing this are often unsatisfactory.

[8] The mortgage also has relevance in other areas of law, such as contract (see JC de Wet & AH van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (5th ed 1992) 401-415) and insolvency (see E Bertelsmann *et al* (C Nagel ed) *Mars the law of insolvency in South Africa* (9th ed 2008) 432-475). Though I touch upon these areas, my primary focus is from a property law perspective.

[9] The term "property" is used here as referring to the object of a property right, namely a so-called "thing". As clarified below, my research focuses on immovable property, namely land, and more specifically on any immovable property that qualifies as residential, in other words, a home.

[10] PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 2; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 2; CG van der Merwe *Sakereg* (2nd ed 1989) 1.

[11] Persons can also have personal rights in respect of property, for example a tenant who rents the property has a personal right against the owner/landlord to occupy the property.

her (*ius in re propria*), in other words property of which he or she is the owner.[12] The second category of real rights, limited real rights, are rights that a person has in property belonging to another (*iura in re aliena*).[13] In other words, these are rights in property over which another person has the right of ownership.[14]

A sub-category of limited real rights is real security rights.[15] Examples of such rights are the mortgage, pledge, tacit hypothec and lien. My focus is on one of these, namely the mortgage. The general purpose of a real security right is to secure a claim of one person against another. The holder of the real security right is a creditor who obtains a right in the property of the debtor, for the purpose of securing a principal obligation owed by the debtor to the creditor.[16] Some general principles of real security law are discussed below, but mainly from the perspective of the mortgage. Hence, the mortgage is defined as part of the general group of real security rights, but also with reference to those characteristics distinguishing it from other forms of real security.

A debt can be secured either by way of personal or real security.[17] An example of personal security is suretyship. Suretyship is a contract whereby a third party, the surety, agrees to bind him- or herself towards the creditor to be responsible for the debtor paying his or her debt. If the debtor fails to pay, the creditor will have a personal right against the surety to pay the debtor's debt. Therefore, a person other than the debtor undertakes to perform the debtor's obligation should he or she fail to do so. Suretyship is a legal relationship only between those two persons and it forms part of the law of obligations.[18] Personal security creates no real right and it consequently offers less security to the creditor than real security

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12 Ownership is said to be the most complete or comprehensive right a person can have in respect of property: See *Gien v Gien* 1979 2 SA 1113 (T) 1120. For general principles on ownership, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 47 and 91-132; CG van der Merwe *Sakereg* (2nd ed 1989) 69 and 169-185.

13 PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 47.

14 Examples are servitudes and registered long leases. In general, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 47, 321-342 and 427-439; CG van der Merwe *Sakereg* (2nd ed 1989) 69 and 457-550.

15 In general, see GF Lubbe "Mortgage and pledge" rev TJ Scott in WA Joubert & JA Faris (eds) *LAWSA* Vol 17 Part 2 (2nd ed 2008) 324-404; CG van der Merwe "Real security" in F du Bois (ed) *Wille's principles of South African law* (9th ed 2007) 630-665; PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 357-422; CG van der Merwe *Sakereg* (2nd ed 1989) 604-726.

16 Grotius *Inleidinge* 2 48 1: "[G]erechtigheid over eens anders zaeck, dienende tot zeeckerheid van inschuld." See also CG van der Merwe "Real security" in F du Bois (ed) *Wille's principles of South African law* (9th ed 2007) 631; CG Hall *Maasdorp's institutes of South African law Vol II: The law of property* (10th ed 1976) 212; RW Lee *An introduction to Roman-Dutch law* (5th ed 1953) 183.

17 PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 357; CG van der Merwe *Sakereg* (2nd ed 1989) 605.

18 In general, see JC de Wet & AH van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (5th ed 1992) 391-401.

does. The creditor can only enforce this personal security right against the specific surety and not against the world at large.

With regard to real security, a specific piece of property, owned by the debtor, is singled out as the object of execution. If the debtor fails to repay his or her debt, this object can be sold in execution for the purpose of satisfying the debt. The real security right is, for the holder thereof, a limited real right in respect of the debtor's specific property; the identity of the owner or possessor is less important. In contrast with personal security, the real security right is enforceable against the world at large (or anyone threatening the right).

The general purpose, context and justification for real security is credit provision. The point of departure is that a debtor is liable for repayment of his or her debt with his or her entire estate.[19] Every creditor has an equal right to settle its claim against the debtor's entire estate in proportion to the amount it claims. The rights of the creditors as a group are protected rather than the rights of individual creditors.[20] Real security is an exception to this rule, since it grants one creditor a preference above other creditors in terms of the specific property burdened with the real security right.[21] Until the secured creditor's claim has been settled, property subject to a real security right is consequently not available to the creditors in general.[22]

When enforcing the real security right of mortgage, the judgment creditor can directly execute its judgment against the specifically hypothecated immovable property of the debtor, to the exclusion of other creditors, even during insolvency proceedings. Conversely, unsecured debt first has to be satisfied against the movable property of the judgment debtor and the proceeds would have to be shared concurrently with other creditors.[23]

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[19] JC Sonnekus "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *TSAR* 696-727 714; JC Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97-117 and 230-257 97.

[20] In insolvency law this principle is referred to as the *concursus creditorum*, a coming together of creditors when the sequestration order is made. From this point onward, a single creditor can no longer, by way of execution, obtain full payment of its claim at the expense of other creditors. See s 20(1)(c) of the Insolvency Act 24 of 1936. See also E Bertelsmann *et al* (C Nagel ed) *Mars the law of insolvency in South Africa* (9th ed 2008) 2-3. The *locus classicus* on the concept of *concursus creditorum* is *Walker v Syfret* 1911 AD 141.

[21] CG van der Merwe *Sakereg* (2nd ed 1989) 605.

[22] However, this does not entail that the property no longer forms part of the mortgagor's estate, but only that he or she is limited in his or her ownership for the duration of the mortgage: See JC Sonnekus "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *TSAR* 696-727 714.

[23] See 2 5 1 below.

Credit provision is a common characteristic of modern trade, even to such an extent that western economies are often referred to as credit economies.[24] The successful functioning of any credit system is dependent on creditors having the assurance that they will retrieve their investments.[25] Credit provision relies on trust (*credere*) but regardless of how thoroughly a creditor investigates the financial position of a prospective debtor, it can never be absolutely certain that such a person would be able to repay the debt, due to the changeability of financial circumstances.[26]

This is the reason why property is put up for security. It allows the creditor to have trust in the fact that it will retrieve its investment (the debt), since the property put up for security normally has an economic value that is sufficient to cover the value of the debt. A peaceful balancing of the opposing private law interests is said to be one of the purposes of the law regulating security transactions.[27] The opposing interests involved are the interests of the debtor[28] and creditor,[29] other creditors of the debtor,[30] third parties[31] as well as the community at large.[32] As Sonnekus points out, it is in the community's interest that security rights are obtained and protected with a high degree of legal certainty.[33]

The weight that should be attached to the various interests involved is determined by the surrounding circumstances of each case, including the basic principles of property law.

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[24] JC Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97-117 and 230-257 97.

[25] CG van der Merwe *Sakereg* (2nd ed 1989) 605.

[26] JC Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97-117 and 230-257 97.

[27] S Scott "A step towards a more sympathetic credit security dispensation in South Africa" (2008) 71 *THRHR* 473-482 474; JC Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97-117 and 230-257 97. According to Scott (at 473) the courts have thus far succeeded in effectively striking this balance. The author is also of the opinion that existing real security law adequately safeguards the interests of creditors and debtors, even though there seems be a bias in favour of debtors. The author further comments that one "should not be over-zealous in attempts to supplant existing law that has served credit security law well over many centuries with [one's] own ideas of what is just and fair in a particular circumstance". However, Scott (at 474) also qualifies this position by stating that she does not deem reform unnecessary.

[28] Interests of the debtor include his or her right to housing, dignity, procedural fairness and consumer protection, amongst others. There is also the need for debtors to obtain affordable credit.

[29] Interests of the creditor include its business interests, the retrieval of its investments and its right to have its contractual agreements and property rights enforced. See 6 4 below.

[30] Other creditors are those whose claims are not secured by a real right over that specific property, or with a real right vested subsequent to that of the first creditor.

[31] Third parties' interests include those of non-owner occupiers and children.

[32] The community's interests include the economic and socio-economic impact of mortgage foreclosures, the implications for legal principles like *pacta sunt servanda* and the effective functioning of the debt enforcement system.

[33] JC Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97-117 and 230-257 97. According to L Steyn "'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) 11 *LDD* 101-119 102 it would also be in the interest of the community to provide a "more clearly defined framework within which the required balance is to be struck"; otherwise "cautious lenders will be reluctant to provide finance against the mortgage of a person's home, lest they find themselves in a situation where they are unable, upon the debtor's default, to realise their security".

Therefore, real security law functions with the purpose of benefiting both the debtor and the creditor.[34] The creditor receives the benefit of knowing that its investment (or claim) is secured and that it has a high prospect of retrieving it. For this reason, persons rich in capital (usually banks) are more willing to lend money to potential debtors. This tendency benefits those who need capital because it will be easier for them to borrow.[35] Consequently, mortgage loans are a popular and secure form of lending in South Africa. This state of affairs is also due to the relatively certain value of immovable property as the object of security and because of the statutory preference given to the mortgagee in the Insolvency Act 24 of 1936.[36]

Since the objects of mortgages are mostly land, there are weighty financial considerations involved for homeowners. Because of the mortgage relationship between the mortgagor and the mortgagee there is a considerable and ongoing burden on the homeowner's earnings.[37] For most people a piece of land (specifically a house) will probably be the asset with the highest value in their estate.[38] Acquiring such an asset by means of cash is a rarity and mortgages are, therefore, a practical reality for people wishing to become homeowners.

2 2 2 Definition

The term "mortgage" is sometimes used to describe the entire field of real security rights, whereas at other times it is used to describe a specific type of real security right. Consequently, a mortgage is either defined comprehensively or restrictively.[39] In its comprehensive sense "mortgage" refers to any right over the property of another to secure an obligation, and in this sense it is a generic term for every form of hypothecation. This broad

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[34] *Institutes* 3 14 4: "*sed quia pignus utriusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et creditoris, quo magis ei in tuto sit creditum*". See also S Scott "A step towards a more sympathetic credit security dispensation in South Africa" (2008) 71 *THRHR* 473-482 474, who provides a translation: "[A] pledge, however, is for the benefit of both parties, for the debtor, so that he can borrow more readily, and for the creditor, so that his loan is safer".

[35] One further need to take cognisance of the unequal bargaining position of the parties involved and that there is an inherent structural imbalance in a mortgage relationship. The reason for this is that the debtor is in need of capital, whereas the creditor is in possession of capital and, therefore, in control of the scarce and highly demanded financial resource: See A Domanski "Mortgage bondage" (1995) 112 *SALJ* 159-168 163.

[36] JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 760.

[37] A Domanski "Mortgage bondage" (1995) 112 *SALJ* 159-168 162.

[38] VA Lawack "'Mortgage' bond clauses in sale of land agreements" (1996) 17 *Obiter* 189-212 190.

[39] PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 357; KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of series in E Kahn (ed) *Principles of commercial law* (1999) 1-5; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 1; CG Hall *Maasdorp's institutes of South African law Vol II: The law of property* (10th ed 1976) 212; AFS Maasdorp "The law of mortgage" (1901) 18 *SALJ* 233-248 233.

definition includes special mortgages (in the narrow sense), pledges,[40] notarial bonds,[41] tacit hypothecs,[42] liens,[43] as well as real security rights created by statute[44] or by court order.[45] In this comprehensive sense there is no limit on the nature of the property, the obligation or the manner in which the right comes into existence. In general, when referring to mortgage in this wide sense, I use the term "real security right(s)" to avoid confusion. The particular forms of real security can be distinguished with reference to the method of effecting the security as well as the nature of the property involved.

In its restrictive sense a special mortgage[46] is that specific type of real security right over immovable property that comes into existence by way of two steps, namely an agreement followed by registration.[47] A mortgage bond can be defined as an instrument hypothecating immovable property to secure existing and/or future debt.[48] This definition of a mortgage bond corresponds to the one in section 102 of the Deeds Registries Act 47 of 1937 ("the DRA"), namely "a bond attested by the registrar specially hypothecating immovable property". Although the term "mortgage" can be used to describe certain property or a specific kind of contract, the most widely accepted use of the word is with reference to the right itself.[49] The term "mortgage" comes from English law[50] but in Roman-Dutch law the

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[40] In general, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 390-395.

[41] In general, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 384-390; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 754-760; CG van der Merwe *Sakereg* (2nd ed 1989) 667-673

[42] In general, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 403-407; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 765-768.

[43] In general, see PJ Badenhorst *et al* H *Silberberg and Schoeman's the law of property* (5 ed 2006) 412-421; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 768-781.

[44] For examples, see s 30 of the Land and Agricultural Development Bank Act 15 of 2002; s 114 of the Customs and Excise Act 91 of 1964; s 173 of the Co-operatives Act 91 of 1981. In general, see further PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 408-412.

[45] This is called a judicial mortgage or pledge (*pignus judiciale*), which is constituted by the attachment of property in pursuance of a writ (or warrant) of execution to satisfy a judgment debt, regardless of whether there was a normal mortgage registered over the property. In general, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 407-408; AFS Maasdorp "The law of mortgage" (1901) 18 *SALJ* 233-248 246-248.

[46] Mortgages can be divided into general and special mortgages: See AFS Maasdorp "The law of mortgage" (1901) 18 *SALJ* 233-248 234. A general mortgage extends over all the property of the debtor, whereas a special mortgage attaches only to certain specific portions of the debtor's property: See *In re Insolvent Estate AR Cunningham* (1908) 29 NLR 469 471-472. See also CG Hall *Maasdorp's institutes of South African law Vol II: The law of property* (10th ed 1976) 213. For purposes of this research the difference is not important, since immovable property cannot be hypothecated with a general mortgage: See S 53(1) of the Deeds Registries Act 47 of 1937. See also KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of series in E Kahn (ed) *Principles of commercial law* (1999) 6-7.

[47] See 2 3 below.

[48] *Lief NO v Dettmann* 1964 2 SA 252 (A) 259.

[49] TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 1; CG Hall *Maasdorp's institutes of South African law Vol II: The law of property* (10th ed 1976) 212. In Afrikaans, for example, it is called a *verbandreg* and the term "mortgage", therefore, refers to the right itself.

terms *onderzetting* or *hypotheec* were used, as originating from the Roman law term *hypotheca*.[51] Derived from the Dutch word *hypotheec*, the verb "hypothecate" is often used in South Africa to describe the legal act of burdening property with a real security right.[52]

Thus far the definition of a mortgage has been narrowed down to a special type of real security right that comes into existence by way of contract and registration, for the purpose of hypothecating specific immovable property as security for a principal obligation. This mortgage can be divided into different categories according to the type of principal obligation, though most of these share the same basic principles.[53] In what follows I briefly distinguish between these categories.

The *kustingsbrief* is a mortgage that is vested when the purchaser of land, along with transfer of the land, contractually agrees to register a mortgage in favour of the person who finances the purchase price.[54] When one requires capital and is already the owner of immovable property, a mortgage can also be registered over such property. This type of mortgage is called a mortgage "for monies lent and advanced". It differs from a *kustingsbrief* in the sense that it does not involve the purchase of property. Another type of mortgage, the covering bond, can be registered for the purpose of securing a future debt, also known as a

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[50] JW Singer *Introduction to property law* (2nd ed 2005) 565. The term "mortgage" is misleading in the sense that it may lead one to believe that South African mortgage law is based on, and has developed from English law, which it has not. Rather, the South African mortgage is based on and has developed from the Roman-Dutch concept of *hypotheec*.

[51] CG van der Merwe *Sakereg* (2nd ed 1989) 612 n 37; RW Lee *An introduction to Roman-Dutch law* (5th ed 1953) 183 n 1.

[52] The verb "hypothecate" should not be confused with another form of real security, namely the tacit hypothec, which falls outside the scope of this dissertation: See also GF Lubbe "Mortgage and pledge" rev TJ Scott in WA Joubert & JA Faris (eds) *LAWSA* Vol 17 Part 2 (2nd ed 2008) 291.

[53] On the different types of special mortgages in general, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 363-364; KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 31-35; CG van der Merwe *Sakereg* (2nd ed 1989) 639-650. I classify notarial bonds as a separate form of real security and not as a sub-category of the mortgage. Notarial bonds are registered over movables, whereas the mortgages I discuss only relate to immovables. For notarial bonds in general, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 384-390; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 754-760; CG van der Merwe *Sakereg* (2nd ed 1989) 667-673.

[54] From the Dutch *kustingbrieven*: See Grotius *Inleidinge* 2 48 40; Voet *Commentarius* 20 4 19; CG van der Merwe "Real security" in F du Bois (ed) *Wille's principles of South African law* (9th ed 2007) 642; KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 31-33; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 760-761; CG van der Merwe *Sakereg* (2nd ed 1989) 639. The main practical difference between a *kustingsbrief* and other mortgages is that the former always has preference over subsequently registered mortgages, because it is always registered along with the deed of sale and, therefore, prior to any other mortgages: See *In re Insolvent Estate of Buissine* 1828 1 M 318 327. For sequestration purposes the holder of a *kustingsbrief* also holds some advantages that other mortgagees do not: See s 88 of the Insolvency Act 24 of 1936. See also E Bertelsmann *et al* (C Nagel ed) *Mars the law of insolvency in South Africa* (9th ed 2008) 436.

mortgage "for monies to be lent and advanced".[55] Other applications of the mortgage include the participation bond,[56] the surety bond,[57] and the sectional bond.[58] Regardless of how the mortgage is classified with relation to these categories and irrespective of how the debt is structured, for purposes of this research I refer to any type of special mortgage registered over immovable property that qualifies as the home of the owner/debtor.

2 3 Creation of a mortgage

2 3 1 General

In this section I explain the way that the right of mortgage comes into existence. The purpose for discussing the creation of mortgages is that it illustrates some of the important characteristics of this real security right. Following from the definition that a real security right is a right over the property of another (*ius in re aliena*) to secure an obligation, there are three essentials for such a right to be created: There must be a principal obligation that has to be secured; the right of security has to attach to the property of another person; and a real right has to be created as security.[59]

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[55] S 50(2) and (3) of the DRA. See also CG van der Merwe "Real security" in F du Bois (ed) *Wille's principles of South African law* (9th ed 2007) 642; KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 16-19; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 764-765. Such a mortgage will only give the mortgagee a right of preference if the bond expressly provides that the mortgage serves to secure a future debt and if it provides for a maximum amount of debt secured: See s 51(1) of the DRA. The covering bond is an exception to the rule that the mortgage is accessory to the principal debt, since this mortgage gives a right of preference from the time of registration and not only from the time the debt comes into existence: See s 87 of the Insolvency Act 24 of 1936.

[56] An investment company can receive a large amount of money from a number of small investors. This capital can then be used to lend to persons in need of capital, followed by the registration of mortgage bonds in favour of the company and attached to property of the borrowers. After registration the mortgagee-company gives letters of participation to its investors, confirming to the investors that their investments are secured by a mortgage. Therefore, a number of investors become participants in the mortgage, even though the mortgage is registered in the name of the company: See CG van der Merwe "Real security" in F du Bois (ed) *Wille's principles of South African law* (9th ed 2007) 642; PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 381-384; KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 34-35; CG van der Merwe *Sakereg* (2nd ed 1989) 541-650. Participation bonds are regulated by the Collective Investment Schemes Control Act 45 of 2002.

[57] This is a mortgage providing security for a debt incurred by a person other than the mortgagor: See PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 364.

[58] A sectional bond is any of the above mentioned mortgages registered over a sectional title unit, a type of immovable property in terms of s 15B(1)(c) of the Sectional Titles Act 95 of 1986. See also GJ Pienaar *Sectional titles and other fragmented property schemes* (2010) 139; PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 480; KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 33-34.

[59] TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 4.

A real security right can originate in one of three ways, namely contract, operation of law or judicial attachment.[60] Tacit real security rights are created by operation of law (for example, tacit hypothecs and liens), while express real security rights are created by way of contract (for example, mortgages and pledges).[61] This dissertation focuses on a real security right created by contract (and followed by registration) – in other words, an express mortgage. Maasdorp[62] listed the four essential elements of every mortgage as follows:

(i) A principal obligation to which the mortgage is accessory;

(ii) property to which the mortgage attaches;

(iii) a mortgage agreement; and

(iv) an act by which the real right is constituted, namely registration.

These four elements are discussed below, namely the two prerequisites (the property and principal obligation) and the two steps (the agreement and registration). A mortgage will always have an object and a subject. The property to which the right attaches is the object of the mortgage, and the claim for which the mortgage serves as security is the subject of the mortgage.

An express (or special) mortgage comes into existence by way of two steps (or phases), namely an agreement to put the specific property up for security, followed by registration.[63] There are two distinct facets of the express mortgage and it, therefore, has a dual nature: Firstly, the mortgage generally operates between the mortgagor and the mortgagee by virtue of the agreement between them. Secondly, it constitutes a real right in the property in favour of the mortgagee by virtue of registration, which right is generally enforceable against all third parties.[64]

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[60] 5; CG van der Merwe *Sakereg* (2nd ed 1989) 606; AFS Maasdorp "The law of mortgage" (1901) 18 *SALJ* 233-248 234.

[61] RW Lee *An introduction to Roman-Dutch law* (5th ed 1953) 184; Grotius *Inleidinge* 2 48 7.

[62] AFS Maasdorp "The law of mortgage" (1901) 18 *SALJ* 233-248 235-239. See also CG Hall *Maasdorp's institutes of South African law Vol II: The law of property* (10th ed 1976) 214

[63] CG van der Merwe *Sakereg* (2nd ed 1989) 612 and 621. See also A Domanski "Mortgage bondage" (1995) 112 *SALJ* 159-168 162, who contrasts a mortgage agreement with a sale agreement.

[64] *Olief v Minnie* 1953 1 SA 1 (A) 3; *Lief NO v Dettmann* 1964 2 SA 252 (A) 264. See also KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 7; CG van der Merwe *Sakereg* (2nd ed 1989) 607; RC Laurens "Mortgage bond: Real security" (1984) Oct *De Rebus* 480.

2 3 2 Object and subject of the mortgage

With regard to real security in general, a specific piece of property that is owned by the debtor is singled out as the object of execution.[65] Anything capable of being bought or sold (*res in commercio*) can in principle be the object of a real security right.[66] This includes movables, immovables, corporeals and incorporeals. With reference to a mortgage, the only property capable of being hypothecated is immovable property.[67]

Immovable property is traditionally defined as land and everything permanently attached thereto.[68] Yet, at least for purposes of mortgage law, immovable property is defined wider than land. Incorporeal rights in immovable corporeal property are also regarded as immovable property. Therefore, these rights are capable of hypothecation, provided that they are able to provide enjoyment or advantage.[69] Examples are registered long leases,[70] personal servitudes,[71] undivided shares in co-owned land[72] and sectional title units.[73] For purposes of this dissertation, the property will always be immovable property of a residential nature.

The right of mortgage attaches to the hypothecated property by operation of law.[74] The mortgage follows the property itself and if the property is alienated, it remains subject to the mortgage. Therefore, if the mortgagee's rights were by mistake disregarded during the process of transfer, they will still be given effect to, even against a purchaser who took transfer of the property in good faith.[75] In *Stewart's Trustee & Marnitz v Uniondale*

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65 CG van der Merwe *Sakereg* (2nd ed 1989) 605. In Afrikaans Van der Merwe refers to it as an *eksekusie-voorwerp* or *verhaalsobjek*. In general, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 360; KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 6; CG van der Merwe *Sakereg* (2nd ed 1989) 615; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 38; AFS Maasdorp "The law of mortgage" (1901) 18 *SALJ* 233-248 235-237.

66 *Smith v Farrelly's Trustee* 1904 TS 949 954. See also RW Lee *An introduction to Roman-Dutch law* (5th ed 1953) 183; Voet *Commentarius* 20 3 1; Grotius *Inleidinge* 2 48 2.

67 S 102 of the DRA.

68 PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 34; Grotius *Inleidinge* 2 1 13.

69 CG van der Merwe *Sakereg* (2nd ed 1989) 615. On the classification of incorporeal property as immovable when the incorporeal property is a right pertaining to immovable corporeal property, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 35-38.

70 Ss 56(1), 60 and 81(a) of the DRA.

71 Ss 53(1), 68(2) and 69(4) of the DRA. See also CG van der Merwe *Sakereg* (2nd ed 1989) 616; Voet *Commentarius* 13 7 2 and 20 3 1; Grotius *Inleidinge* 2 48 2.

72 S 27(2)(a) of the DRA.

73 S 15(1)(c), (2) and (8) of the Sectional Titles Act 95 of 1986. See also CG van der Merwe *Sakereg* (2nd ed 1989) 615. The owner of this unit does not own the land itself but only an undivided share in it as part of the sectional title unit. On sectional titles in general, see further GJ Pienaar *Sectional titles and other fragmented property schemes* (2010).

74 TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 132.

75 For examples, see *Standard Bank van SA Bpk v Breitenbach & Andere* 1977 1 SA 151 (T) 156-157; *Barclays Nasionale Bank Bpk v Registrateur van Aktes Transvaal & 'n Ander* 1975 4 SA 936 (T) 941. See also

Municipality[76] it was stated by De Villiers CJ that the mortgage provides the mortgagee with a "charge upon the land" and that a mortgage places "a charge upon the entire *dominium* [ownership] of the land". It is not the mortgagor's rights in the property that are hypothecated but the property itself.[77]

The real right also attaches to all accruals, additions and accessions of the property, however it may have occurred.[78] The mortgage is an "indivisible right".[79] Therefore, the right burdens the property as a whole and even when the property has a higher value than the debt, the mortgagee can have the whole property sold in execution. When the debt is partially repaid, the mortgage is still applicable to the whole property and not just a proportion of it.[80]

Any kind of obligation can in principle be the subject of a mortgage, as long as it is lawful and valid.[81] The mortgage must always relate to some obligation and it is imperative to the validity of a mortgage that there is a lawful principal obligation that it secures.[82] If there is no

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CG Hall *Maasdorp's institutes of South African lawVol II: The law of property* (10th ed 1976) 212. In this regard though, the rights of the mortgagee are safeguarded by s 56 of the DRA, which requires that, in the case of a transfer free of the bond, no property may be transferred until the mortgage is cancelled or until the land is released by the mortgagee's written consent. On the mortgagee's right to follow the property, see 2 4 3 below.

[76] (1889) 7 SC 110 112. See also PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 364.

[77] *Progress Shippers (Pty) Ltd v Van Staden* 1963 1 SA 87 (T) 89. Conversely, JC Sonnekus "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *TSAR* 696-727 700 argues that a limited real right cleaves to the relationship of the owner with the property and is therefore a limitation on the competencies of the owner and not a limitation on the property itself.

[78] *Western Bank Bpk v Trust Bank van Afrika Bpk en Andere NNO* 1977 2 SA 1008 (O) 1017. See also CG van der Merwe *Sakereg* (2nd ed 1989) 628-629; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 132-133; *Digesta* 13 7 21 and 20 1 16 2; Voet *Commentarius* 20 1 2 and 20 1 4. In other words, if a piece of land is hypothecated, all buildings erected on it are also automatically subject to the mortgage. This is a consequence of the rules of *accessio*: See CG van der Merwe *Sakereg* (2nd ed 1989) 148-175. However, the buildings on the land must be immovable in that they must be permanently attached to the land according to the rules of property law. For instances when movable property becomes immovable by way of *accessio*, see further PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 145-156; CG van der Merwe *Sakereg* (2nd ed 1989) 244-258. See also *Trust Bank van Africa Bpk v Western Bank Bpk en Andere NNO* 1978 4 SA 281 (A) 295. It is furthermore interesting to consider that in *Standard Bank of South Africa Ltd v Swartland Municipality and Others* 2010 5 SA 479 (WCC) paras 16 and 28 it was held that the real security right can never attach to unauthorised and illegal structures which might form part of the immovable property. Therefore, the existence of a mortgage cannot prevent the demolition of such structures. This principle was upheld by the SCA in *Standard Bank of South Africa Ltd v Swartland Municipality and Others* 2011 5 SA 257 (SCA) para 15.

[79] PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 378; CG Hall *Maasdorp's institutes of South African law Vol II: The law of property* (10th ed 1976) 245-246; CG van der Merwe *Sakereg* (2nd ed 1989) 613; Voet *Commentarius* 13 7 6.

[80] PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 378; CG Hall *Maasdorp's institutes of South African law Vol II: The law of property* (10th ed 1976) 245-246.

[81] In general, see KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of series in E Kahn (ed) *Principles of commercial law* (1999) 8-10; CG van der Merwe *Sakereg* (2nd ed 1989) 619-621; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 5-6; AFS Maasdorp "The law of mortgage" (1901) 18 *SALJ* 233-248 235; *Digesta* 20 1 5.

[82] *Thienhaus NO v Metje & Ziegler Ltd and Another* 1965 3 SA 25 (A) 32; *Kilburn v Estate Kilburn* 1931 AD 501 506. The principal obligation need not be contractual and it need not be expressed in terms of a monetary

valid obligation there is no mortgage either.[83] This follows from the principle that a mortgage is accessory to the principal obligation.[84] After the right has been established through registration, the mortgage cannot be separated from the principal obligation. When the principal debt is extinguished (for example, by payment in full of the outstanding debt) or held to be invalid, the mortgage also comes to an end.

In practice, the principal debt is often contractually converted into an agreement to pay a liquid sum of money, with the purpose of attaining the advantages of provisional sentence and simplifying the execution procedure. Furthermore, the entire principal debt does not have to be covered by the mortgage, but if the agreement does not limit the debt, it is presumed that the entire debt is covered by the mortgage.[85] The mortgage covers incidentals to the principal debt as well, including interest,[86] expenses to sustain the property[87] and costs to enforce the mortgage.[88] In each case it will be a matter of proper construction of the agreement concerned to determine which obligations or debts are secured by the mortgage.

2 3 3 Two steps: Contract and registration

For the mortgage contract to be concluded there must be an agreement[89] between the parties to burden the property with a real security right.[90] In the contract the mortgagor undertakes to

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obligation either. It can even be an obligation to perform a certain act, provided that it is capable of being converted into an obligation sounding in a fixed amount of money. However, for purposes of this research the principal obligation is a home loan.

83 RW Lee *An introduction to Roman-Dutch law* (5th ed 1953) 183.

84 *Lomcord Agencies (Pty) Ltd v Amalgamated Contruction Co (Pty) Ltd* 1976 3 SA 86 (D) 90; *Thienhaus NO v Metje & Ziegler Ltd and Another* 1965 3 SA 25 (A) 43-44; *Lief NO v Dettmann* 1964 2 SA 252 (A) 276. See also PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 358-359 and 378; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 746-749 and 753; CG van der Merwe *Sakereg* (2nd ed 1989) 613 and 636; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 4-5; Grotius *Inleidinge* 2 48 44; Voet *Commentarius* 20 1 18, 20 6 2; *Digesta* 20 1 5.

85 CG van der Merwe *Sakereg* (2nd ed 1989) 620.

86 620. In the absence of an agreement to the contrary or other exceptional circumstances, a mortgage securing a capital debt secures the interest on that debt as well: See *Kursan and Another v Eastern Province Building Society* 1996 3 SA 17 (A) 26. Much depends on the intention of the parties. For examples, see *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 1 SA 527 (T) and *Klagbruns Inc v Adjunk-Balju, Bronkhorstspruit* 1979 2 SA 169 (T), where the courts analysed the mortgage agreements to determine what the parties' intentions were with regard to what exactly is covered by the mortgage.

87 S 51(2) of the DRA. See also *Smith v Farrelly's Trustee* 1904 TS 949 962.

88 *Smith v Farrelly's Trustee* 1904 TS 949 963.

89 It is important to distinguish between this mortgage agreement and the agreement that brings the primary obligation (the subject of the mortgage) into existence. The contract referred to here is the one that brings the mortgage into existence and not the one that creates the debt.

90 In general, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 361; KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 11-15; TJ Scott & S Scott *Wille's law of mortgage and pledge in South*

pass a mortgage bond over specific property in favour of the mortgagee. There are two essential elements to the nature of this agreement, namely the consent of both parties and the intention to create a mortgage.[91] The mortgage agreement does not have any formal requirements but must comply with the normal rules of contract law.[92] Further, the National Credit Act 34 of 2005 prescribes certain formal requirements for the creation of credit agreements.[93]

Prior to registration, the agreement to hypothecate his or her property is binding on the debtor. Yet, the creditor has no effective security by way of contract alone. It obtains no real right from the agreement. Rather, the creditor only obtains a personal right in terms of which the debtor has the obligation to furnish it with real security.[94] Before registration, the personal rights contained in the mortgage agreement can be relied upon and the mortgagee can prevent the mortgagor from dealing with the property in ways that the agreement does not allow, but it is only binding between the parties to the contract.[95] A mortgage bond is registered in fulfilment of the mortgage agreement, in terms of which the mortgagor bound him- or herself to grant a real right in the property to the mortgagee as security for the debt.[96] Failure to effect registration would not as a rule prejudice the operation of the mortgage as a personal right between the parties themselves, but registration is essential to constitute a real right so as to make the mortgage effective against third parties.

Africa (3rd ed 1987) 41; AFS Maasdorp "The law of mortgage" (1901) 18 *SALJ* 233-248 237-239; Grotius *Inleidinge* 2 48 9.

91 KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 13. The contract will only exist if it can be shown that it was the true intention of the parties to secure the principal obligation by burdening or hypothecating the property with a mortgage: See CG van der Merwe *Sakereg* (2nd ed 1989) 612-613. The intention must be to create a real security right. Where the parties intended some other consequence to follow, the mere fact that the transaction appears as a mortgage does not necessarily render it such and, conversely, security may be constituted by an agreement having a different form but where the parties instead intend to create security. For example, see *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A).

92 CG van der Merwe *Sakereg* (2nd ed 1989) 621. For the normal contractual requirements, see further S van der Merwe *et al Contract general principles* (3rd ed 2007).

93 In this regard, see JM Otto "Conclusion, alteration and termination of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) ch 9.

94 CG van der Merwe *Sakereg* (2nd ed 1989) 621; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 82. Also, prior to registration, in the case of the debtor's insolvency the creditor has no preference but is only a concurrent creditor. This creditor will only share along with other creditors in the balance of the proceeds after secured creditors have been repaid. Save for registration, third parties cannot be bound unless, in terms of the doctrine of notice, the third party acquires the property with knowledge of the mortgage agreement: See *Thienhaus NO v Metje & Ziegler Ltd and Another* 1965 3 SA 25 (A) 43; CG van der Merwe *Sakereg* (2nd ed 1989) 621-622; JC de Wet & AH van Wyk AH *Die Suid-Afrikaanse kontraktereg en handelsreg* (5th ed 1992) 402.

95 *Thienhaus NO v Metje & Ziegler Ltd and Another* 1965 3 SA 25 (A) 43.

96 43.

For a real right to be vested, delivery or registration of the property is required – delivery in the case of pledging movables and registration in the case of hypothecating immovables.[97] Therefore, registration is the second step in the creation of a mortgage.[98] It is this legal act that creates the limited real right in the property by officially hypothecating it in terms of the registration procedure prescribed by the DRA.[99] The mortgagee's real right of security, enforceable against third parties, does not accrue at the time the debt was incurred but upon registration.[100] The mortgage agreement has to be embodied in a document, namely the mortgage bond.[101] This bond then has to be executed by the parties in the presence of the registrar of deeds,[102] whose duty it is to attest and register the bond.[103] At this point, when signed by the registrar of deeds, the real right comes into existence.[104]

There are two reasons (and purposes) for registration as the act by which the real right over the immovable property is vested. Firstly, it is a legal requirement.[105] Ownership and other real rights in land can only be created and transferred from one person to another by way of registration. Secondly, registration fulfils the requirement of publicity and, in other words, it gives notice to the world at large that the real right exists. In property law the principle of publicity plays an important role.[106] Real rights are enforceable against the world at large, as opposed to personal rights, which are generally only enforceable between parties

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97 CG van der Merwe *Sakereg* (2nd ed 1989) 612; AFS Maasdorp "The law of mortgage" (1901) 18 *SALJ* 233-248 239.

98 On registration in general, see the DRA. See also PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 201-239 and 368-369; CG van der Merwe *Sakereg* (2nd ed 1989) 333-345 and 622-624; AFS Maasdorp "The law of mortgage" (1901) 18 *SALJ* 233-248 240-246. The procedural details are not discussed here in full, as it falls within the scope of conveyancing. Rather, the focus is on the implications of registration on the property right of mortgage.

99 KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 8. Already in Roman-Dutch law a form of registration was required: See RW Lee *An introduction to Roman-Dutch law* (5th ed 1953) 185; Voet *Commentarius* 2 1 9. This was regulated by the *Placaat of Charles V* of 10 May 1529 (1 *Groot Placaat Boek* 374). A special mortgage had to be executed in writing before a judge and in the place where the property was situated. The transaction had to be registered in the land-book and there was even a transfer duty payable, namely 2.5 per cent of the amount of the loan.

100 PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 368-369; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 760; CG van der Merwe *Sakereg* (2nd ed 1989) 622; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 129-130; Grotius *Inleidinge* 2 48 30; Voet *Commentarius* 20 1 9.

101 The mortgage bond is the physical written instrument or document in which the terms of the mortgage agreement are agreed upon.

102 S 50(1) of the DRA.

103 S 3(1)(e) of the DRA.

104 In general, see JE Knoll *Property law: Conveyancing*, published as part of a series in JP Naudé (ed) *Butterworths forms and precedents* Vol 8 (1994) 150; HS Nell *Jones conveyancing in South Africa* (4th ed 1991) 435-687.

105 S 16 of the DRA.

106 In general, see CG van der Merwe *Sakereg* (2nd ed 1989) 13-15.

to an arrangement.[107] Accordingly, it is essential that the world at large should be aware of the existence of real rights or have the opportunity to come to the knowledge of such rights, since they are bound by it. For movables, possession serves as publicity to the world, whereas registration in the deeds office fulfils this purpose for immovables. The purpose of a registered mortgage bond is to ensure that the world at large would have knowledge that specific property of a debtor is hypothecated in favour of a specific creditor and that a limited real right exists in favour of that creditor.[108] This is similar to delivery of a movable, which fulfils the purpose of publicity in the case of a pledge. Registration is the only way "delivery" can be accomplished with regard to vesting real rights in immovable property.[109]

A mortgage bond will often include an acknowledgment of debt, although this is not required for a valid real security right to come into existence. The purpose is not to provide an exact account of the mortgagor's indebtedness but only to give notice to the world that there is a charge against the property.[110] Creditors of the mortgagor cannot rely on the acknowledgment of debt in the bond as a correct representation of the debt owed to the mortgagee.[111]

As part of the process of registration, the practice exists that the deed of transfer of the property is endorsed with a stamp or seal, which declares that the property is burdened with a limited real right. However, this is not a requirement in terms of the DRA but merely a practice that makes it easier to determine whether a property is hypothecated. Even though the practice of endorsement is of practical value with regard to publicity, failing to follow this practice does not invalidate registration.[112]

Not all the provisions of the mortgage bond form part of the real security right and some create mere personal rights. Even though registration of these personal rights is allowed in the

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[107] PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 51; CG van der Merwe *Sakereg* (2nd ed 1989) 60.
[108] *Thienhaus NO v Metje & Ziegler Ltd and Another* 1965 3 SA 25 (A) 30.
[109] *Smith v Farrelly's Trustee* 1904 TS 949 955. Delivery of the deed of transfer to the mortgagee – for the purpose of holding it as security – is insufficient.
[110] *Thienhaus NO v Metje & Ziegler Ltd and Another* 1965 3 SA 25 (A) 31; *Lief NO v Dettmann* 1964 2 SA 252 (A) 259.
[111] According to RC Laurens "Mortgage bond: Real security" (1984) Oct *De Rebus* 480 there is a shortfall in that parties can usually establish the existence of the real right from the deeds registry but may be unable to determine to what extent the mortgaged property stands in as security, in other words, the size of the debt. In terms of s 51(1) of the DRA, the upper limit of the debt must be indicated in the case of future debts. However, there is still no way of determining how much has been repaid or re-advanced and how much is still outstanding. These may be crucial questions for anyone inquiring into the existence of real rights.
[112] *Standard Bank van SA Bpk v Breitenbach en Andere* 1977 1 SA 151 (T) 155-156.

case of mortgage bonds,[113] the nature of the principal obligation is not affected by registration and it retains its character as a personal right of action.[114]

2 4 Content, scope and legal nature of a mortgage

2 4 1 General

The definition of a mortgage has been narrowed down to a real security right created by contract and registration, which hypothecates the immovable property of a debtor (the mortgagor) for the purpose of securing a loan obtained from a creditor (the mortgagee). For purposes of this dissertation a mortgage is further narrowed down to the situation where the owner of a residential property willingly agrees to register a mortgage bond over his or her home in favour of a creditor as security for a loan. The definition of a mortgage was confirmed by Cameron JA and Nugent JA in a recent Supreme Court of Appeal decision:

> "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."[115]

It is important to investigate the implications that this right of mortgage have for the owner of the property. Since a mortgage is classified as a limited real right, it follows that the mortgage limits the entitlements of ownership of the mortgagor while at the same time providing the mortgagee with certain defined (and limited) entitlements to the property.[116]

During the process of hypothecation the mortgagor agrees to limit his or her ownership, while allowing the mortgagee to obtain a charge over the property. This is not a transfer of rights in the sense that the mortgagor transfers certain of his or her entitlements of ownership to the mortgagee. It is probably also not a disposal (or alienation) of property.[117] Unlike a

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[113] S 63(2) of the DRA.
[114] *Lief NO v Dettmann* 1964 2 SA 252 (A) 265.
[115] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 2, discussed in 3 2 3 2 below.
[116] S Scott & E Dirix "Calling up a mortgage bond of immovable property" (2009) 72 *THRHR* 575-598 590.
[117] In *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No 2)* 2010 1 SA 634 (WCC) paras 15-23 the court held, in the context of company law, that the act of hypothecating property is not a disposal (or alienation) of property. Even though the case dealt with the interpretation of the term "dispose of" in s 228(1) of the Companies Act 61 of 1973, it is helpful to explain the nature of hypothecation. The court

normal transfer of property or rights, that which the mortgagee receives in this process is not exactly the same as that which the mortgagor gives up. Therefore, in this sense hypothecation is not a transfer of rights but rather the limiting of one right (namely ownership) along with the creation of a new right (namely mortgage). It is part and parcel of the value of any property that the owner thereof may limit his or her ownership by registering limited real rights against the capital value of the property in order to obtain loans for whatsoever purpose.[118] Without this entitlement to hypothecate property, few persons would be able to own immovable property.

Mortgage law has developed over many years and most of the foundational principles regarding mortgages have become trite. In a recent Supreme Court of Appeal decision the value and importance of the mortgage in present-day society was confirmed, which gave some much needed assurance to persons starting to doubt its value as a secure right. In the introductory remarks by Cameron JA and Nugent JA in *Standard Bank of South Africa Ltd v Saunderson and Others*[119] the court confirmed the indispensable value of the mortgage bond as a tool for spreading home ownership wider, since few people are able to buy a home without obtaining a loan. Providing security for such a loan by way of a mortgage enables them to purchase a home. Consequently, almost all homeowners were mortgagors at some

held that the ordinary meaning of disposal is to "make over" or "part with by way of sale" or to "transfer into the control of someone else". The Afrikaans word *vervreem* refers to the transfer of ownership. Hypothecating property would, according to the court, not ordinarily be seen as a disposal of property. When the debtor defaults and the creditor consequently becomes entitled to have the property sold in execution, the property is only thereafter transferred to whosoever purchases it. Yet, at hypothecation it is not the debtor's purpose to part with his or her property. In fact, the mortgagor hopes for the property to ultimately stay with him or her, as he or she pays off the debt. If the property is later sold in execution, this is not because it was the debtor's intention, but because of the creditor enforcing its right in spite of what the debtor's intention may be. In addition, at the sale in execution it is the sheriff who disposes of the property and not the debtor. Though a mortgage may lead to a forced sale, the hypothecation itself does not have a sale as its purpose and if the forced sale takes place, it is not a sale to which the mortgagor is party. Therefore, even the eventual sale in execution cannot be seen as a disposal by the mortgagor. Hypothecation can also not be seen as the first step towards a disposal of the hypothecated property. The transaction that exposes the debtor's property to the risk of a sale in execution is the act of borrowing money, and not the hypothecation itself. Constituting the mortgage is not the part of the transaction that creates the risk of execution. Rather, the mortgage only determines who benefits first from the proceeds of the sale in execution. The court concluded that even if there were contexts where a disposal can include hypothecation, there was no reason to adopt such an interpretation in this context. The court consequently implied that the norm would be for hypothecation to not be considered an act of disposal, at least within the meaning that the Companies Act gives to this concept. I suggest that, in terms of mortgage doctrine, it is probably more correct to refer to hypothecation not as a type of disposal of the land, but as limiting the debtor's right to freely dispose of the land.

[118] CG van der Merwe *Sakereg* (2nd ed 1989) 173.

[119] 2006 2 SA 264 (SCA) paras 1-3.

point in time.[120] Moreover, the value of a mortgage lies in the confidence that the law will give effect to its terms.

The content and scope of the mortgagee's charge is mostly determined by the mortgage agreement with its various clauses. However, there are also inherent rights attached to the right of mortgage, following from its definition and purpose. The basic rights and duties of parties may be varied by agreement and additional terms may be added, as long as these do not have the effect of changing the nature of the contract into something other than a security agreement.[121]

The primary content of the right of mortgage is that the mortgagee may retain its hold (or charge) over the secured property until the debt is paid.[122] The effect of a mortgage is a right of preference regarding specific property above that of other creditors, combined with the procedural enforcement advantages. A mortgage usually confers the following rights: Firstly, it affords a right to follow the property and restrain the owner's dealings with it. Secondly, it provides a right, arising on default of the obligation that it secures, to have the property sold and to obtain payment of the debt from the proceeds of the sale. Thirdly, it provides a preference in favour of the mortgagee in the proceeds of a forced sale of the property, whether due to insolvency[123] of the mortgagor or execution at the instance of another creditor.[124]

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[120] Evidence was also given to the effect that in 2005 the loans secured by mortgages on residential property in South Africa amounted to almost R500 billion.

[121] An example of a possible additional clause is the *pactum antichresis*, which gives the mortgagee the right to use the property and receive its fruits, for instance, instead of receiving interest on the original debt: See PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 365; CG van der Merwe *Sakereg* (2nd ed 1989) 626; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 111-121. In *Barclays Western Bank Ltd v Comfy Hotels Ltd* 1980 4 SA 174 (E) 178 it was held that such rights to receive and use the rents and fruit of the hypothecated property are not personal rights but limited real rights, seeing that they are real rights in respect of the immovable property of which the mortgagor is owner.

[122] On the nature and scope of the mortgage in general, see *Lief NO v Dettmann* 1964 2 SA 252 (A) 259. See also PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 361-363; KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 7-8; CG van der Merwe *Sakereg* (2nd ed 1989) 606 and 628-635; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 5; RC Laurens "Mortgage bond: Real security" 1984 (Oct) *De Rebus* 480.

[123] For the implications of real security rights in insolvency law, see E Bertelsmann *et al* (C Nagel ed) *Mars the law of insolvency in South Africa* (9th ed 2008) 432-475. The holder of a mortgage bond that hypothecates immovable property is a secured creditor for sequestration purposes, and a secured creditor is anyone who enjoys a security for his claim over the property of the insolvent by virtue of a special mortgage: See the definition of "special mortgage" in s 2 of the Insolvency Act 24 of 1936.

[124] PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 371-373; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 752-753; CG van der Merwe *Sakereg* (2nd ed 1989) 632-633; JC Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97-117 and 230-257 98. Persons other than the mortgagee can have claims against the debtor. These include the trustee of the debtor's insolvent estate as well as third parties such as other unsecured or secured creditors of the mortgagor. Another secured creditor can, for

In practice, the mortgage also limits the realisation value of the property. When sold in the normal course of events the bond must be cancelled and the outstanding debt must first be paid from the proceeds. Therefore, if a portion of the debt is still outstanding at the time of sale, the mortgagor will only receive such an amount of the proceeds as remains after repayment of the debt. In other words, part of the limitation on ownership is that, for the duration of the mortgage, the owner has to bear the practical reality of a lowered realisation value.[125]

The right of mortgage (a real right in property) is itself considered to be incorporeal property and it can be ceded as such.[126] The real right under the mortgage bond is immovable but the personal rights, including the debt, are movable.[127] The mortgage bond as a document is a corporeal movable that embodies an incorporeal right of action as well as a real right in the immovable property.[128] A real right in land is considered to be incorporeal property and, even though not physically immovable, is regarded as immovable incorporeal property because it is a real right in a corporeal immovable.[129]

2 4 2 Limitations on the mortgagor's ownership

The mortgagee's charge against the property entails that ownership in the property is limited to a certain degree, hence a *limited* real right. For the purpose of protecting its security, the mortgagee can restrain the mortgagor from acting in certain ways with the property. The mortgagor does not lose ownership (*dominium*) of the property and the mortgagee, therefore,

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example, be the holder of a second mortgage. The mortgagee's right of mortgage does not make the property immune to attachment by other creditors of the mortgagor. However, following from its right of preference, the mortgagee has the right to place a reserve price on the sale of the property instituted by third parties. When a sale in execution occurs due to a judgment in favour of a third party or by reason of the mortgagor's insolvency, the mortgagee has a preferent right to the proceeds. When the proceeds of the sale are insufficient to cover the entire debt, the mortgagee will be a concurrent creditor along with the other creditors for the purpose of the remaining part of the debt. Although it is possible to register more than one mortgage over the same immovable property, the rights of later mortgagees are always subject to the preferential rights of the first mortgagee and a sale in execution by the second mortgagee may not prejudice the rights of the first mortgagee.

[125] JC Sonnekus "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *TSAR* 696-727 714. For example, although the mortgagor owns a house worth R1 million, when selling it he or she would only receive R100 000, since the outstanding loan of R900 000 first has to be repaid from the total proceeds. This also illustrates the commercial and social value of the mortgage in that it creates the opportunity for persons to own homes and accumulate capital wealth where they otherwise would not have been able to do so.

[126] On the cession of mortgage bonds, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 375-378. For example, see also *Naik v Standard Bank Ltd* 1975 1 SA 197 (R).

[127] *Lief NO v Dettmann* 1964 2 SA 252 (A) 259. See also PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 35-38.

[128] *Lief NO v Dettmann* 1964 2 SA 252 (A) 276.

[129] PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 35-38. For constitutional purposes, a right of mortgage will probably also be regarded as "property": See 6 4 2 2 below.

does not obtain ownership when the property is hypothecated in its favour, but only a limited real right (*ius in re aliena*).[130] This limited real right confers certain rights upon the mortgagee and, subject to taking the appropriate steps, enables it to have its claim satisfied out of the proceeds of such property.[131] Other than the right to have the property sold pursuant to an order of court, the mortgagee is incapable of dealing with the property in any way, since it does not have any of the ordinary entitlements of ownership.[132] When the mortgagee does not have possession of the property, as is mostly the case with hypothecated land, its right to safeguard its security interest in the property is consequently confined to restraining the mortgagor's right of alienation.[133]

The mortgage constitutes "a charge upon the entire *dominium* of the land"[134] and, since the mortgage attaches to the hypothecated property itself, it has the effect of deducting from the rights of the owner.[135] For a person to be a mortgagor (in other words, for a person to be able to hypothecate his or her property), he or she first of all has to be the owner.[136] A person cannot hypothecate property of which he or she is not the owner.[137] However, this requirement is not enough, seeing that the person wanting to hypothecate his or her property must also have the power to alienate such property (*ius disponendi*).[138] The reason for this prerequisite is that the mortgage limits the owner's entitlement to freely alienate (or dispose of) the property without the mortgagee's consent.[139] The mortgagor may not sell the property or burden it with servitudes without the mortgagee's permission.[140] Yet, the mortgagor may

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[130] *Oertel v Brink* 1972 3 SA 669 (W) 674; *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 245-246; *Rothschild v Lowndes* (1908) TSC 493 498. See also TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 128; *Digesta* 13 7 35 1 and 20 5 12.

[131] *Rothschild v Lowndes* (1908) TSC 493 498.

[132] *Roodepoort United Main Reef GM Co Ltd (In Liquidation) & Another v Du Toit* 1928 AD 66 70-71. See also S Scott & E Dirix "Calling up a mortgage bond of immovable property" (2009) 72 *THRHR* 575-598 580.

[133] TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 139-140.

[134] *Stewart's Trustees & Marnitz v Uniondale Municipality* (1889) 7 SC 110 112 per De Villiers CJ.

[135] CG Hall *Maasdorp's institutes of South African law Vol II: The law of property* (10th ed 1976) 212.

[136] S 50(1) of the DRA. See also CG van der Merwe *Sakereg* (2nd ed 1989) 618; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 8; *Digesta* 13 7 20.

[137] RW Lee *An introduction to Roman-Dutch law* (5th ed 1953) 183 n 9; Voet *Commentarius* 20 3 3; *Codex* 8 15(16) 6. If a non-owner does hypothecate property, the mortgage will be valid as between him or her and the mortgagee but not to the prejudice of the real owner.

[138] TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 8; KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 13; Grotius *Inleidinge* 2 48 5.

[139] JC de Wet & AH van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (5th ed 1992) 401; CG van der Merwe *Sakereg* (2nd ed 1989) 624; JC Sonnekus "Sekerheidsregte – 'n nuwe rigting?" 1983 *TSAR* 97-117 and 230-257 98.

[140] Ss 65(3), 75(3) and 76(2) of the DRA. See also PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 364-365; CG van der Merwe *Sakereg* (2nd ed 1989) 623. Although not a requirement, for practical reasons the title deed of the hypothecated property is often placed in the possession of the mortgagee to further prevent the mortgagor from alienating the property without the mortgagee's consent.

lease the property, burden it with further mortgages or exploit it. If the mortgagor tries to commit an act that would deprive the mortgagee of its security or that may cause the value of the property to decline, the mortgagee can obtain an interdict to restrain the mortgagor from committing such an act.[141]

2 4 3 Right to follow the property[142]

Since the mortgage attaches to the property itself, the holder can enforce it even when the property leaves the possession of the debtor.[143] This is referred to as the right to follow the property (*opvolgingsreg*). As mentioned, the mortgagor may not alienate the property without the written consent of the mortgagee. However, if real rights are vested over the property without its permission, the mortgagee's rights will prevail against third party holders of newly vested rights,[144] including subsequently registered mortgages.[145]

Even if ownership of the property is registered in the name of a third party without the mortgagee's prior consent, the mortgagee's real right will remain in existence.[146] Therefore, the mortgagee can obtain a judgment order against the debtor/mortgagor and have the property sold in execution, even if it is in the hands of the third party purchaser.[147] The

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[141] *Stewart's Trustees & Marnitz v Uniondale Municipality* 1889 7 SC 110 112 per De Villiers CJ:

> "The object of a mortgage is to give the mortgagee a charge upon the land mortgaged as security for the debt due. It is a charge upon the entire dominium of the land, and therefore if any portion of that dominium is interfered with by the mortgagor, it is a prejudice to the legal rights of the mortgagee. There is no need for the mortgagee to prove actual pecuniary damage; the interference by the mortgagor in diminishing any portion of the dominium of the land charged by imposing a servitude upon it, is a prejudice to the mortgagee's legal rights, and therefore he or she is entitled to have the act which causes such prejudice set aside."

See also *Williams (Pty) Ltd v Gounden* 1960 1 SA 797 (D) 799; *SA Permanent Building Society v Liquidator Isipingo Beach Homes (Pty) Ltd & Others* 1960 1 SA 305 (D) 310; PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 364; CG van der Merwe *Sakereg* (2nd ed 1989) 629 n 189.

[142] CG van der Merwe *Sakereg* (2nd ed 1989) 629-632.

[143] JC de Wet & AH van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (5th ed 1992) 401.

[144] For examples, see *Standard Bank van SA Bpk v Breitenbach & Andere* 1977 1 SA 151 (T) 156; *Barclays Nasionale Bank Bpk v Registrateur van Aktes Transvaal & 'n Ander* 1975 4 SA 936 (T) 941.

[145] See PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 365 and 372; Voet *Commentarius* 20 3 4; *Digesta* 20 4 12 7. More than one mortgage can be registered over the same immovable property, but the first mortgagee will enjoy preference: See JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 752-753. On the relationship between first and later mortgagees, see also PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 364-375; CG van der Merwe *Sakereg* (2nd ed 1989) 631-632.

[146] *Standard Bank van SA Bpk v Breitenbach & Andere* 1977 1 SA 151 (T) 156; *Barclays Nasionale Bank Bpk v Registrateur van Aktes Transvaal & 'n Ander* 1975 4 SA 936 (T) 941; CG van der Merwe *Sakereg* (2nd ed 1989) 630; Grotius *Inleidinge* 2 48 32; Voet *Commentarius* 20 1 13.

[147] Barclays *Nasionale Bank Bpk v Registrateur van Aktes Transvaal & 'n Ander* 1975 4 SA 936 (T) 941. See also CG van der Merwe *Sakereg* (2nd ed 1989) 630.

mortgagee's right does not even have to be displayed on the purchaser's deed of transfer and such registration does not even have to be cancelled first, since the original registration of the mortgage is the reason for the mortgagee's right of action.[148] If the bond was cancelled or de-registered without the mortgagee's knowledge or consent,[149] and even if the property was transferred to a *bona fide* third party, such transfer was not free of the mortgage.[150]

The mortgage is clearly a formidable real right that is strong and well protected. This is demonstrated by the fact that the right is not affected by acquisition of ownership or other rights in the hypothecated property by *bona fide* third parties who do not know or were not reasonably able to know about it. This is even the case if the third parties' *bona fides* were due to error or oversight in the process of registration.[151]

2 4 4 Right to foreclose the mortgage

The two key clauses in any mortgage agreement are the foreclosure clause (*oproepingsbeding*), in combination with the acceleration clause (*opeisbaarheidsbeding*).[152] These clauses – usually combined in one clause – entail the strongest entitlement of the mortgagee, namely the right to call up the bond or claim foreclosure thereof.[153] It comprises of an agreement that, should the mortgagor default on the payment of instalments, payment of

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[148] Barclays *Nasionale Bank Bpk v Registrateur van Aktes Transvaal & 'n Ander* 1975 4 SA 936 (T) 941-942. See also CG van der Merwe *Sakereg* (2nd ed 1989) 630.

[149] For the requirements of cancellation, see s 56 of the DRA.

[150] *Barclays Nasionale Bank Bpk v Registrateur van Aktes Transvaal & 'n Ander* 1975 4 SA 936 (T) 941-942. The court held that the original mortgagee's right of mortgage is not extinguished by the cancellation thereof without its consent. Its rights are also not affected by the transfer of the property to a *bona fide* purchaser. Therefore, despite cancellation of the bond, the mortgage still exists with the same legal force. The only difference is that the mortgagee now only has a personal right against his or her debtor (the original mortgagor) for the outstanding debt, while it has the right to institute the *actio hypothecaria* against the third party (new owner of the property, or any other possessor), in terms of which such third party has to allow the sheriff to sell the property in execution of the judgment against the original mortgagor.

[151] RC Laurens "Mortgage bond: Real security" (1984) Oct *De Rebus* 480. However, this can have a devastating effect on *bona fide* successors in title of the mortgagor. For examples, see *Standard Bank van SA Bpk v Breitenbach en Andere* 1977 1 SA 151 (T); *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal, en 'n Ander* 1975 4 SA 936 (T).

[152] PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 364 n 61 and 367-368; CG van der Merwe *Sakereg* (2nd ed 1989) 625.

[153] Here is an example of a typical clause to this effect in a mortgage agreement, as quoted in *Firstrand Bank Ltd v Soni* 2008 4 SA 71 (N) para 5:

> "[I]n the event of the [mortgagor] failing to pay any amount due in terms of the bond or committing a breach of any other provision of the bond, then all amounts whatsoever owing to the [mortgagee] by the [mortgagor] should forthwith be payable in full, notwithstanding the exercise by [mortgagor] of any other rights granted in terms of the bond, and the [mortgagee] might institute proceedings for the recovery thereof and for an order declaring the mortgaged property executable".

the entire outstanding balance on the loan becomes accelerated. The mortgagee consequently has the right to claim the entire balance of the debt, since it becomes "due and payable" immediately, along with the right to call up the bond.[154] The outstanding loan becomes "due" in the sense that the mortgagor, after defaulting, is under an obligation to pay the entire debt without further ado, and the debt becomes "payable" in the sense that the mortgagee can demand payment thereof immediately.[155] By calling up the bond the mortgagee cancels the mortgage agreement and if the mortgagor is not able to pay the entire debt, the mortgagee may have the property sold in execution to have the debt satisfied from the proceeds.[156]

To have the hypothecated property sold in execution is a substantive right[157] of the mortgagee and it furthermore has an inherent or implied right to have the hypothecated property sold and to receive a sufficient amount from the proceeds to settle the debt.[158] In the absence of a clause specifically authorising execution, the executability of the foreclosure clause arises by operation of law.[159]

In *Nedcor Bank Ltd v Kindo*[160] ("*Kindo*") the question was asked whether it is necessary to expressly provide in the bond that the hypothecated property may be sold in execution. It was argued that such an express provision was unnecessary, given the legal consequences and nature of a mortgage. It was further argued that it was the parties' very intention that the immovable property would be hypothecated and that the mortgagee could claim the real right afforded it by the mortgage and sell the hypothecated property, in the event of the mortgagor's default.

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[154] *TG Bradfield Coastal Properties (Pty) Ltd & Another v Toogood* 1977 2 SA 724 (EC) 730. See also Voet *Commentarius* 20 5 1.

[155] *Firstrand Bank Ltd v Soni* 2008 4 SA 71 (N) para 22; *The Master v IL Back & Co Ltd and Others* 1983 1 SA 986 (A) 1004; *Western Bank Ltd v SJJ Van Vuuren Transport (Pty) Ltd and Others* 1980 2 SA 348 (T) 351; *Moodley v Community Development Board* 1968 4 SA 615 (D) 619.

[156] The mortgagee's intention to cancel the bond must be communicated to the mortgagor unless the mortgage agreement provides that notice is not necessary, in which case the cancellation takes immediate effect: See *TG Bradfield Coastal Properties (Pty) Ltd & Another v Toogood* 1977 2 SA 724 (EC) 730. However, I argue that such an agreement that excludes notice of cancellation is no longer valid, especially in light of s 26 of the Constitution (see ch 3 below) and ss 129 and 130 of the National Credit Act 34 of 2005 (see 4 3 1 below).

[157] Since the right to foreclose in terms of the foreclosure clause is a substantive right, the mortgagee can never be compelled to foreclose: See CG van der Merwe *Sakereg* (2nd ed 1989) 625. When the circumstances for possible foreclosure arise it still has the right to choose against the remedy and merely insist on repayment of the debt. However, as soon as the mortgagee elects to foreclose, that decision may not be revoked: See *TG Bradfield Coastal Properties (Pty) Ltd & Another v Toogood* 1977 2 SA 724 (EC) 730. However, in light of new developments in recent years it seems undesirable to place a prohibition on revoking foreclosure, especially in light of negotiation procedures provided for by the National Credit Act 34 of 2005.

[158] *Thirlwell v Johannesburg Building Society and Others* 1962 4 SA 581 (N) 583. See also *Digesta* 13 7 4; Voet *Commentarius* 20 5 1.

[159] *Nedcor Bank Ltd v Kindo* 2002 3 SA 185 (C) 186-188. See also PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 367-269.

[160] 2002 3 SA 185 (C) 186-188.

In other words, the question was whether the court could give an order declaring the property executable even if there was no express contractual term in the bond providing for execution. Does the mortgagee have an inherent or implied right to have the hypothecated property sold and to receive the proceeds as payment for the debt? An implied right like this can arise by operation of law (in terms of the nature of a mortgage) or as a result of the parties' intention. The court agreed that the logic behind this approach is that the payment of the debt is irrevocably bound to the mortgage, seeing that the mortgage secures the debt.

The court discussed the "generally accepted principle of South African law" that "where there is a right there is a remedy" (*ubi ius ibi remedium*).[161] It found that the mortgagee's right to have the property sold in execution follows automatically from its act of calling up the mortgage and that this right is only qualified by the rule that a court must authorise the sale. The reason for this qualification is the fact that the mortgagee only has a limited real right and, therefore, the courts must protect the mortgagor against the abuse of this limited real right.[162] It further follows from the mortgagor's primary duty, namely to pay the secured debt, that the mortgagee has a corresponding right to foreclose the bond and have the property sold if the mortgagor defaults.

The court also held that as soon as the mortgage is foreclosed, the mortgagee is entitled to a court order declaring the property executable. If this were not the case, it would lead to absurd consequences, since the mortgagee would have a right but no remedy, something that, according to the court, cannot be correct. It was clear to the court that the executability of the property arises by operation of law and that even the absence of a clause allowing execution does not lead to a situation where the property cannot be declared executable. To hold otherwise, the court held, would defeat the purpose of hypothecating property with a mortgage, namely to entitle the mortgagee, in the event of default, to foreclose the mortgage and have the property sold. Therefore, the mortgagee would only have a right and a sufficient remedy if execution is possible regardless of the contract not providing for it specifically.

Kindo illustrates the difference between the contractually agreed upon and registered real right and the consequences the law attaches thereto as a result of the implicit purpose of such a real right. The mere fact that the mortgagor agreed to allow a claim over his or her property in favour of the mortgagee implies that such a claim will be enforceable by way of sale in execution. The remedy of selling the mortgagor's property in satisfaction of the debt is, as a

[161] 187 per Hlophe JP.
[162] 178-188.

result, inextricably linked to the law of mortgage, even to the extent that the courts will recognise it as an implicit part of enforcing the secured debt. *Kindo* is a good illustration of the basic common law foundation of mortgage foreclosure and sale in execution.

2 4 5 The mortgagor's right of redemption[163]

The common law provides a mortgagor with a way of preventing his or her property from being sold in execution, even if the bond had been called up. The mortgagee is usually entitled to institute legal proceedings to have the hypothecated property sold in execution as soon as it has lawfully foreclosed the mortgage. However, the defaulting debtor only loses ownership of the hypothecated property when it is transferred to the auction purchaser. While he or she is still the owner of the property – even after it has been attached and sold at the auction – the debtor has the right to redeem the property. This entails that when the mortgagor pays the mortgagee the total amount owed, the property is freed from the limited real right of the mortgagee. After the debtor has paid the amount due to the mortgagee, the debtor is entitled to have his or her property returned free of the mortgage. The bond must consequently be cancelled. In terms of the right of redemption, the debtor's property is only freed from the mortgage if the debt has been fully discharged.

A new remedy that is similar to redemption was recently introduced by section 129(3) and (4) of the NCA, namely the right to reinstate a credit agreement by getting the amounts in arrears up to date. Therefore, the hypothecated property can be redeemed from the execution process by simply getting the amounts in arrears up to date and not the entire outstanding debt. Even though the property is not redeemed from the limited real right, the sale in execution is prevented in the sense that foreclosure is reversed by the reinstatement of the credit agreement.[164]

[163] See PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 381. See also TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 191-195 and the sources cited there.
[164] See 4 3 2 below, where I discuss reinstatement in more detail.

2 5 The enforcement process[165]

2 5 1 General

The value of a real security right lies in its enforcement.[166] An unenforceable right may be no right at all, since it will lead to absurd results if a mortgagee has a right but no remedy.[167] As I explain throughout this dissertation, the impact of the right of access to adequate housing on the enforcement of mortgages has become controversial in the constitutional era, especially with regard to residential property being sold in execution. This debate is complicated even further by the constitutional protection of property and by the impact of the NCA. For purposes of this chapter, the focus remains on a broad overview of the enforcement of mortgages. Some of the more complex details of the procedure are discussed in chapter 3 below with reference to the developments inspired by section 26 of the Constitution.

The most common remedy in mortgage law is the mortgagee's right to have the property sold pursuant to an order of court and to receive payment for the outstanding debt from the proceeds.[168] This remedy is firstly a consequence of the mortgagee's limited real right (*ius in re aliena*) that entitles it to "hold" the property as security until the debt has been satisfied.[169] Secondly, it is also a consequence of the mortgagor's principal duty, namely to pay the debt secured by such mortgage.[170] The mortgagee has no inherent right to sell the property privately but has to employ the available mechanisms of the law. Obtaining a judgment followed by a sale in execution is the only way for the mortgagee to enforce its right of

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[165] This section is largely based on AC Cilliers *et al Herbstein and Van Winsen the civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Vol 2 (5th ed 2009) 1019-1096; TJM Paterson *Eckard's principles of civil procedure in the Magistrates' Courts* (5th ed 2005) 251-278. See also S Scott & E Dirix "Calling up a mortgage bond of immovable property" (2009) 72 *THRHR* 575-598; PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 370; KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 22-23 & 42-46; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 753; CG van der Merwe *Sakereg* (2nd ed 1989) 633-635; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 203-251.

[166] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 3.

[167] PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 363. See also the discussion of *Nedcor Bank Ltd v Kindo* 2002 3 SA 185 (C) in 2 4 4 above.

[168] *Rothschild v Lowndes* 1908 TS 493 498; *Roodepoort United Main Reef GM Co Ltd (In Liquidation) v Du Toit NO* 1928 AD 66 71. See also TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 128; *Digesta* 13 7 4.

[169] TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 128; *Digesta* 20 1 13 4.

[170] In practice, the parties mostly agree on repayment in instalments and a portion of the debt, therefore, becomes due and payable periodically: See PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 364.

recourse, since a *parate executie* clause and a *pactum commissorium*, which grants the mortgagee the right to circumvent the court's intervention, are both invalid.[171]

The sale in execution process entails all the procedural aspects, requirements and so forth, leading towards and culminating in a public auction. It includes the court applications, obtaining of a judgment order and an order declaring the property executable, obtaining a writ (or warrant) of execution, the attachment of the property by the sheriff, and the auction.

A general principle is that in the absence of a court order that declares the immovable property of the debtor specially executable, the creditor may not execute against the immovable property before first executing against the debtor's movable property. Moreover, the sale may not occur, nor may the property be attached, without such declaratory order.[172] This principle has been codified.[173] The granting of an execution order against immovable property requires special circumstances, but the fact that the property has been hypothecated as security for the judgment debt is traditionally sufficient to constitute such special circumstances.[174] Any judgment creditor (whether a mortgagee or not) may execute against the debtor's immovable property if his or her movables have been exhausted. No further order declaring immovable property executable is necessary if the execution against the movables proved to be insufficient.[175]

The primary circumstance under which the mortgagee can have the property sold is when the mortgagor defaults on his or her loan repayment instalments.[176] Specifics will depend on the exact agreement and detail of the foreclosure clause, for example, whether payment is by

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[171] The *pactum commissorium* is a clause in terms of which the mortgagee automatically becomes owner of the hypothecated property upon the mortgagor's default. The clause permitting *parate executie* is a clause in terms of which the mortgagee may effect a private sale of the hypothecated property without first obtaining the court's permission. These clauses are unlawful because they permit the mortgagee to take the law into its own hands by bypassing judicial oversight: See *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A) 611 (*pactum commissorium*); *Iscor Housing Utility Co and Another v Chief Registrar of Deeds* 1971 1 SA 614 (T) (*parate executie*). See also PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 368; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 752; CG van der Merwe *Sakereg* (2nd ed 1989) 627. Private sales of immovables are invalid, but once the mortgagee acquires the right to foreclose he may make a valid agreement with the mortgagor for private sale at a fair price, albeit not before the mortgagor defaults and activates the foreclosure clause.

[172] *Barclays Nasionale Bank Bpk v Badenhorst* 1973 1 SA 333 (N) 338. See also KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 42.

[173] HCR 45(1); s 66(1)(a) of the Magistrates' Courts Act 32 of 1944. For the constitutional developments in this regard, see 3 2 below.

[174] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 3; *Ledlie v Erf 2235 Somerset West (Pty) Ltd* 1992 4 SA 600 (C) 601.

[175] *Gerber v Stolze and Others* 1951 2 SA 166 (T) 171. This principle proved to be controversial and was later amended as a result of s 26 of the Constitution: See 3 2 5 below.

[176] TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 128; Voet *Commentarius* 20 5 1.

way of monthly or annual instalments. Therefore, the content of the agreement will to a large extent prescribe the circumstances under which foreclosure can take place.[177] When instituting proceedings to foreclose the mortgage, the mortgagee's cause of action is consequently based on the mortgagor's breach of contract.[178]

The right to foreclose is not an unlimited entitlement of the mortgagee. It is firstly regulated by the substantive rules of mortgage law and furthermore by the procedural measures that are mostly contained in the high court and magistrates' court legislation and rules of court.[179] The purpose of this discussion is not to give an in-depth account of the procedure since this falls in the law of civil procedure. Rather, the purpose is to provide a broad overview of the procedure as far as it is relevant for substantive property law.[180]

After obtaining a judgment in its favour, the judgment creditor can enforce the judgment by the process called execution. A judgment is a prerequisite for sale in execution and the mortgagee consequently has to prove the debt owed to it by the mortgagor.[181] There are three requirements or steps before it can be said that execution has been levied: The granting of a valid writ (or warrant) of execution; the attachment of the debtor's property (unless he or she pays the amount of the writ plus costs); and a sale by public auction of the attached property.[182]

2 5 2 Attachment of the property

All processes directed to the sheriff, including writs of execution, must be executed by the sheriff or the deputy sheriff concerned.[183] Therefore, the sale in execution and various matters incidental to or consequential upon it are conducted by the sheriff. Upon attachment, the possession, custody and control of the property pass into the hands of the sheriff who

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[177] The agreement will probably also prescribe a certain amount of time after which the mortgagee is entitled to claim foreclosure. The agreement can furthermore provide for foreclosure when interest is not paid in line with the agreed-upon instalments. Foreclosure can also occur when any other condition of the agreement is broken, provided that the agreement itself provides for foreclosure to take place under such circumstances.

[178] TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 204.

[179] The Supreme Court Act 59 of 1959; the High Court Rules ("HCR"); the Magistrates' Courts Act 32 of 1944 ("MCA"); the Magistrates' Courts Rules ("MCR").

[180] The processes in the high court and the magistrates' court are similar and it can be assumed that the principles discussed relate to both courts unless stated otherwise. The specific differences are not relevant for current purposes, unless stated otherwise.

[181] HCR 45(1); MCR 36(1) and (7). See also *Van Dyk v Du Toit* 1993 2 SA 781 (O) 782-783.

[182] *Mattoida Constructions (SA) (Pty) Ltd v E Carbonari Construction (Pty) Ltd* 1973 3 SA 327 (D) 332.

[183] S 36(1) and (2) of the Supreme Court Act 59 of 1959; MCR 8. The sheriff must also make a return in which he or she gives account of the manner of execution to the court and to the party at whose instance the order was issued. Such a return is *prima facie* evidence of the matters stated therein.

executes the warrant of execution.[184] Consequently, after attachment, the mortgagee is not in control of the property. Although in theory the sheriff is in control of the attached property, in reality the mortgagor often remains in control until the auction and after he or she abandons possession voluntarily or is evicted.[185]

The method of attachment of immovable property is by way of notice in writing by the sheriff. This notice must be served upon (by means of a registered letter) and addressed to the owner,[186] the registrar of deeds[187] and non-owner occupiers.[188] There is no valid execution if there is no attachment by way of notice as required by the rules.[189] Furthermore, the property can only be attached after a writ of execution had been issued.

A writ (or warrant) of execution is a document, requested by the party in whose favour any judgment of the court had been pronounced, issued by the registrar of the high court or the clerk of the magistrates' court,[190] directed to the sheriff, ordering him or her to take possession of as much of the debtor's property as will realise by public sale the amount of the judgment and the costs incurred in satisfying it. A writ that is regular on the face of it is an absolute justification to the sheriff for what is correctly done in pursuance of it, even though the judgment on which it is founded may afterwards be set aside.[191]

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[184] *Morrison NO v Rand NO* 1967 2 SA 208 (D) 210.

[185] *Bisnath NO and Others v ABSA Bank Ltd; ABSA Bank Ltd v Bisnath NO and Others* 2008 4 SA 92 (SCA) paras 24 and 28. For a discussion of this case, see S Scott & E Dirix "Calling up a mortgage bond of immovable property" (2009) 72 *THRHR* 575-598.

[186] In *Hopkins Boerdery (Edms) Bpk v Colyn and Another* [2006] 1 All SA 497 (C) 50-52 it was held that failure to notify a co-owner in writing could not lead to the setting aside of a judicial sale where the co-owner had been aware of all the steps taken and had attended the sale in execution without protest.

[187] The attachment is not complete before there has been proper notice to the registrar of deeds: See *Sowden v ABSA Bank Ltd and Others* 1996 3 SA 814 (W) 821-822.

[188] HCR 46(3); MCR 43(2)(a). If a registered letter has been duly prepaid, posted and addressed to the person intended to be served, it will constitute proper service, regardless of whether the letter has been returned unopened: See *Stand 734 Fairland CC v BOE Bank Ltd and Others* 2001 4 SA 255 (W) paras 4 and 12; *Standard Bank of SA Ltd and Another v Bundu Te Litho* 1999 3 SA 979 (C) 983-984. Therefore, service takes place upon the posting by prepaid registered post of a letter containing the requisite notice to the address of the person intended to be served. Such address must either be the address chosen or furnished by the addressee as his or her address or his or her actual postal address. If no address has been chosen or furnished and his or her whereabouts are unknown, an application to the court for directions as to service should be made: See *Ex parte Firstrand Bank Ltd t/a FNB Home Loans v Sheriff, Brakpan, and Others* 2007 3 SA 194 (W) 200-201.

[189] *Sowden v ABSA Bank Ltd and Others* 1996 3 SA 814 (W) 821-822; *Joosum v J I Case SA (Pty) Ltd (now known as Construction & Special Equipment Co (Pty) Ltd) and Others* 1992 2 SA 665 (N) 673.

[190] HCR 45(1); MCR 36(1) and (2). See the discussion in 3 2 below on the role of judicial oversight over the procedure. This chapter focuses mainly on the position prior to *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC). The warrant can now only be issued after a court has declared the residential property executable.

[191] *Deputy-Sheriff, Cape Town v SAR&H* 1976 2 SA 391 (C) 396.

A successful judgment creditor may sue out a writ at any time after the judgment has been given.[192] In the case of unhypothecated property, no writ of execution may be issued against a debtor's immovable property until the registrar or clerk is satisfied that there is insufficient movable property to satisfy the writ. Proof that there is no or insufficient movable property to satisfy the judgment is usually supplied by a *nulla bona* return. After it appears that no or insufficient movable property is available to satisfy the judgment debt, the creditor can (without any further order of court) levy execution against the immovable property of the judgment debtor.[193]

A writ can be issued without the abovementioned *nulla bona* return when immovable property has been specially declared executable. This would usually be the case if the property is hypothecated with a mortgage. Even though the normal sequence of execution is to first execute against movables and thereafter against immovables, the court has the power to alter this sequence, as is most often the case with mortgages.[194] The court also has power in terms of the common law to declare immovable property executable.[195] As will become clear in 3 4 3 below, this principle of mortgage law, namely that execution against movables can be skipped, might be controversial in light of the fact that the immovable property in question is the debtor's primary residence. I explain how it may no longer be constitutionally acceptable to declare residential property executable without first considering alternatives such as execution against movables. In chapter 4 below I also explain how this possible inadequacy of the common law principle is generally overcome by the consumer protection mechanisms in the National Credit Act. In 3 2 5 below I provide an explanation and historical overview of how the court practice for mortgage foreclosure has developed, specifically how the lack of judicial oversight came about. In 3 2 below I also explain how judicial oversight was reintroduced on the basis of the constitutional imperative to ensure that a home is not lost before a court decides whether this would be justifiable on the facts of each case.

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[192] After judgment, the creditor does not have an obligation to wait for a reasonable time before suing out the writ, in order to allow the debtor the opportunity to satisfy the judgment: See *Perelson v Druain* 1910 TS 458 462. In terms of HCR 46(1) and MCR 43(1) a writ of execution against immovable property must 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 must be accompanied by sufficient information to enable valid attachment.

[193] HCR 45(1); s 66(1)(a) of the MCA. Prior to *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC), both the clerk of a magistrates' court and the registrar of the high court could declare the immovable property executable and issue a warrant of execution after being presented with a *nulla bona* return. However, neither the clerk, nor the registrar can do so any longer, since the procedures in both courts have subsequently been amended: See 3 2 below.

[194] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 3.

[195] *Silva v Transcape Transport Consultants* 1999 4 SA 556 (W) 562; Voet *Commentarius* 42 1 42.

2 5 3 Sale by public auction and transfer of the property

The sheriff must appoint a day and place for the sale of the property.[196] Following attachment, it is necessary to prepare the conditions of sale[197] and the notice of sale[198] and to advertise the sale.[199] The primary purpose of giving notice of the sale is to inform the public of what is being sold in order to attract bidders so as to realise as high a price as possible for the property.[200] Obtaining as high a price as possible is important if justice is to be served towards both the mortgagee and mortgagor. Justice requires that the mortgagee's claim be satisfied and that the mortgagor's debt is repaid, hopefully leaving a surplus large enough to start over with. The sale in execution must take place in the district in which the attached property is situated and must be conducted by the sheriff or deputy sheriff of that district.[201]

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[196] This day may not be less than one month after the service of the notice of attachment, except by special leave of a magistrate: See HCR 46(7)(a); MCR 43(6)(a).

[197] The conditions of sale must be prepared by the execution creditor, not less than twenty days prior to the date of the sale, as near as may be in accordance with the prescribed form: See HCR 46(8)(a)(i); MCR 43(7)(a). It must also be submitted to the sheriff in order for him or her to settle the conditions. The execution creditor must thereafter supply the sheriff with two copies of the conditions of sale, one of which must lie for inspection by interested parties at the sheriff's office: See HCR 46(8)(a)(ii); MCR 43(7)(a). The fact that the conditions may be inspected must be advertised and notified to interested parties. Any interested party may, not less than ten days (15 days in the magistrates' courts) prior to the date of the sale, upon 24 hours' notice to the execution creditor and the bondholders, apply for modification of the conditions of sale, and the judicial officer may make such order as may seem fit to him, including an order as to costs: See HCR 46(8)(b); MCR 43(7)(b). The court will not interfere with the sheriff's discretion in fixing the conditions of sale where the sheriff seeks to protect the interests of a second bondholder and the debtor, as well as that of the judgment creditor. The court will, however, intervene if the sheriff imposes a condition against the creditor's will that infringes its substantive rights: See *Thirlwell v Johannesburg Building Society and Others* 1962 4 SA 581 (N) 583.

[198] After consultation with the sheriff, the execution creditor must prepare a notice of sale that contains a short description of the property, its situation and street number (if any), the time and place of the sale and the fact that the conditions may be inspected at the office of the sheriff: See HCR 46(7)(b); MCR 43(6)(b). The execution creditor must publish the notice in a newspaper that circulates in the district in which the immovable property is situated and in the *Government Gazette* not less than five days and not more than 15 days prior to the date of the sale and provide the sheriff, by hand or by facsimile, with one photocopy of each of the published notices: See HCR 46(7)(c); MCR 43(6)(c).

[199] Not less than ten days prior to the date of sale, the sheriff must forward by registered post a copy of the notice of sale to every judgment creditor who caused the immovable property to be attached and to every mortgagee of the property whose address is known: See HCR 46(7)(d); MCR 43(6)(d). Not less than ten days prior to the date of the sale, the sheriff must affix one copy of the notice on the notice board of the magistrate's court and one copy at (or as near as may be to) the place where the sale is to take place: See HCR 46(7)(e); MCR 43(6)(e). If the writ was issued by a high court, the notice must be placed at the magistrates' court of the district in which the property is situated. However, if the writ was issued by a magistrates' court, the notice must be placed at that particular magistrates' court.

[200] *Maritz t/a Maritz & Kie Rekenmeester v Walters and Another; Maritz t/a Maritz & Kie Rekenmeester v Walters and Another (Firstrand Bank Ltd Intervening); Maritz t/a Maritz & Kie Rekenmeester v Walters and Others* 2002 1 SA 689 (C) para 41; *Botha and Another v ABSA Bank Ltd and Another* [2002] 1 All SA 579 (SE) para 7; *Rossiter and Another v Rand Natal Trust Co Ltd and Others* 1984 1 SA 385 (N) 389; *Pillay v Messenger Magistrate's Court, Durban and Others* 1951 1 SA 259 (N) 264.

[201] HCR 46(4); MCR 43(10) and (11). The sheriff may on good cause shown authorise the sale to be conducted elsewhere and by another sheriff, subject to any order made by a magistrate on an application of modification of the conditions of sale.

The property must be sold by the sheriff by way of public auction[202] and the sale is subject to the real rights of third parties in the property unless those persons agree otherwise.[203]

At common law a public auction ordered by the court for the purpose of satisfying a judgment debt was referred to as an auction *subhastationis publicae* (a *sub hasta* auction).[204] The auction takes place under the authority of the court and on behalf of the government. Therefore, when ownership is acquired over property bought at auction, it occurs under the auspices of the law and is authorised and guaranteed by the public authorities.

A sale by public auction without reserve is completed and a valid agreement of sale comes into being at the fall of the hammer, on the terms and conditions set out in the conditions of sale that are displayed, pronounced or read out by the auctioneer. The sale is complete when the final bid is accepted by the sheriff, and at this point his or her authority to further sell the property ceases. The conditions of sale are signed to record and have certainty over the oral contract and its content, as concluded by the auction sale, and to ensure that the auctioneer and the purchaser were bound thereto by reason of their signature.[205] To undo the sale, the sheriff has to obtain cancellation of the sale by a judge in chambers.[206]

Unless a preferent creditor stipulates a reserve price, the sale is without reserve and the property must be sold to the highest bidder.[207] This leaves the sheriff with no discretion other than to accept the highest bid. If the reserve price is not reached, there is no sale, unless the interested parties concur to allow the property to be sold to the highest bidder. Alternatively, where the reserve price has not been reached, the court can order the property to be put up for sale again without reserve. If immovable property is sold in execution but the judgment concerned is later invalidated, a *bona fide* purchaser acquires no rights under the sale.[208]

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[202] HCR 46(10); MCR 43(10). A "public auction" is not defined in either of the acts or rules, and it must therefore be taken that the draftsman of the rules had in mind a public auction in terms of the common law: See *Syfrets Bank Ltd and Others v Sheriff of the Supreme Court, Durban Central* 1997 1 SA 764 (D) 770-771. In general, see also S Scott & E Dirix "Calling up a mortgage bond of immovable property" (2009) 72 *THRHR* 575-598 589-597.

[203] HCR 45(10); s 66(2) of the MCA.

[204] For more details, see JC Sonnekus "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *TSAR* 696-727 702-711.

[205] *Ivoral properties (Pty) Ltd v Sheriff, Cape Town, and Others* 2005 6 SA 96 (C) paras 55-56.

[206] HCR 46(11). Even then the sheriff's authority under the rules would require a further sale by public auction. No other form of sale is within the sheriff's power: See *Syfrets Bank Ltd and Others v Sheriff of the Supreme Court, Durban Central* 1997 1 SA 764 (D) 771.

[207] HCR 46(12); MCR 43(10).

[208] *Jubb v Sheriff, Magistrate's Court, Inanda District, and Others; Gottschalk v Sheriff, Magistrate's Court, Inanda District, and Others* 1999 4 SA 596 (D) 600-605. In *Menqa v Markom* 2008 2 SA 120 (SCA) para 46 the court concluded that a sale in execution at common law was void for want of compliance with an essential formality, but that non-compliance with non-essential formalities did not have this result. To determine which

When the sheriff disposes of property by way of sale in execution, he or she acts as an executive of the law and not as an agent of any person.[209] As part of the execution process, when the sheriff commits him- or herself to the conditions of sale, he or she does so in his or her own name according to his or her statutory authority and may also enforce it as such.[210] This power is implicit in the duty to pass transfer in terms of the court rules, which oblige the sheriff to do anything necessary to register the transfer.[211] In other words, the sale in execution of immovables consists of two distinct transactions, namely the sale itself and the transfer of the property.[212] In transferring the property the sheriff acts not as principal but as statutory agent of the judgment debtor.[213]

Once sold in execution, the property may be transferred by the sheriff free of all bonds.[214] The sheriff must give transfer to the purchaser against payment of the purchase price and upon performance of the conditions of sale, and may for that purpose do anything necessary to effect registration of transfer.[215] Furthermore, anything so done by the sheriff is as valid and effectual as if he or she was the owner of the property.[216] Ownership of the attached immovable property does not pass upon the sale in execution but only upon formal transfer by the sheriff to the purchaser in execution.[217]

At the sale, a contract comes into existence between the sheriff and the purchaser. Neither the judgment creditor, nor the judgment debtor is a party to this contract. The obligation to deliver the property to the purchaser remains the obligation of the sheriff. The purchaser's

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formalities are non-essential, the old authorities will not necessarily be a safe guide because of modern legislation dealing with the formal requirements of a valid sale in execution. In each case regard would be had to the reason for the formality, the extent of the non-compliance and the prejudice or potential prejudice caused to interested parties, especially the judgment debtor. For a discussion of *Menqa*, see AJ van der Walt "Property" (2008) 1 *JQR* para 2.3.

209 *Ivoral properties (Pty) Ltd v Sheriff, Cape Town, and Others* 2005 6 SA 96 (C) para 66.

210 *Sedibe and Another v United Building Society and Another* 1993 3 SA 671 (T) 676.

211 HCR 46(13); MCR 43(13).

212 *Schoerie NO v Syfrets Bank Ltd and Others* 1997 1 SA 764 (D) 778.

213 *Sedibe and Another v United Building Society and Another* 1993 3 SA 671 (T) 674; *South African Permanent Building Society v Levy* 1959 1 SA 228 (T) 230; KM Kritzinger *Principles of the law of mortgage, pledge & lien*, published as part of a series in E Kahn (ed) *Principles of commercial law* (1999) 43.

214 S 56(1)(a) of the DRA.

215 HCR 46(13); MCR 43(13).

216 HCR 46(13); MCR 43(13).

217 *Simpson v Klein NO and Others* 1987 1 SA 405 (W) 411; *National Bank of SA Ltd v Cohen's Trustee* 1911 AD 235 242-243. See also TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 128-129. However, JC Sonnekus "*Sub hasta*-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging" 2008 *TSAR* 696-727 707-711 argues that when the purchaser becomes owner, he or she becomes so not by way of derivative acquisition of ownership but by way of original acquisition of ownership and therefore becomes owner without the cooperation of the previous owner. There is no agreement between the previous owner and the new owner, and ownership is not transferred by the auctioneer from the previous to the new owner. The purchaser obtains a new right of ownership, a clean slate (*onbesproke blad*), one which is not subject to any limited real rights.

obligation to pay the price remains enforceable by the sheriff and not the judgment creditor.[218]

The purchase price must be paid to the sheriff, who immediately pays it into the account of the relevant court, where it is kept until transfer to the purchaser has been completed.[219] After the costs and charges of execution have been subtracted from the proceeds, the claims of preferent creditors (ranking in priority according to their legal order of preference) will be satisfied. This is followed by the claims of other creditors (whose writs have been lodged with the sheriff) in the order of preference as appears from sections 96 and 99 to 103 of the Insolvency Act 24 of 1936.[220]

At the end of the execution proceedings, after the proceeds had been paid over to the sheriff (or mortgagee) the limited real right of mortgage is extinguished.[221] This is a consequence of the principle that the mortgage is accessory to the principal debt. It is not necessary for the property to be transferred to the new owner first, because the mortgage comes to an end as soon as the debt is extinguished. However, even if the proceeds are not enough to cover the debt, the mortgage is still extinguished upon transfer of the proceeds to the mortgagee. For the remaining debt, the mortgagee only has a concurrent claim. If the property is sold in execution for more than the value of the outstanding debt, the surplus must be handed over to the mortgagor.[222] This is in accordance with the general principle that the creditor may not be enriched by the security transaction. The sole purpose of the real security right is to secure payment of the principal debt and not to enrich the mortgagee.

The sheriff's role in the attachment of property will become important during my constitutional analysis in chapter 6 below. There I explain how that it is the acts of attaching the property, selling it in execution and transferring it to the auction purchaser that deprives the debtor of his or her immovable property. In that chapter I analyse whether this deprivation

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[218] A conveyancer will act as the sheriff's agent even if appointed by the judgment creditor in terms of the conditions of sale: See *Mpakathi v Kghotso Development CC and Others* 2003 3 SA 429 (W) para 13.
[219] HCR 46(14)(a); MCR 43(14)(a).
[220] HCR 46(14)(c); MCR 43(14)(b) and (c).
[221] S Scott & E Dirix "Calling up a mortgage bond of immovable property" (2009) 72 *THRHR* 575-598 590; PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 380; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 190. For the other ways in which mortgages can be extinguished, see TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 165-190.
[222] HCR 45(11)(b); MCR 43(14)(g). See also S Scott & E Dirix "Calling up a mortgage bond of immovable property" (2009) 72 *THRHR* 575-598 595.

(as ordered and authorised by the court) is consistent with section 25(1) of the Constitution.[223]

2 6 Conclusion

The real security right held by a mortgagee over the property of its debtor in terms of a registered mortgage bond is a very strong right. Traditionally, save for any procedural shortfalls, courts will rarely refuse to uphold this right. The fact that the mortgagor willingly limits his or her own right of ownership in the property, on the face of it, undercuts arguments against foreclosure based on the unfairness of the mortgagor losing his or her property. A sale in execution is a forced sale in the sense that the mortgagor does not agree to it in the normal way one would agree to a sale. However, upon hypothecation he or she clearly agrees to give the mortgagee the right to call up the bond and have the property sold in execution in the case of non-payment.

As a way of enforcing home loans, mortgage foreclosures and the accompanying sales in execution are popular and relatively easy, compared to enforcing debts not so secured. The practice of hypothecating property and the procedure of foreclosing it when the debtor falls into arrears is well known in South Africa and also worldwide. The very purpose is to give the secured creditor an easy way to enforce the debt. For example, it does not first have to execute against the movables of the debtor, as is the case with unsecured debt. This exception to the general principle seems justified, based on policy grounds, considering that the purpose of the mortgage is to encourage financial institutions to lend large amounts of money to people. This they would probably not have done without knowing that their investments are safely secured by the value of the hypothecated immovable property. The importance of the mortgage is illustrated by the fact that, in all probability, the vast majority of people purchasing immovable property cannot do so in cash, but need to borrow large amounts of capital. The role played by credit provision in the supply of housing is evident, since people need loans to purchase houses. Grantors of credit will not extend these loans for such high amounts without security.

A large portion of owners of immovable property, therefore, have mortgages registered in favour of credit providers. These people all have limitations imposed on their ownership. In other words, for most people it is impossible to obtain ownership of a house without at the

[223] See 6 3 below.

same time limiting their ownership by granting a real security right to a creditor. If one wants to purchase a house one simply has little choice other than to give a creditor the authority to deprive one of one's house in the event that one defaults on the loan. This is the modern-day reality most people who own hypothecated homes live in, namely under the constant threat of losing their homes if they default. Hence, the continued ownership of one's home depends on one's ability to continue paying the monthly instalments.[224]

The purpose of this chapter was to offer a broad overview of the mortgage as a real right, and specifically one of its core entitlements, namely the right to foreclose the mortgage and have the hypothecated property sold in order to satisfy the debt. The procedures regulating mortgage foreclosure place a limitation on the mortgagee's right to foreclose, regulating the way in which and the circumstances under which foreclosure may take place. In the following chapters attention will be given to the consequences of the National Credit Act 34 of 2005 and sections 25 and 26 of the Constitution. These developments in South African law pose new questions regarding the rights and interests involved in conflicts arising in foreclosure scenarios. It also illustrates the development in South African mortgage enforcement law, away from a system based on mere procedural steps towards a system where substantial circumstances and consumer rights play a larger role.

[224] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 2.

CHAPTER 3
THE HOUSING CLAUSE

3 1 Introduction

Providing the homeless with access to housing, as well as protecting existing housing, has become a fundamental consideration in the South African society, which is plagued with homelessness and poverty. Due to the apartheid history of arbitrary and forced evictions, the housing issue is also sensitive politically. Therefore, the normative aspects of housing are more related to welfare (or the lack thereof) than to traditional private property law disputes. As the Constitutional Court ("CC") stated with reference to the facts of a leading case,

> "the underlying problem raised by the facts of this case is not greed, wickedness or carelessness, but poverty. What is really a welfare problem gets converted into a property one."[1]

Although homelessness is a welfare problem, the court admitted that it has been transformed into a property law issue. The problem of homelessness should presumably be dealt with by the state's welfare system, which occurs to a certain degree through aspects such as state housing subsidies and social housing programs. Yet, homelessness is not addressed fully through welfare programmes and, consequently, the unavoidable question is what role the resolving of private property disputes should play in the fight against poverty. This question is especially pertinent in cases of evictions and sales in execution, which traditionally operate in the private sphere but, when enforced, can have a negative impact on welfare. Persons who face the enforcement of mortgage bonds – or the enforcement of landowners' rights of ownership – will often be those living in poverty or who face a decrease in welfare.[2] This factor makes these cases particularly sensitive, especially since debtors who face the loss of their homes must be treated with dignity.[3]

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1 *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 30 per Mokgoro J.

2 As Sachs J stated in *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 17, "[f]orced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat".

3 Often, when housing is involved in a case, s 10 of the Constitution ("Everyone has inherent dignity and the right to have their dignity respected and protected") is also implicated. This is particularly true for marginalised persons: See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 21; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 10, 12, 15, 17, 18, 29, 41 and 42. Human dignity is a central value in the Constitution, which (in s 1) expressly states that South Africa is founded

To give effect to the constitutional imperative to fight and prevent homelessness, certain developments have taken place over the last couple of years – also in the context of private mortgage foreclosures. As from 24 December 2010, High Court Rule ("HCR") 46(1)(a)(ii) was amended to include a proviso that direct execution of a judgment debt against immovable property is allowed only if the property is declared executable and that

> "where the property sought to be attached is the primary residence of the judgment debtor, no writ [of execution] shall be issued unless the court, having considered all the relevant circumstances, orders execution against such property."[4]

Therefore, a judge (and no longer a registrar) must grant an execution order against a home before a warrant of execution may be issued and the property is attached and sold in execution.[5] Moreover, this order may be granted only after all the relevant circumstances had been considered. The amendment of HCR 46 came as a direct result of and was "clearly intended to ensure compliance with the substantive provisions" of section 26 of the Constitution of the Republic of South Africa 1996 ("the Constitution").[6] The section – titled "Housing" – provides as follows:

> "(1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

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on the values of freedom, equality and human dignity. See also S Liebenberg "The value of human dignity in interpreting socio-economic rights" (2005) 21 *SAJHR* 1-31 1; I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 272-275; A Chaskalson "Human dignity as a foundational value of our constitutional order" (2000) 16 *SAJHR* 193-205 196. Moreover, the role of dignity was confirmed in some of the leading judgments handed down by the CC: For examples, see *S v Makwanyane and Another* 1995 3 SA 391 (CC) paras 144 and 328; *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) para 56. It has also been argued that dignity informs the content of all other rights and that it plays a role in harmonising different rights and values: See A Chaskalson "Human dignity as a foundational value of our constitutional order" (2000) 16 *SAJHR* 193-205 204, who asks "how can there be dignity in a life lived without access to housing" and other socio-economic rights? It is clear that dignity is not only an independent right protected by the Constitution, but also a value that gives content to, for instance, the scope of the housing clause. Whenever courts have to decide on matters where s 26 may be (or is) limited, they have to consider the human dignity of those involved. In general, see also S Woolman "Dignity" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2005) ch 36.

4 The amendment was published in *Government Gazette* 33689, GN R981 (19 November 2010).

5 The registrar can still declare non-residential property executable. In this sense HCR 31(5) and s 27A of the Supreme Court Act 59 of 1959 are still in force. In addition, if a creditor applies for the default judgment and the execution order separately, it can still apply for the default judgment to the registrar and thereafter, for the execution order, to a judge. In such a case, when the registrar considers that the facts of the case may implicate an unjustifiable loss of a home, the registrar should even refer the application for default judgment to a judge. Where the creditor applies for a default judgment and execution order together, a judge must hear the matter: See *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) paras 43 and 54-55.

6 *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) para 2.

(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."[7]

Section 26 embodies a socio-economic right,[8] which one would usually expect to be relevant only in public law and not in private law. Nonetheless, socio-economic rights are not limited to public law relationships.[9] The purpose of section 26 of the Constitution is twofold. Firstly, it aims to alleviate homelessness and, secondly, it is intended to prevent an unjustified increase in homelessness. The positive obligation on the state, in terms of subsections (1) and (2), aims to relieve homelessness. Section 26(1)'s chief purpose is to oblige the state to provide access to adequate housing. This aspect falls outside the scope of my research. However, in a negative sense section 26(1) also aims to prevent the loss of existing adequate housing. The regulation of evictions[10] (subsection (3)) and the negative obligation on all

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[7] The three subsections should be read as a whole and not in isolation: See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 28; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) para 34.

[8] On socio-economic rights in general, see I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 567-598. On the interpretation and application of the socio-economic right of housing in general, see S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 317-358; S Liebenberg "The interpretation of socio-economic rights" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2003) ch 33; K McLean "Housing" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 4 (2nd ed OS 2006) ch 55; G van Bueren "Housing" in MH Cheadle *et al* (eds) *South African constitutional law – the Bill of Rights* (2nd ed 2005) ch 21. The right to housing is a socio-economic right, along with the other rights in s 27 regarding health care, food, water and social security. The socio-economic rights embodied in ss 26 and 27 relate to the right of "everyone" to "have access to" these commodities. They are not absolute, but are qualified in that the state only has to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation" of these rights. The traditional idea behind Bills of Rights is that they should, as is the case with the South African Constitution, entrench and protect civil and political rights (first-generation rights). These include equality, personal liberty, free speech, property, assembly and association – the typical liberal political rights. These rights impose a duty on the state to not act in certain ways that will infringe them (negative rights). However, many modern Bills of Rights, also the South African one, include provisions regarding socio-economic rights, namely rights that protect and promote the basic social conditions of people (second-generation rights). These rights are positive, since they impose obligations on the state to do as much as possible to secure the basic social needs of society. Examples are education, health care, food, water as well as access to housing.

[9] In general, there seems to be a resistance against applying constitutional rights to private law. The reason for this traditional resistance is partly motivated by the notion of individual autonomy, which is apparently protected by common law rules and institutions: See S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 318; S Woolman & D Davis "The last laugh: *Du Plessis v De Klerk*, classical liberalism, creole liberalism and the application of rights under the interim and final constitutions" (1996) 12 *SAJHR* 261-404 385. Despite some conceptual resistance against the application of socio-economic rights in private law (in other words, horizontal application), the Constitution makes it clear that these rights must be applied in all areas of South African law. For a comprehensive discussion of the horizontal application of the Bill of Rights, see S Woolman "Application" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2005) ch 31. Ss 8(1) to (3) and 39(2) of the Constitution make it clear that private law as well as private persons (and entities) are bound by the Bill of Rights and will be held accountable for infringements of these rights: See S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 319. For Liebenberg's perspective on the application of socio-economic rights in private law based on ss 8 and 39(2) of the Constitution, see 321-341.

[10] The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act") is one of the acts that were promulgated to give effect to s 26(3). In this dissertation I do not focus on the actual

persons not to deprive others of their existing rights to have access to adequate housing (subsection (1)) aim to prevent an unjustified increase in homelessness. This is the second aim of section 26 and my research concerns its relevance for mortgage foreclosures. In 3 3 below I analyse the exact interpretation and application of section 26(1) and (3) for purposes of mortgage foreclosures.

Traditionally, personal circumstances played little or no role during mortgage foreclosures. If the creditor could prove a valid claim against the debtor and could show that the debt had become due and payable as a result of the debtor's default, then (barring any procedural deficiencies) the creditor was entitled to a judgment order for the full outstanding debt. The mortgage creditor could also have the hypothecated property sold without a court taking any extra-legal factors into consideration. The maxim *ubi ius ibi remedium* (where there is a right there is a remedy) illustrates this point.[11] The fact that the property was someone's home played little, if any, role. However, the protection of "adequate housing" is not an extra-legal consideration but part of the country's law and, by reason of its inclusion in the Constitution, supreme law.[12] Therefore, the residential status of the property can no longer be ignored, but – as a result of section 26 – courts now need to grapple with how and to what extent this factor impacts the foreclosure dispute.

As indicated above, when adjudicating mortgage foreclosures, HCR 46(1)(a)(ii) is henceforth the rule that courts must apply when granting execution orders against mortgaged homes. Not only does the rule require court oversight over mortgage foreclosures, but it also provides courts with a discretion, based on "all the relevant circumstances", either to grant or deny the execution order. After the rule was amended, the CC confirmed the principle of judicial oversight that was introduced by HCR 46 and held that the former procedure was unconstitutional to the extent that it lacked judicial oversight.[13] The amended court rule has also been applied and interpreted in a number of high court judgments, two of which were

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eviction stage but only the sale in execution. It was established in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 1 SA 113 (SCA) that, if a debtor's home was sold in execution, the PIE Act must be complied with to evict the former owner (see also *Lundy and Another v Nkomo and Others* (19998/2011) [2012] ZAGPJHC 11 (10 February 2012)). On evictions under the PIE Act in general, see PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 247-255 and 652-660. There are other acts that include eviction provisions and play a role in giving effect to s 26(3), for examples, the Extension of Security of Tenure Act 62 of 1997; Land Reform (Labour Tenants) Act 3 of 1996; Informal Protection of Land Rights Act 31 of 1996.

11 *Nedcor Bank Ltd v Kindo* 2002 3 SA 185 (C) 186-188.

12 S 2 of the Constitution: "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." See also *Ex parte President of the Republic of South Africa: In re Pharmaceutical Manufacturers Association of South Africa* 2000 2 SA 674 (CC) para 44.

13 *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC), discussed in 3 2 4 below.

full bench decisions. The essential impact of these developments is that the granting of execution orders is no longer a merely procedural matter that can be dealt with by the registrar of the high court. Section 26(3) of the Constitution entails that a substantive judicial enquiry is from now on compulsory.[14] However, what exactly this substantive enquiry entails has not yet been comprehensively analysed, a need this dissertation aims to address.

A controversy regarding mortgage foreclosures has been in existence since 2004, when the CC delivered a judgment concerning a similar issue in the Magistrates' Courts Act 32 of 1944 ("the MCA"). *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*[15] ("*Jaftha*") is the first case that was handed down with regard to the impact of section 26 of the Constitution on the sale in execution of homes. There has been a degree of confusion ever since. Although the need to give effect to housing rights is generally acknowledged, there is still a degree of uncertainty as to how these rights are to be given effect to in practice and doctrine. *Jaftha* dealt specifically with section 66(1)(a) of the MCA and the facts related to the abusive enforcement of unsecured judgment debts that were too small to justify the loss of the debtor's home. However, it has become clear that this leading case is applicable also to the process in the high court and when homes are sold in execution of debts that are secured by mortgage bonds.

Ever since *Jaftha*, section 66(1)(a) of the MCA provides – as regards the process in magistrates' courts – that a magistrate (and no longer a clerk) has to approve sales in execution, and only after "all relevant circumstances" had been considered. The CC's amendment of the MCA in *Jaftha* inspired the corresponding amendment to HCR 46.[16] Although the terminology in the two provisions is not identical, the effect is similar. In this chapter I focus on the procedure in the high court, that is, the application of the discretion described in HCR 46. On a substantive level, very little (if anything) hinges on the difference between sales in execution in the high and the magistrates' court. Although the facts of the cases in the lower and higher courts may differ (based on, for example, the size of the amounts claimed), the general principles that I discuss in this chapter can be applied to mortgage foreclosures in both courts.[17]

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[14] *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 5 SA 610 (C) paras 20-22 and the cases referred to there.

[15] 2005 2 SA 140 (CC).

[16] *FirstRand Bank Ltd v Meyer and Another* (3483/10) [2011] ZAECPEHC 8 (17 March 2011) para 23.

[17] When the registrar still had the power to grant execution orders, mortgage foreclosure claims that fell within the jurisdiction of the magistrates' courts, but that were instituted in a high court, had to be referred by the registrar to a judge. The high court in *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) did not want to remove the

The amendment of the MCA came around five years before the amendment of the HCR. In the historical course of events, *Jaftha* was the first step towards the inclusion of housing values in the substantive requirements for mortgage foreclosure. After *Jaftha*, a few cases were handed down that analysed and applied *Jaftha* to mortgage foreclosures in the high court. However, there was a lack of consistency in these decisions.[18] To date there has been a misunderstanding of section 26 and (what best can be described as) apprehension of the impact that housing rights may have on the rights of creditors. I aim to provide clarity in this regard, not by ignoring or discrediting the role of section 26, but by embracing the section and applying it with reference to the traditional doctrine of mortgage law.

Section 26(3) of the Constitution establishes the principle that any proceeding that might lead to a person being evicted from his or her home, must be authorised by a court and only after all relevant circumstances were taken into consideration.[19] This constitutional principle has now been given effect to through the procedural rules that regulate the sale in execution of homes. The amended section 66(1)(a) of the MCA and HCR 46(1)(a)(ii) both reflect the same requirement and use similar terminology. However, neither the court rule, nor section 26(3) of the Constitution, elaborates on exactly which "relevant circumstances" must be taken into account and how this test is to be applied. The term "all the relevant circumstances" is wide and can include potentially anything. However, these circumstances can include only those that are legally capable of influencing the court's discretion. In other words, one should take into consideration the existing substantive legal principles. The purpose of judicial oversight is to ensure that a home is not sold in execution under circumstances that the positive law does not allow. Hence, it is necessary to reaffirm the exact circumstances under which the law (including constitutional law) allows sales in execution of mortgaged homes. A pertinent question is whether and how the debtor's personal circumstances are relevant.

Section 26(3) only provides procedural safeguards and it does not provide much assistance with regard to the exact substantive considerations. This is where section 26(1) enters the

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registrar's power to grant execution orders, but acknowledged that cases that belong in the magistrates' courts are more sensitive to abuses and infringements of human rights. This is probably because these debtors, who own homes of lower values, are more likely to be poor, ignorant of their rights and under threat of being left homeless. Therefore, even a judgment like *Mortinson*, which in general supported the continued granting of execution orders by the registrar, acknowledged that cases involving vulnerable debtors should be heard by judges. Consequently, it is reasonable to expect that a higher number of sensitive cases will be heard by magistrates than judges.

[18] *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 28.

[19] See 3 3 2 below.

picture. This subsection is not of a procedural nature, but provides the substantive scope of what section 26 as a whole is aimed at providing and protecting, namely "access to adequate housing".[20] The purpose of the judicial oversight and discretion that section 26(3) requires is to ensure that, when a process limits someone's "right to have access to adequate housing" (section 26(1)), such a result must be justified in light of all the relevant circumstances of the case. This justification enquiry is underlined by the limitation clause, section 36(1) of the Constitution, which provides as follows:

> "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."

Fundamental rights – including those in section 26 – may be limited only in terms of section 36(1).[21] As a result, the limitation must be authorised by "law of general application" and the limitation may go only as far as it would be acceptable in an open and democratic society based on the values mentioned. This test requires that the impact of the infringement must be proportionate to the purpose thereof.[22] In this regard, all factors must be taken into account,

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[20] The CC in *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* (CCT 57/11) [2012] ZACC 2 (13 March 2012) para 5 went as far as to state that the "right of access to housing ... *includes* the right not to be evicted without an order made by a court after taking into account all the relevant circumstances" (my emphasis).

[21] As S Liebenberg "The application of socio-economic rights to private law" 2008 *TSAR* 464-480 348 explains,

> "private law rules or conduct which permits people to be deprived of the existing access which they enjoy to socio-economic rights is inconsistent with sections 26(1) and 27(1) of the constitution, and is subject to justification in terms of section 36."

On the limitation clause in general, see also S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2006) ch 34; I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 163-188.

[22] The clearest authority for the principle that the limitation clause requires a proportionality test is the CC decision of *S v Makwanyane and Another* 1995 3 SA 391 (CC) para 149. Although this case was decided on s 33 of the Interim Constitution (Constitution of the Republic of South Africa 108 of 1993), the court's policy statement with regard to proportionality is applicable to s 36 as well: See *National Coalition for Gay and Lesbian Equality v Minister of Justice & Others* 1999 1 SA 6 (CC) para 33. The applicability of the proportionality test was also confirmed in *S v Manamela & Another (Director-General of Justice Intervening)* 2000 3 SA 1 (CC) para 32; *S v Bhulwana* 1996 1 SA 388 (CC) para 18; *S v Mbatha* 1996 2 SA 464 (CC) para 14. See also S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2006) 34-69 - 34-70; I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 176-178. Of course, in the current context, the strongest authority is *Gundwana v Steko Development and Others* 2011 3

which includes the ones listed. Therefore, the test under the HCR is underlined by the principle that courts should ensure that if a sale in execution would limit section 26 of the Constitution, such a limitation is reasonable and justifiable in terms of section 36(1). A judge must make use of "all the relevant circumstances" in order to decide whether the particular deprivation of the debtor's "access to adequate housing" would be proportionate to the purposes of sale in execution.

Accordingly, the broad purpose of this chapter is to investigate how the substantive law that governs mortgage foreclosures has developed as a result of the housing clause. Stated differently, in light of section 26, when and why does the law allow a home to be sold in execution of a mortgage debt? HCR 46 must be interpreted and applied with reference to the constitutional clause that underlies it, namely section 26. However, creditors should not fear section 26. My hypothesis is that it is generally justifiable to sell homes in execution of debts secured by mortgaged bonds over such properties. Therefore, homes are not excluded from the execution process.

In addition to the general justification of the sale-in-execution process, it is necessary to conduct case-specific tests based on the facts of each case as well. In this chapter I explain what the test is for applying section 26 in cases where peoples' homes are lost, namely the proportionality test required by section 36(1) of the Constitution. In every individual case, the judge – when requested to do so – must evaluate whether the sale in execution of the debtor's home would unjustifiably limited the debtor's section 26(1) rights. In 3 4 3 3 below I refer to certain instances where it would seem unjustifiable to have the debtor's home sold, either because the debt seems capable of being satisfied in other less invasive ways, or because the result of the forced sale would be disproportionate. This state of affairs would, therefore, seem to render the common law in need of constitutional development.

However, after showing how the common law – when viewed in isolation – suffers from unconstitutional elements, I nevertheless defend the common law and explain in the next chapter why it should *not* be developed. I explain in that chapter that any area in which the current common law relating to mortgage foreclosure falls short of the Constitution is sufficiently remedied by the proper application of the National Credit Act 34 of 2005 ("the NCA"). The NCA provides (or can provide) for all situations where it would otherwise be unjustifiable to allow a home to be sold in execution. Therefore, the social harm that the sale

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SA 608 (CC) para 54; *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) paras 36 and 40-42.

in execution of mortgaged homes may lead to is mitigated by the NCA. I argue in view of the subsidiarity principles that to go beyond the protection measures of this Act would be unjustifiable.[23] Before the NCA came into force (and even afterwards), there were some unfortunate scenarios that enticed the courts to make decisions that would now – under the new credit dispensation – no longer be necessary (or, as I argue, justifiable). I explain in due course that the NCA now provides for these eventualities.

In the first part of this chapter I explain the issues surrounding the introduction of judicial oversight into the procedure for the granting of execution orders by default. In the second part I focus on the interpretation and application of section 26(1) and (3) of the Constitution, with reference to how section 26(1) may be limited in terms of section 36(1) of the Constitution. In the third part I explain how sections 26 and 36 find relevance under the application of HCR 46(1)(a)(ii).

3 2 Road to judicial oversight

3 2 1 Introduction

The question that section 26 raised on a procedural level was whether it is constitutionally compliant for an execution order to be granted without judicial oversight. Although the procedural issue as such mostly falls outside the scope of my dissertation, it is necessary to discuss the way that the courts treated this matter, since many of the arguments relate to issues of substantive law. The way some courts dealt with section 26's impact on the procedure also illustrates the concern that was experienced, namely that a higher procedural compliance requirement would threaten the real security value of the mortgage bond. In my view, this apprehension was (and is) unwarranted.

In the past, under default judgment circumstances the high and magistrates' courts procedures provided for execution orders to be granted by the registrar of the high court and the clerk of the magistrates' court, respectively. During default judgment proceedings (in other words, where debtors do not defend), it was possible that the process could be completed without a magistrate or judge ever hearing the matter. The clerk or registrar could grant a default judgment for the amount owed, as well as an execution order against the immovable property of the debtor. Therefore, the former procedure entailed that mortgage

[23] On subsidiarity, see 3 5 below.

creditors could obtain execution orders by default, circumventing the courts and simply approaching the registrar or clerk of the court. This state of affairs made it easier for these creditors to obtain execution orders against hypothecated homes. This was also an advantage that made the mortgage as a form of real security even more attractive than it already was. Not only was the specific property available for the satisfaction of the mortgage creditor's claim (to the exclusion of other creditors), but execution of this right (if the debtor did not defend) could be enforced quickly and without having to convince a judge or magistrate that the sale would be justified.

In these cases there was no judicial filter to ensure that these debtors (who did not defend themselves, often due to a lack of knowledge and/or funding) were protected against human rights infringements and abuse of the process. This was a creditor-friendly system that the industry and the courts alike became accustomed to.[24] It seemed like this procedural advantage became part of the essence of the creditor's entitlements under the limited real right of mortgage. However, doctrinally this was never the case. As I explain in chapter 2 above, the essence of the mortgage can be summarised as follows:

(1) For execution purposes, the hypothecated property is at the exclusive disposal of the mortgage creditor (to the exclusion of other creditors) in the event that the debtor no longer is able to honour his or her contractual obligations to the creditor.

(2) The creditor can execute its claim against the hypothecated property automatically and does not have to first attempt to satisfy its claim by, for example, selling the debtor's other assets in execution.

As I argue in this dissertation, these two basic elements of the mortgage as a limited real right still apply, despite recent developments that may seem to imply the contrary. However, to give effect to the entitlements contained in the mortgage, it is not necessary that the creditor should have the advantage of a quick procedure that circumvents judicial oversight. To require a court order before a home is sold in execution does not threaten the real security value of the mortgage, nor does it mean that the mortgage is no longer the same strong and valuable security right that it always was. The only change to this prospect is that courts can now, based on the relevant circumstances, decline to grant an execution order, which was previously not the case. However, as I explain in this chapter, the court's discretion does not

[24] See S Scott "The persistent meanness of banks transforms judge into praetor: *FirstRand Bank Ltd v Soni*" (2009) 21 *SA Merc LJ* 249-259 257.

allow it to ignore the foundational principles of mortgage law. The point is that South African common law of mortgage never (as a substantive element of the mortgage) provided for the execution of mortgages without judicial oversight. In fact, the availability of a summary, extra-judicial procedure is a relatively recent measure that was introduced for practical and logistical reasons. HCR 31(5), which provided for the registrar's powers to grant default judgments, was introduced only in 1994.[25]

I do not wish to suggest that a loss of home would not be possible when a mortgage is enforced – in fact, it mostly will be allowed. What I do suggest is that when someone's home is lost pursuant to mortgage foreclosure, this must be justified under the substantive principles of South African law. Only a judge or magistrate has the power to make such an evaluation.[26] This is true especially in cases where debtors suffer from a lack of legal and financial knowledge. It is the court's obligation to ensure that justice is done for these vulnerable people.[27] It cannot simply be accepted that debtors who do not defend, do so willingly and with a full understanding of the consequences. In what follows I discuss some of the most important cases that deal with the issue of judicial oversight over the sale in execution process.

3 2 2 *Jaftha* and the amendment of the Magistrates' Courts Act

Jaftha was poor, unemployed, suffered from health problems that prevented her from working and had a very basic level of education.[28] She bought the house she and her children lived in with a state housing subsidy. Jaftha borrowed R250 for purposes unrelated to the purchase of the house and had to repay the debt in instalments. When she could not keep up with her payments, the creditor took default judgment against her in the magistrates' court to the amount of R632,45. Thereafter she made some more payments, but after spending time in hospital she discovered that her house had been attached pursuant to a warrant of execution and was fated to be sold in execution to pay the outstanding debt. After her creditor's

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[25] See *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 53; *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) paras 17-20.

[26] See *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 49.

[27] See *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) para 9; *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) para 77. See also *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 53.

[28] The facts are set out in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2003 10 BCLR 1149 (C) paras 2-10; *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) paras 2-5. For a general discussion on the case, see also M du Plessis & G Penfold "Bill of Rights jurisprudence" (2005) *ASSAL* 77-81.

attorneys informed her that she had to pay R5 500 to prevent the sale in execution, she paid two further amounts, namely R300 and R200 respectively. The attorneys also increased the required R5 500 to R7 000. This was impossible for her to pay and the house was consequently sold in execution for R5 000, with the result that Jaftha was forced to vacate her home.

Van Rooyen was also unemployed, uneducated, poor and had three children. Her house, which she inherited, was acquired by her late husband by means of a state subsidy. She incurred a debt of R190 to purchase vegetables on credit. Since she was unable to pay, the creditor obtained a judgment order and the house (purchased at approximately R15 000) was sold in execution for R1 000. Considering the facts of these two cases, it is clear that there were abuses of the process present. Moreover, it was common cause that the creditors' attorneys perpetrated irregularities.[29] Houses were apparently often sold in the town of Prince Albert for amounts substantially lower than their values.

The general argument of the debtors in the *Jaftha* case was that their rights under section 26 of the Constitution had been limited unjustifiably by the effect of section 66(1)(a) of the MCA. The scheme of the MCA provided for the possibility that a sale in execution could be conducted without prior judicial oversight, even under conditions where it would limit rights in section 26(1) of the Constitution in an unjustifiable way. The debtors in *Jaftha* did not attack the general principle of attachment and sale in execution of homes to satisfy judgment debts. They even acknowledged the legitimate purpose of section 66(1)(a). Rather, they objected to the unconstitutional effect caused by the procedure and argued that the procedure was objectionable because it may have resulted in persons unnecessarily and disproportionately being deprived of their homes.[30]

In the judgment of the Cape High Court, the court took the approach that a sale in execution does not limit the rights in section 26(3) of the Constitution. For that reason, the lack of judicial oversight in the MCA (for the issuing of warrants of execution) was found *not* to be unconstitutional. Although the court conceded that the MCA often was abused in cases like *Jaftha*, where homes were sold for insubstantial debts, the court held that this state of affairs on its own did not render the section unconstitutional.[31] The crux of the court's

[29] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) paras 15 and 43.
[30] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2003 10 BCLR 1149 (C) para 32.
[31] Paras 25-26.

reasoning was that section 26(3) of the Constitution does not apply to sales in execution, since it only refers to evictions:

> "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*."(My emphasis.)

Therefore, the argument was that "an order of court made after considering all the relevant circumstances" was necessary only during eviction proceedings. According to the high court, the state already had provided protection for homeowners by promulgating the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ("the PIE Act"). Consequently, it was held that the PIE Act sufficiently fulfils the purpose of section 26(3), namely to prevent unfair evictions.[32]

The court held that sales in execution and evictions are two separate proceedings based on two separate causes of action. The court also found that issuing a warrant of execution against immovable property does not impact the right of ownership or occupation negatively.[33] Moreover, the loss of ownership does not entail a violation of access to housing, since section 26 does not include the right to have ownership of immovable property.[34] Hence, the court held that the consequences of the execution process in terms of section 66(1)(a) are not in conflict with section 26 of the Constitution.[35] As a result, if the clerk issues a warrant of execution it does not conflict with the right of access to housing.[36]

In reaction to the high court's decision, the debtors appealed directly to the CC.[37] After investigating the procedure, the CC concluded that if the judgment was one by default, the entire process occurred without any judicial oversight, since the clerk could enter the judgment and issue the warrant of execution.[38] The court commented that the need for protecting security of tenure in section 26 must be seen in the light of the injustices of forced removals perpetrated in the past.[39] The section is aimed at creating a new dispensation in which every person has access to adequate housing and where unjustifiable interferences with adequate housing are prohibited.[40] The importance of adequate housing and security of tenure

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32 Para 40.
33 Paras 42-46.
34 Para 47.
35 Para 48.
36 Para 48.
37 *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC).
38 Paras 15-16.
39 Paras 26-27.
40 Para 28.

is emphasised by section 26 and these are important values in the new constitutional democracy.[41]

Whereas the high court focussed on section 26(3), the CC concentrated more on the implications of subsection (1) – "the right to have access to adequate housing". Without delineating the circumstances under which a measure will constitute a violation of the negative obligations imposed by section 26, the CC held that, at least

> "any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in [section] 26(1). Such measure may, however, be justified under [section] 36 of the Constitution."[42]

The court held that, during the section 36 enquiry, the importance of the purpose of the limitation had to be weighed up against the nature of the right and the nature and extent of the limitation.[43] The CC acknowledged the purposes and importance of the debt enforcement mechanism contained in section 66(1)(a)(ii). It was argued that the section facilitates debt enforcement in the most viable way and that convenient enforcement mechanisms enhance the credit market. However, the CC held that the importance of these factors was diminished by the fact that trifling judgment debts could be executed against homes without a court first approving it.[44] In other words, there was insufficient proportionality between the purpose of the limitation and impact thereof.

The CC commented that, relative to homelessness, having a home even under the most basic circumstances can be "a most empowering and dignifying human experience".[45] Section 66(1)(a) could undermine this experience. It could place people in the position where they never again can acquire state-aided housing and may, therefore, "be rendered homeless and never able to restore the conditions for human dignity".[46] Accordingly, in view of the importance of housing and dignity, it would not be justifiable to have someone's home sold in execution if there are alternative methods to satisfy the debt.

The court also pointed to the potential abuse of the section 66(1)(a) process. The section provided the possibility that an unscrupulous person easily could abuse another person's lack

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41 Para 29.
42 Para 34.
43 Para 36. See also S Liebenberg "The application of socio-economic rights to private law" 2008 *TSAR* 464-480 468.
44 *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) paras 40-42.
45 Para 39.
46 Para 39.

of knowledge.[47] Consequently, if the process is abused, execution will not be justified.[48] The CC held that the scheme of the MCA was broad enough to allow unjustified sales in execution.[49] It was clear to the CC that section 66(1)(a) was so broad that it permitted unjustifiable sales in execution without judicial oversight.[50] The court found that as long as a legislative scheme allows for the possibility that debtors' rights can be violated unjustifiably, such a scheme is too broad.[51] The legislative framework would have to be narrowed in such a way as to exclude the unjustified violation of rights. Therefore, section 66(1)(a) of the MCA was found to be unconstitutional to the extent that it allowed for unjustifiable sales in execution.

The CC decided that the section should be remedied in a way that will accommodate varying circumstances and that takes cognisance of debtors' security of tenure.[52] The section should also be sensitive to the interests of creditors and provide for the importance of poor persons to take financial responsibility for owning homes.[53] Adding judicial oversight to the process seemed to be the proper way to remedy the situation.[54] Therefore, the court agreed that the section should be remedied to require that a creditor who wants to execute against the immovable property of a debtor (and after insufficient movables was found) must approach a court to obtain an execution order. A court then should consider all the circumstances to determine whether there is good cause to grant the order.[55] This would be the case even during applications for default judgments. Hence, it also should prevent unjustifiable execution against the homes of people who do not defend themselves due to a lack of knowledge of the legal process.[56]

The CC decided to read words into section 66(1)(a) of the MCA to bring the section in line with the Constitution and to prevent unjustified sales in execution from occurring without judicial oversight.[57] The effect of this reading-in is that, henceforth, after the sheriff issues a *nulla bona* return (indicating that there are insufficient movables) the creditor needs to

47 Para 43.
48 Para 43.
49 Para 44.
50 Para 48.
51 Para 48.
52 Para 53.
53 Para 53.
54 Para 54.
55 Paras 54-55.
56 Para 55.
57 Paras 66ff.

approach the court for permission to execute against the immovable property.[58] Furthermore, the court may give permission only after it has taken all relevant circumstances into consideration.[59]

The CC is to be applauded for its decision in *Jaftha*. The court introduced judicial oversight, not to prevent sales in executions of homes *per se*, but to ensure that *unjustifiable* sales in execution do not occur. Justifiable executions against debtors' homes can continue, but a court needs to evaluate in every case whether the sale was indeed justifiable. It is important to consider that the CC in *Jaftha* did not diminish the value and importance of

[58] The decision was decided with regard to unsecured debt, although it later became clear that the same principle would apply to all debt enforcement cases that implicate homes: See 3 2 4 below.

[59] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 64. Since *Jaftha*, s 66(1)(a) of the MCA has been published in a version that includes the words read into it by the CC, as if the legislature itself had amended the Act. As a result of this seemingly blanket judicial oversight created by the amended s 66(1)(a), the magistrates' courts have applied *Jaftha* to the extent that judicial oversight was required for execution against all types of immovable property. Soon after *Jaftha* was delivered, CM van Heerden & A Boraine "Reading procedure and substance into the basic right to security of tenure" (2006) 39 *De Jure* 319-353 330 submitted that the amendment read in by the CC in *Jaftha* should only apply where the house of the debtor is to be attached. This question was addressed in *Mkhize v Umvoti Municipality and Others* 2010 4 SA 509 (KZP) ("*Mkhize*"), where the high court qualified the effect of the CC's reading-in remedy. The court held that the amended s 66(1)(a) only applies under circumstances where the property constitutes the judgment debtors' home and not where he or she owns the property for investment purposes. The court found that the clerk is only prohibited from issuing the execution order where there is a prospect that s 26(1) may be infringed by a sale in execution. Under circumstances other than these, the clerk can still grant a warrant for execution. To reach its conclusion, the court analysed the scope of *Jaftha*, the principles concerning the remedy of reading-in, as well as the principles regarding the doctrine of separation of powers: See *Mkhize v Umvoti Municipality and Others* 2010 4 SA 509 (KZP) paras 10-11, 19-30, 37-38 and 40-41. The court (at para 26) held that *Jaftha* does not affect the sale in execution of commercial, agricultural or mining land, nor does it affect sales in execution of residential property that is not contemplated by s 26(1) or where the property is rented out. The high court's decision has been confirmed by the SCA in *Mkhize v Umvoti Municipality and Others* 2012 1 SA 1 (SCA). See especially the SCA's conclusion at para 20:

> "[T]he order made in *Jaftha*, as the context of the judgment shows, is aimed at preventing the infringement of the right to adequate housing. This is the sole purpose of requiring judicial oversight in all cases of execution against immovable property."

See also *Hopkins Boerdery (Edms) Bpk v Colyn and Another* [2006] 1 All SA 497 (C) paras 86-87, where the court held that *Jaftha* was not applicable to the facts of that case. The case dealt with the unsuccessful setting aside of a sale in execution of farm land because of alleged shortcomings in the notice of sale. I assume that (for current purposes at least) the effect of *Jaftha* is limited to homes. However, it appears that this question might not truly be at rest. Considering the CC's earlier decision in *Chief Lesapo v North West Agricultural Bank and Another* 2000 1 SA 409 (CC) ("*Chief Lesapo*"), one might ask whether judicial oversight is in fact necessary for the sale in execution of all classes of property. *Chief Lesapo* did not deal with residential property, but with movables subject to a notarial bond. Based on s 34 of the Constitution, the CC in that case was adamant that judicial oversight is always necessary when someone's property is deprived by way of attachment and sale in execution. Although this is not the same situation as the registrar's power to grant execution orders by default, the CC in *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 39 quoted from *Chief Lesapo* and used it as supporting authority for its finding that the registrar may no longer grant execution orders. Although the CC mostly referred to property that is "a person's home", it can be argued that the judgment has a wider effect. S 26(3), of course, does not apply to non-residential property, but s 34 and *Chief Lesapo* arguably does. However, it is not necessary for me to take a final position in this regard.

mortgage bonds.[60] The court did not place homes beyond the scope of sales in execution of secured or even unsecured debts either. The CC merely endorsed a proportionality inquiry where the interests of creditors are weighed up against the tenure rights of debtors.[61] However, to my mind it seems that this is precisely what many thought to have been the potential effect of *Jaftha*. It seems that many in the industry may have seen (or still see) section 26 as a "tightrope" for enforcing mortgage debt.[62]

3 2 3 Initial effect on the high court process

3 2 3 1 Snyders *and* Mortinson

Since the amendment to the magistrates' courts procedure by the CC in *Jaftha*, there has been reasonable clarity as to the process in the lower courts. However, *Jaftha* also created some uncertainty concerning the effects of this CC decision on the high court process, mostly due to fear of the impact that section 26's could have on the right of mortgage. Concerning the scope of *Jaftha*'s effect, Van der Walt stresses that

> "[d]espite the potentially negative economic impact that stricter judicial control over sale in execution could have in 'normal' mortgage situations, it is important that the Constitutional Court's decision in *Jaftha* should not be marginalized or played down. *Jaftha* established the significant constitution principle that court procedures that have been established to facilitate 'normal' commercial processes may not be abused to exploit or exacerbate the economic and social weakness and marginality of the poor, especially when doing so has a negative impact on state efforts to alleviate homelessness, but this should not create the false impression that judicial oversight is required only in these extreme situations."[63]

Soon after *Jaftha* was delivered it was suggested that the high court process should be brought in line with the decision in *Jaftha* as well.[64] However, the courts did not arrive at this conclusion immediately. In *Standard Bank of SA Ltd v Snyders and Eight Similar Cases*[65] ("*Snyders*") the high court attempted to take the correct approach pertaining to mortgage bonds, but this caused uncertainty in practice. The high court decision in *Nedbank Ltd v*

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[60] For the CC's comments regarding mortgage bonds, see 3 4 2 below.
[61] S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 386.
[62] For example, see the title of this article: C Smith & SJ van Niekerk "Execution against immovable property: Negotiating the tightrope of s 26" (2010) Jan-Feb *De Rebus* 32-33.
[63] AJ van der Walt "Property, social justice and citizenship: Property law in post-Apartheid South Africa" (2008) 3 *Stell LR* 325-346 331-332 (footnote omitted). See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 305-306; AJ van der Walt "Constitutional property law" (2006) 1 *JQR* para 2.3.
[64] CM van Heerden & A Boraine "Reading procedure and substance into the basic right to security of tenure" (2006) 39 *De Jure* 319-353 336 and 342. See also M du Plessis & G Penfold "Bill of Rights jurisprudence" (2005) *ASSAL* 81.
[65] 2005 5 SA 610 (C).

Mortinson[66] ("*Mortinson*") and the SCA judgment in *Standard Bank of South Africa Ltd v Saunderson and Others*[67] ("*Saunderson*") represent strong reactions, where the courts tried to provide stability to the credit sector.[68] Although the main issue in these cases was the question of judicial oversight, the real issue – in my opinion – is more subtle and relates to the economic importance of the mortgage bond. It seems that the requirement of judicial oversight created a sense of fear that such oversight will diminish the security value of the mortgage bond, which is not the case. The inconsistency in court decisions probably contributed to this state of affairs, since creditors generally did not know what to expect when they brought applications for execution orders.

The high court decision in *Snyders* was the first reported case regarding sales in execution of immovable property after *Jaftha*.[69] Moreover, this was the first case concerning the effect of *Jaftha* on orders declaring specially hypothecated property executable in the high court. In light of the CC's decision in *Jaftha*, the high court in *Snyders* decided that a sale in execution of mortgaged immovable property is subject to section 26 of the Constitution.[70] Therefore, only the court – and not the registrar – has the power to grant the execution order.[71] In addition, the court held that creditors are to inform debtors of their rights under section 26(3) and that the summons should contain a suitable allegation of the facts to justify an order in terms of section 26(3).[72]

In *Mortinson* the full bench rejected the position adopted in *Snyders*, namely that *Jaftha* applies to the high court procedure and that the registrar would, accordingly, not have the power to grant such orders.[73] Although section 26(3) of the Constitution is limited by the principle that the registrar can grant the execution order, such a limitation was found to be

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66 2005 6 SA 462 (W).
67 2006 2 SA 264 (SCA).
68 For a general discussion of the cases, see also M du Plessis & G Penfold "Bill of Rights jurisprudence" (2006) *ASSAL* 83-93.
69 For the facts, see *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 5 SA 610 (C) paras 2-4. The mortgagee sued each of the nine defaulting mortgagors for the balance due in respect of their mortgage debts. It was seeking judgments in its favour (for the amounts due) as well as orders declaring the immovable properties executable. Only one mortgagor filed a notice of intention to defend the matter and the mortgagee brought an application for summary judgment against this mortgagor. Eight of the mortgagors did not deliver notices declaring their intention to defend the matters. Therefore, the mortgagee filed written applications to the registrar of the high court for default judgments in terms of HCR 31(5)(a). However, the registrar – prompted by the then recent *Jaftha* decision – claimed that he did not have the power to grant such an order for sale in execution and, in terms of HCR 31(5)(b)(vi), referred the matter to open court.
70 *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 5 SA 610 (C) paras 5-6.
71 Para 7.
72 Paras 19, 23-24 and 30.
73 *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) para 31.

reasonable and justifiable.[74] The court used a substantive argument, namely the presence of a mortgage bond, to justify the reasonableness of the limitation of section 26(3). As long as there is no indication of an abuse of the process, it would accordingly be justifiable for the registrar to grant an execution order against mortgaged homes.[75] The court in *Mortinson* also rejected the finding in *Snyders* that the summons should contain suitable and sufficient allegations to justify an order in terms of section 26(3) of the Constitution.[76] However, the court in *Mortinson* decided to lay down a rule of practice that will help the registrar to determine whether a case should be referred to a judge. Henceforth, the mortgagee who applies to the registrar for default judgment had to provide certain information that would assist the registrar in determining whether there was an abuse of the process. The court formulated another rule of practice, namely that the warrant of execution must contain a notice advising the debtor of the provisions of rule 31(5)(d).[77] The information that needs to be provided to the court includes the following:[78]

- The amount of the arrears outstanding as at the date of the application for default judgment;
- whether the immovable property which it is seeking 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;

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[74] See also *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) para 18. The court in *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) para 39 also discussed HCR 45(1). It suggested that the section should be amended in the same way that s 66(1)(a) of the MCA was amended in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC).

[75] *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) para 33.

[76] Para 32.

[77] The new rules of practice, including the information the applicant should provide, was quoted in *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) paras 33-34. Similar rules of practice were issued in KwaZulu-Natal, the North West Province as well as in the Eastern Cape: See CM van Heerden & A Boraine "Reading procedure and substance into the basic right to security of tenure" (2006) 39 *De Jure* 319-353 343. For an application of the new rules of practice in the Eastern Cape, see *First Rand Bank Ltd v Siebert and Another, First Rand Bank Ltd v Nel and Another* (2635/2010, 2219/2010) [2010] ZAECPEHC 75 (17 December 2010) para 1. One can argue that it is perhaps time for the legislature to step in with a comprehensive and coherent set of uniform rules in this regard, since these rules, according to CM van Heerden & A Boraine "Reading procedure and substance into the basic right to security of tenure" (2006) 39 *De Jure* 319-353 343, "add another confused layer to the already fragmented" process. See also C Smith & SJ van Niekerk "Execution against immovable property: Negotiating the tightrope of s 26" (2010) Jan-Feb *De Rebus* 32-33, who briefly attempt to reconcile the procedure. In *Nedbank Ltd v Mashiya and Another* 2006 4 SA 422 (T) ("*Mashiya*"), the mortgagee purported to provide sufficient information in its pleadings in accordance with the rule of practice laid down in *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W). However, the court in *Mashiya* held that the information provided by the mortgagee was insufficient to satisfy the requirement of the rule.

[78] *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) para 33.

- whether the immovable property is used for residential purposes or commercial purposes; and
- whether the debt which is sought to be enforced was incurred to acquire the immovable property sought to be declared executable or not.

3 2 3 2 Saunderson

Saunderson was an appeal against the decision in *Snyders*. The SCA in *Saunderson* started by providing an overview of the mortgage bond as an indispensable tool for spreading home ownership.[79] The mortgage bond's immense value as an instrument of security lies therein that the law will give effect to its terms. This confidence was apparently shaken by the decisions in *Jaftha* and *Snyders*.[80]

The SCA commented that the high court in *Snyders* gathered from *Jaftha* that section 26 of the Constitution is always limited when an order is sought to execute a judgment against residential property, irrespective of the nature of the property or the circumstances of the debtor. Also, the court in *Snyders* held that all sale-in-execution cases must be justifiable under section 26(3), after considering all the relevant circumstances. The SCA remarked that the high court referred to the factors listed in *Jaftha*, but applied it to an analysis under section 26(3) of the Constitution, whereas the CC in *Jaftha* listed these factors under its section 36 enquiry. Moreover, the CC was not dealing with s 26(3).[81]

Therefore, the SCA held that the high court in *Snyders* misinterpreted the decision in *Jaftha*, since section 26(3) of the Constitution was not at issue in that case, but rather section 26(1).[82] The SCA held that section 26(3) is relevant only if an eviction will follow upon a sale in execution, which was not at issue in *Jaftha*.[83] In this regard, it seems that the SCA endorsed the high court's approach in *Jaftha* concerning the conceptual distinction between

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[79] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) paras 1-3. The court commented that almost all property in South Africa had probably at one time or another been subject to a mortgage and that most homeowners had at some point been mortgagors. Few people can buy a home without providing security for a loan by way of registering a mortgage bond. The SCA made it clear that the traditional principles of mortgage still apply in modern South African law and the court (at para 2) confirmed the definition of a mortgage bond: See the full quote in 2 4 1 above.

[80] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 3.

[81] Para 13.

[82] Para 15. See also M Kelly-Louw "The right of access to adequate housing" (2007) 15 *JBL* 35-39 37-38.

[83] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 15, citing *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 1 SA 113 (SCA).

sale-in-execution and eviction proceedings. It follows that the SCA took the CC in *Jaftha*'s silence pertaining to section 26(3) as authority that section 26(3) is not applicable to sales in execution. Because the CC focussed on section 26(1), the SCA held that judicial oversight would be necessary only if there is an indication that the sale in execution might threaten the debtor's "access to adequate housing".[84]

The SCA acknowledged that the CC in *Jaftha* did make observations regarding mortgage bonds, but merely as a factor during the justification test under section 36 of the Constitution and only after the court had determined that a section 26(1) right had been limited.[85] The SCA held that, in the *Saunderson* matter, it was not necessary to decide whether a section 26(1) right may be limited when a mortgagee seeks to enforce its rights in terms of the mortgage bond and when the property does in fact constitute "adequate housing".[86] The court held that even if such cases do exist, they are likely to be rare, since it is hard to conceive how a mortgagee's right will be denied altogether.[87] What is more, no abuse of the procedure was alleged in this case. Further, weight should be attached to the fact that – in all mortgage foreclosure cases – the mortgagee's claim is against the property itself. The mortgagee's entitlement originated from a limitation on the mortgagor's title of ownership, a limitation that the owner willingly accepted in exchange for the loan.[88] Therefore, until the mortgagor shows that the sale in execution would limit his or her section 26(1) right, the mortgagee cannot be required to justify the execution. Moreover, the fact that the property is residential does not by itself lead to the conclusion that section 26(1) will be infringed.[89] In any event, in none of these matters did the mortgagors even allege that section 26(1) would be infringed. The mortgagee was consequently never obliged to justify the execution order.[90]

It is clear that the SCA was hesitant to acknowledge that a sale in execution might limit section 26(1) rights. The court seems to have reasoned that acknowledging such a limitation would hinder the effective enforcement of mortgage bonds. However, as I explain in this chapter, recognising that sales in execution of homes limit section 26(1) rights does *not* stand in the way of enforcing mortgage bonds. Section 26 – along with section 36 – simply ensures

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[84] I explain in 3 3 below that this approach to s 26(1) and (3) is incorrect and that the CC's silence with regard to s 26(3) does not necessarily denote that the CC's decision was not based on s 26(3).
[85] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 18.
[86] Para 19.
[87] Para 19.
[88] Para 19. See also para 2: "The mortgage bond thus curtails the right of property at its root, and penetrates the right of ownership, for the bond-holder's rights are fused into the title itself."
[89] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 20.
[90] Para 21.

that homes are not sold in execution where it would otherwise be unjustifiable. Section 26(1) does not afford any extraordinary protection to debtors that will cause prejudice to creditors. It merely ensures justice for homeowners and creditors alike.

The significant point is that, in response to the apparent uncertainty that was caused by *Jaftha* and *Snyders*, the SCA held that the registrar *does* have the authority to declare immovable property executable by default.[91] The constitutionality of a warrant of execution against a home can arise only if the mortgagor formally defends the matter or at least objects to it informally.[92] In such cases the registrar is obliged – after evaluating whether the summons discloses a proper cause of action – to refer the matter to open court in terms of rule 31(5).[93] The court cautioned that the registrar should refer matters to court even when the mortgagor informally raises a constitutional objection. However, if the constitutional validity of the sale in execution order is not disputed, the registrar may enter judgment in terms of rule 31(5).[94]

Although the SCA reaffirmed the entitlement of mortgage creditors to obtain execution orders by default from the registrar (and consequently rejected the role of section 26(3) in this regard), the court gave some consideration to section 26(1). The court conceded the possibility of section 26(1) rights being limited by a sale in execution.[95] Moreover, the court found it desirable that the defaulting mortgagor should be informed that section 26(1) rights may be affected by the mortgagee's claim to foreclose. The reason for this is that in most of these cases mortgagors would have no defence against the claim for payment and, therefore, they are unlikely to obtain legal advice.[96] In the event of a court finding that section 26(1) binds the mortgagee, the mortgagor would have the right to raise personal circumstances in an effort to persuade the court to postpone execution. However, the mortgagee would not have to justify a possible limitation of section 26(1) rights in advance.[97]

In accordance with its powers in terms of section 172 of the Constitution, the SCA decided to lay down a rule of practice. In the summons (in which an order declaring immovable property executable is sought) the mortgagee is required to inform the homeowner of his or

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91 Para 22.
92 Para 23.
93 Paras 23-24.
94 Para 24.
95 Para 25.
96 Para 25.
97 Para 25. See also *ABSA Bank Ltd v Noniki Trading CC and Another, ABSA Bank Ltd v Ikroza Enterprise Solutions CC and Others, ABSA Bank Ltd v Hqubela Trading CC and Others* (404/2011, 405/2011, 407/2011) [2011] ZAECGHC 15 (7 April 2011) para 52.

her right of access to adequate housing and that this right may be impacted by the order.[98] This rule of practice would, however, only be required for future summonses. Since the mortgagors in this case did not contest the constitutionality of the sale-in-execution orders, there were no grounds to refuse the orders. The court decided that the bank's appeal had to succeed and that the registrar was entitled to issue the execution warrants.[99]

The decision in *Saunderson* was taken on appeal to the CC in *Campus Law Clinic (University of KZN Durban) v Standard Bank of SA Ltd and Another*[100] but this appeal was unsuccessful.[101] Soon after *Saunderson* was decided, Van der Walt explained that he was satisfied with the SCA's decision in *Saunderson*, since

> "it acknowledges economic realities and the importance of protecting commercial interests but also provides sufficient protection for persons or families whose s[ection] 26(1) rights may actually be threatened by execution procedures, leaving it to them to raise and prove such a threat and to the courts to then consider the justification of allowing execution in view of all the circumstances."[102]

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[98] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 25. The court (at para 27) described the information that must be conveyed in the following words:

> "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."

The court in *Firstrand Bank Ltd v Soni* 2008 4 SA 71 (N) para 29 held that the wording does not have to be exactly the same as the wording provided in *Saunderson*. It merely must serve to achieve the same purpose. In light of the later CC decision in *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) (see 3 2 4 below), the court in *Nedbank Ltd v Jessa and Another, ABSA Bank Ltd v Morulane, Firstrand Bank Ltd v Hendricks and Another* (6656/2011, 15274/11, 15388/2011) [2011] ZAWCHC 12 (20 December 2011) suggested that the *Saunderson* notice should not only include a reference to s 26(1), but it should also draw the mortgagor's attention to his or her right to provide information regarding all the relevant circumstances, as contemplated by s 26(3).

[99] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 26. The court in *First Rand Bank Ltd v Lenea and Another* 2008 3 SA 491 (E) held that a court may grant an order declaring hypothecated property executable in summary judgment proceedings. AJ van der Walt "Property" (2007) 3 *JQR* para 2.4 warns that this decision should be read with care and against the background of the CC's decision in *Jaftha* and *Saunderson*. Although the mortgagee can obtain an execution order during summary judgment proceedings, it is important that the mortgagee comply with the rule of practice set out in *Saunderson*.

[100] 2006 6 BCLR (CC).

[101] The Campus Law Clinic of the University of KwaZulu-Natal launched an application to the CC for leave to appeal against the SCA's decision in *Saunderson*. The Law Clinic was not a party to the SCA proceedings. Yet, purporting to act in the public interest, it challenged the constitutionality of s 27A of the Supreme Court Act 59 of 1959 as well as HCR 45(1). Since this issue was not before either the high court or the SCA, the CC decided not to grant leave to appeal in this matter. The CC considered the issues to be of great constitutional importance and decided that it was not in the interests of justice to decide the case as the court of first and last instance. These questions could firstly not be considered in an appeal against *Saunderson* because the SCA did not deal with them. Secondly, the court would not allow direct access to the CC, since it would not be proper if these substantive issues were not first adjudicated in the high court. The CC commented that this matter raised constitutional issues and that all interested parties should be joined.

[102] AJ van der Walt "Constitutional property law" (2006) 1 *JQR* para 2.3.

Van der Walt further argues that this approach by the SCA facilitates a

> "balance between the two sets of interests ... by expecting that potentially negatively affected homeowners should raise and prove the existence of a threat to their section 26 rights, whereupon the courts must consider the justification of allowing execution in view of all the circumstances."[103]

In contrast with Van der Walt's initial support of the approach taken in *Saunderson*,[104] Liebenberg[105] regards the SCA's decision as unfortunate, but applauds the decision in *ABSA Bank Ltd v Ntsane and Another*[106] ("*Ntsane*"). The reason for this is that the decision in *Ntsane* gave due attention to the importance of judicial oversight by ensuring that all the relevant interests are considered and evaluated within "a balanced normative framework".[107] Liebenberg argues that such a framework should include the interests and values protected by section 26 of the Constitution. The author favours judicial oversight because of the complex questions concerning the balance between contractual, property and housing rights.[108] Liebenberg further refers to the context-sensitive balancing of competing rights and interests as emphasised by the CC in *Jaftha*, which balance can be struck best by the courts.[109]

3 2 4 *Gundwana* and the amended High Court Rule

Since the SCA handed down the decision in *Saunderson*, registrars continued to grant execution orders against homes, unless the facts prompted them to refer the matter to court.[110] Also, the high courts could not deliver decisions contrary to that of the SCA, since they are obliged to adhere to this higher court's decisions. One can only speculate whether all unjustified sales in execution were prevented by this approach. However, eventually HCR 46 was amended to restrict the registrar's powers when it comes to execution against primary

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[103] AJ van der Walt "Property, social justice and citizenship: Property law in post-Apartheid South Africa" (2008) 3 *Stell LR* 325-346 332.

[104] The author later acknowledged the correctness of the CC' rejection (see 3 2 4 below) of *Saunderson*: See AJ van der Walt *Constitutional property law* (3rd ed 2011) 305-306; AJ van der Walt & R Brits "The purpose of judicial oversight over the sale in execution of mortgaged property: *Gundwana v Steko Development* 2011 3 SA 608 (CC); *Nedbank Ltd v Fraser and Four Other Cases* 2011 4 SA 363 (GSJ)" (2012) 75 *THRHR* 322-329.

[105] S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 357-358.

[106] 2007 3 SA 554 (T), discussed in 4 4 3 2 below.

[107] S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 357.

[108] 358.

[109] 357 n 231. Liebenberg (at 357 n 232) also relies on the CC decision in *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) paras 49-50, where the court confirmed that procedures that result in the deprivation of homes should be subject to judicial oversight.

[110] See M du Plessis & G Penfold "Bill of Rights jurisprudence" (2006) *ASSAL* 83-93, who anticipated some of the problems with this approach, as later acknowledged in *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC).

residences. The amended HCR 46 is the high court equivalent of the CC's amendment of the MCA in *Jaftha*. The SCA recently described HCR 46 as "in effect a legislative interpretation of *Jaftha* demonstrating the policy of the legislature".[111]

As I explain in 3 1 above, the procedural end result of the cases decided in this part of the chapter is that the HCR now prohibit a registrar from granting execution orders against judgment debtors' primary residences. The high court process has now been conformed to the principle set out in *Jaftha* and section 26(3) of the Constitution, namely that a *court* must grant the execution order and only after it has taken all the relevant circumstances into consideration. After this amendment took effect, the CC confirmed that the principles laid down in *Jaftha* also apply to the high courts. Therefore, even if HCR 46 was not amended, the CC would have found the high court process unconstitutional. In what follows I discuss the CC's decision in this respect, which illustrates the reasons why the former process was unconstitutional.

In *Gundwana v Steko Development CC and Others*[112] ("*Gundwana*") the CC delivered an important judgment regarding the process in the high court as it was prior to the amendment of HCR 46.[113] Substantive arguments were advanced in an attempt to convince the CC that judicial oversight was not necessary in normal mortgage cases. The mortgagee agreed that judicial oversight was required in cases like *Jaftha*, but argued that the facts of *Gundwana* did

[111] *Mkhize v Umvoti Municipality and Others* 2012 1 SA 1 (SCA) para 13 (footnote omitted).

[112] 2011 3 SA 608 (CC). For a summary of the case, see AJ van der Walt & R Brits "The purpose of judicial oversight over the sale in execution of mortgaged property: *Gundwana v Steko Development* 2011 3 SA 608 (CC); *Nedbank Ltd v Fraser and Four Other Cases* 2011 4 SA 363 (GSJ)" (2012) 75 *THRHR* 322-329; M Bishop & J Brickhill "Constitutional law" (2011) 2 *JQR* para 2.2; G Mirugi-Mukundi "Judicial oversight required for sales in execution of residential property" (2011) 12 *ESR Review* 6-8.

[113] *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 1. The importance of the outcome of this case had perhaps been diminished in light of the amendment of HCR 46. Yet, the amended rule does not have retrospective effect and this decision is therefore important as regards execution orders granted in the past: See para 33. For the facts of the case, see paras 5-12: In 2003 the registrar of the Cape High Court granted a default judgment that included an execution order against a mortgage debtor's hypothecated property. A warrant of execution was issued on the same day. Nevertheless, for approximately four years the mortgagee did nothing in terms of these orders and the mortgagor continued to make payments, albeit irregularly. In 2007 the mortgagor discovered that her house was to be sold in execution. The amount in arrears was R5 268,66 and the total accelerated outstanding debt was R23 779,13. The mortgagor attempted to settle the arrears by paying R2 000. However, the sale in execution went ahead and Steko Development CC ("Steko") bought the property at the auction. The property was consequently transferred to Steko by way of registration and, since the mortgagor did not vacate voluntarily, Steko applied for an eviction order in the magistrates' court. At that point the mortgagor was no longer the registered owner and, therefore, technically an unlawful occupier. Though the application for an eviction order was postponed once, the order was eventually granted. The mortgagor launched two failed appeals against the eviction order, first in the Cape High Court and then in the SCA. After this eviction order was granted, the mortgagor applied to the Cape High Court for a rescission of the default judgment that was granted in 2003. This application was still pending and had been postponed to await the judgment by the CC. Therefore, the CC case was an appeal against the eviction order and a challenge against the constitutionality of the default judgment proceedings.

not fall within the ambit of *Jaftha*.[114] This was based on two arguments (which were apparently based on *Saunderson*):

(1) Neither the person of the applicant nor the nature of the property fell within the ambit of *Jaftha*. This was a fact-based argument.

(2) *Jaftha* did not impact mortgaged property, since mortgagors willingly accept the risk of losing their homes when they conclude mortgage agreements. The CC referred to this as "the voluntary placing-at-risk argument".[115]

The CC per Froneman J stated that both these arguments were "based on incorrect premises" and did not rely "on precedent-based reasoning".[116] The first argument, namely that the facts of *Gundwana* did not fall within the scope of *Jaftha*, was rejected by the CC. Firstly, the court held that the validity of a provision could not depend on the subjective facts of each case. The rules were either objectively valid or invalid.[117] Secondly, the CC held that an enquiry of some sort is required to ascertain *whether* the facts of any particular case fall within the scope of *Jaftha*. This kind of enquiry goes beyond the registrar's powers, namely to ascertain from the summons whether there is a proper cause of action. It would often not be possible to determine from the summons whether the facts fall under *Jaftha* or not.[118] Therefore, a judge should hear the matter.

The CC held that the second argument, the so-called "voluntary placing-at-risk argument", did not validate the order being granted by a registrar either.[119] In this regard, the CC held that it is true that a mortgagor willingly allows his or her immovable property to be the object of a limited real right to secure the loan he or she obtains from the mortgagee. The mortgagor voluntarily accepts the risk that the property may be sold in execution to satisfy the debt. However, this willingness of the mortgagor does not imply that the debt may be enforced

[114] *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 42.
[115] Para 42.
[116] Para 42.
[117] Para 43. Although the court found that a *rule* can only be objectively valid or invalid, it is in my view possible to argue that, despite the general validity of a rule, a specific sale in execution can still be found to be constitutionally invalid on the facts of a particular case. See the distinction I draw between general justification and case-by-case proportionality in 3 4 2 and 3 4 3 below. It seems to me that Froneman J had the broader justification of the court rules in mind, since this is the issue that the case dealt with.
[118] *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 43.
[119] Para 44.

without judicial supervision.[120] As Van der Walt explains the effects of *Jaftha* and *Gundwana*,

> "what seems like a purely technical issue, namely attachment and execution practice, cannot be restricted to its (admittedly important) procedural and economic considerations, because it affects the efficacy of the government's land and housing programmes."[121]

The CC held that the SCA's decision in *Saunderson*, namely that a registrar is competent to grant execution orders by default, was non-binding.[122] According to the CC it was expressly *obiter*, since the registrar in that case had referred all the matters to the high court and the question of judicial oversight was, therefore, not before the SCA.[123] The CC found that the concept of granting execution orders without judicial oversight was challenged by its previous judgments in *Chief Lesapo v North West Agricultural Bank and Another*[124] ("*Chief Lesapo*") and *Jaftha*.[125] The CC decided that the combined effect of its judgments in these two cases was that execution against property may only follow after an order had been given by a court of law.[126] The court found that this is especially important when indigent debtors face execution against their homes and the loss of their tenure security. Consequently, judicial oversight of the execution process is "a must".[127]

The CC relied on *Chief Lesapo* in holding that mortgaged property may not be declared executable without court sanction.[128] The facts of each case must be examined to decide whether an execution order may be granted against someone's home.[129] This kind of examination may only be carried out by a court and not by a registrar. Therefore, the rules

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[120] Para 44.
[121] AJ van der Walt *Constitutional property law* (3rd ed 2011) 305.
[122] *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 29.
[123] Para 29 n 21.
[124] 2000 1 SA 409 (CC).
[125] *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 38.
[126] Para 40. Although *Chief Lesapo v North West Agricultural Bank and Another* 2000 1 SA 409 (CC) was never referred to in *Jaftha*, it was quoted with approval in *Gundwana* at para 39. The procedural protection offered to owners and occupiers by s 26(3) is rooted in s 34 of the Constitution: See *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) para 14. S 34, titled "Access to courts", 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."

The CC in *Chief Lesapo* per Mokgoro J held (at para 15) that s 34 "also protects the attachment and sale of a debtor's property". In addition the CC held (at para 16) that "any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land."
[127] *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 41.
[128] Para 45.
[129] Para 49.

were held to be unconstitutional to the extent that they allowed for the registrar to grant the execution order.[130] Accordingly, the CC overturned the judgments of the SCA in *Saunderson* and the full bench in *Mortinson* to the extent that these cases found it to be constitutionally compliant for a registrar to grant execution orders under rule 31(5)(b).[131] Nevertheless, the CC emphasised that the practical suggestions made by those courts should not be disregarded, since they are valuable to safeguard the rights of mortgagors.[132]

The mortgage bond's value as an instrument of real security lies therein that the law will give effect to its terms. As the SCA in *Saunderson* mentioned, the decisions in *Jaftha* and *Snyders* apparently had shaken the certainty that normally accompanies the enforcement of mortgage bonds.[133] The arguments that the SCA used were based predominantly on the substantive elements of the mortgage as a real security right. However, the mere fact of judicial oversight does not diminish the actual substantive value of the mortgage bond. The general purpose of judicial oversight is purely to ensure that the process is not abused (as it was in *Jaftha*) and to ensure that the sale of the home will be the last resort, taking both parties' rights into consideration. None of this is truly a contradiction of or deviation from the traditional principles of mortgage law. The SCA decided that judicial oversight is warranted only if the facts of the case might indicate an abuse or a limitation of section 26(1). As I explain above, the CC in *Gundwana* rejected this line of argument, holding that judicial oversight is always necessary to evaluate *whether* section 26(1) might be implicated in the first place. The registrar does not have the power to make such an evaluation.

3 2 5 Relationship between the substantive rule and the procedural exception

Before further exploring the scope and content of section 26 for foreclosure purposes, it is important to consider how the substantive rules of mortgage law and the procedural rules of debt enforcement fit together. The substantive law of mortgage foreclosure establishes the creditor's entitlement to claim direct execution against the hypothecated immovable property. However, the procedural rules of debt enforcement require that execution must first take

[130] Para 49. The CC (at para 51) expressed no opinion as to whether s 25(1) of the Constitution had any application in this matter and found it unnecessary to make such enquiry. Rather, the court was satisfied that this case should be limited to the potential infringement of a mortgagor's rights under ss 26(1) and (3) of the Constitution.
[131] *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 52.
[132] Para 52.
[133] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 3. This uncertainty led to a near standstill of default judgment applications in the Cape High Court.

place against movables and only if there is insufficient movables may execution proceed against the immovable property. Despite this procedural point of departure, the rules provide for an exception, namely direct execution against an immovable, but only if the court grants an order to that effect.[134]

A court will generally grant an execution order against the debtor's immovable property only if the sheriff issues a *nulla bona* return, which indicates that there are no or insufficient movables available to satisfy the debt. In other words, the current procedural rules pertaining to the enforcement of debts already provide the framework for avoiding abuse of the execution process. A debtor's home will in theory never be sold in execution of an *unsecured* debt if there are sufficient other assets available. When a creditor tries to avoid this principle in an unscrupulous manner, it can be regarded as abuse of the process, which must be prevented by the courts. *Jaftha* was an example of exactly this logic, which illustrates one of the purposes of judicial oversight, namely to ensure that the general procedural principle is adhered to in the case of unsecured debts. Judicial oversight should then also ensure – in line with *Jaftha* – that homes are not sold for insignificant unsecured debts.

The mortgage situation is more complicated because the substantive rule of mortgage foreclosure requires the existence of an exception to the procedural rule. One of the foundational principles of mortgage law is that the mortgage creditor who holds a limited real right to secure the debt can execute its judgment directly against the immovable property in question, without first attempting to execute against the debtor's movables. There is usually a clause in the mortgage bond that provides for this entitlement. It has also been held that even if the mortgage agreement does not provide for the creditor's right to obtain a direct execution order expressly, the mortgage creditor is entitled to such an order by operation of law.[135] Therefore, the common law accepts that the mortgage creditor can *per se* execute its claim directly against the hypothecated property. Hence, direct executability against the hypothecated property is a substantive rule of mortgage law (and not an exception). To give effect to the creditor's rights under the mortgage bond (the substantive rule), it is procedurally necessary to bypass execution against the debtor's movables. Therefore, direct execution against hypothecated immovable property is an exception to the procedural debt enforcement principle that movables should be executed against first.

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[134] See 2 5 above.
[135] See *Nedcor Bank Ltd v Kindo* 2002 3 SA 185 (C) 186-188, discussed in 2 4 4 above.

Accordingly, mortgage foreclosure entails the cooperation of a substantive rule and a procedural exception. However, the procedural enforcement of this substantive rule should be subject to court authorisation, which – unfortunately – had not been the case for a number of years. The CC in *Gundwana* summarised the creation of the procedural exception to allow for the principles of mortgage foreclosure as follows:

> "[E]xecution upon judgment on a money debt generally took place against movable property first and upon immovable property only if there was insufficient realisable movable property to satisfy the judgment. Initially the practice was that the court had to be approached for an order declaring immovable property executable when movables were insufficient to satisfy the debt, but this practice was soon discontinued. The practice of ordering immovable property specially executable at the time of judgment arose on the basis of practical expediency, namely to circumvent the necessity of first executing against movables where immovable property had been specially hypothecated as security for the debt."[136]

At common law, to bypass execution against movables, the court had to give a declaration of executability.[137] If a court did not grant such a declaration, a warrant of execution was issued against the debtor's movables. If no or insufficient movables were found, it was not necessary for a court to authorise execution against the immovable property and the registrar could issue the warrant.[138] Direct execution always had to be authorised by the court. However, when execution against movables was sought and a *nulla bona* return was issued, a further court authorisation was unnecessary before execution could be levied against the immovable property. Although this was initially seen as an "executive matter which [was] dealt with by the [r]egistrar",[139] judicial oversight is required now under HCR 46(1)(a)(ii),[140] read with the CC judgment in *Gundwana*.

However, today – even under HCR 46 and *Gundwana* – a *nulla bona* return is not always necessary and, therefore, it is possible to still obtain a direct execution order simultaneous with the judgment order. The most significant recent development is that this order can only be obtained from a court and not from a registrar. In other words, direct execution clauses in

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[136] *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 37 (footnotes omitted). The court referred to the history behind the process as it was discussed in *Gerber v Stolze and Others* 1951 2 SA 166 (T) 171-172 and *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) para 12ff.

[137] *Colonial Mutual Life Assurance Society Ltd v Tilsim Investments (Pty) Ltd* 1952 4 SA 134 (C) 135.

[138] *Gerber v Stolze and Others* 1951 2 SA 166 (T) 171.

[139] 171, quoted in *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 37.

[140] See *Standard Bank of South Africa Ltd v Bekker and Another* [2011] ZAWCHC 330; 6628/2011, 6635/2011, 6644/2011, 7032/2011, 7047/2011 (25 August 2011) para 4:

> "[E]ven in a case in which the judgment debt remains unpaid after excussion of the judgment debtor's movable property, execution cannot thereafter be levied against immovable property that is the judgment debtor's home unless a court, after consideration of all the relevant circumstances, so orders."

mortgage bonds are still valid, but courts must be circumspect when giving procedural effect to creditors' substantive entitlement to obtain direct execution orders. Section 26(3) requires that care should be given in cases where the enforcement of direct execution clauses may lead to eviction from someone's home. Accordingly, it seems that under mortgage circumstances, when execution against assets other than the home is skipped, the court must also be certain that such an order will be justifiable.[141]

Consequently, the exception to the normal procedural rule (movables before immovables) is available for mortgage creditors, but it must be authorised by a court. The reason for the procedural exception, namely allowing mortgaged property to be executed directly against immovable property (without first executing against movables) was set out by the full court in *Gerber v Stolze and Others* ("*Gerber*"):[142]

> "The only reason for applying to Court at all is to have a short-cut in the one case where a money judgment has been obtained and the money judgment is secured to the plaintiff by specially hypothecated immovable property; then, in the normal course, the Court is asked, in advance, to dispense with the circumlocution of having to take execution against the movable property first and only on that property failing to realise the money sum, then to have recourse against the immovable property. When an order is granted declaring executable the property specially hypothecated, that order permits the grantee, the creditor, to take his execution straightaway against the immovable property."

However, at the time *Gerber* was decided a court still had to declare the hypothecated property executable. Accordingly, judicial oversight was present to ensure – in theory at least – that the exception to the procedural rule (namely to first execute against movables) was justified. It was only in 1991 that section 27A was added to the Supreme Court Act 59 of 1959,[143] granting the registrar of the high court the power to grant default judgments.[144] HCR 31(5) was only added in 1994,[145] describing the registrar's powers in more detail. These provisions, read with HCR 45 – prior, of course, to the amendment of HCR 46(1)(a)(ii) – provided that the registrar could grant a default judgment, declare the immovable property executable and issue a warrant of execution, all at the same time.[146] The court in *Gundwana*

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[141] See *Changing Tides 17 (Pty) Ltd NO v Erasmus and Another; Changing Tides 17 (Pty) Ltd NO v Cleophas and Another; Changing Tides 17 (Pty) Ltd NO v Frederick and Another* (18153/09, 14229/09, 11973/09) [2009] ZAWCHC 175 (12 November 2009) para 8.

[142] 1951 2 SA 166 (T) 172 per Murray J, quoted in *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) para 17.

[143] S 27A was added to the Supreme Court Act 59 of 1959 by s 5 of the Judicial Matters Amendment Act 4 of 1991.

[144] *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) para 18.

[145] HCR 31(5) was introduced by *Government Gazette* 15322, GN R2365 (10 December 1993) and later amended by *Government Gazette* 17853, GN R417 (14 March 1997) and *Government Gazette* 18956, GN R785 (5 June 1998).

[146] *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) para 20.

referred to the irony that the position has now been restored to the way it was prior to 1994, when HCR 31(5) was introduced.[147]

The previous process (from 1994 to 2010) allowed for immovable property to be sold in execution under circumstances where a court did not evaluate whether it was justifiable to skip the execution against movables. In 3 2 2 and 3 2 4 above I explain that this is no longer acceptable and that sales in execution of homes no longer (under any circumstances) can occur without court oversight. Now that judicial oversight always is required before a home can be sold in execution, the courts should (and presumably will) ensure that sales in execution are justifiable despite the fact that execution was not first levied against other assets. My conclusion is that, in general, a mortgage creditor is entitled to execute its claim directly against the hypothecated immovable property, but that this is subject to court authorisation. The entitlement of the creditor to obtain an execution order is, therefore, no longer "unbridled" or "unassailable"[148] but subject to scrutiny based on debtors' substantive housing rights.

One purpose of court oversight, then, is to ensure that if alternatives *are* available, these alternatives are either pursued or that if the available alternatives *are not* pursued (because they are not viable, for example), it is justifiable to skip them. Therefore, it is justifiable to allow this procedural exception in mortgage circumstances, subject to – as I explain – court supervision. In many cases (especially mortgage foreclosures), even when there are alternatives available in theory, it might not be viable to explore these options. Consequently, it is necessary to acknowledge the option of directly executing against immovable property, even when alternatives seem possible. Nevertheless, I emphasise the role that courts should play in ensuring that this state of affairs is justifiable under the circumstances of each case.

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147 *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 53.

148 J van der Merwe "*Standard Bank of South Africa Limited v Rudiger Marshall Saunderson and two others* 2006 2 SA 264 (SCA)" (2006) 7 *ESR Review* 26-28 28:

> "The norms on which the Constitution is founded and which inform section 26 seek to curb the unbridled power of the banks, creditors and land owners to deprive people of security of tenure and to trade people's need for adequate housing for capital gain. The cases under review have developed the statutory and common law to some extent in accordance to constitutional values ... The developments, particularly in the practice and procedure of executing against mortgaged property ... illustrate that the constitutionally entrenched right of adequate housing is starting to have implications in areas where the powers of banks and other mortgage holders were previously unassailable."

See also L Steyn "'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) 11 *LDD* 101-119 112, according to whom this statement by Van der Merwe specifically applies to the result in *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T), where the court refused to allow a bond to be foreclosed for a "piffling" amount in arrears. See 4 4 3 2 below.

Courts should ensure that mortgage foreclosures remain within the bounds of justifiable limitations of section 26(1) rights. In other words, the result must be proportionate. The proportionality test is elaborated on in 3 4 3 below. Also, as will become clear, this dissertation advocates the importance of the National Credit Act in resolving foreclosure disputes.

3 2 6 Conclusion

The practical burden that it would cause for courts to hear all applications for warrants of execution played a role in both *Saunderson* and *Mortinson*. Admittedly, there are practical difficulties for courts that are running at full capacity and for judges with overextended court schedules. Therefore, it seems logical to have the registrar take over some of this load, especially those instances where debtors do not defend their cases. Since these seem like straightforward procedural matters, the registrar arguably should be able to fulfil this task.

However, it is clear that sales in execution of homes are no longer merely procedural matters. Moreover, the practical difficulties cannot outweigh the prejudice and hardship some debtors might face due to the potentially unjustified sale in execution of their homes. The law cannot allow homes to be lost unless it is certain that it is justified under the circumstances.[149] Therefore, in retrospect, judicial oversight seems like an obvious requirement. However, it has taken a number of years, various court decisions and amendments to court practice finally to establish the requirement of judicial oversight in execution proceedings that concern homes.

Generally speaking, section 34 of the Constitution (the right of access to courts) requires judicial oversight over the settling of private disputes. Section 26(3) of the Constitution specifies this constitutional value for purposes of evictions from homes. This subsection emphasises that evictions from homes may only occur subsequent to a court taking all the relevant circumstances into consideration. This principle not only provides for a procedural safeguard in eviction cases, but also ensures that courts take circumstantial considerations into account. The combination of sections 34 and 26(3) – with the predominant focus on the latter section – established the constitutional basis for the development that has taken place in

[149] See also *Nedbank Ltd v Mashiya and Another* 2006 4 SA 422 (T) para 29, where the court held that before a court can declare residential property executable, it must be certain that the cause of action is fully and properly established, since the right to housing is not one to be "trifled" with. The court (at para 50) held that the spirit of the Constitution would not be properly served by allowing a house to be declared executable on information that is superficial and that has not been established as originating from reliable sources.

the law of sale in execution, namely that homes may only be sold in execution after a court (and not a registrar or clerk) has taken all the relevant circumstances into consideration. In the following section of this chapter I analyse in more detail how subsection 26(1) and (3) should be interpreted and how the content of these subsections translate into the developments I describe here.

3 3 Scope and application of the housing clause

3 3 1 Introduction

In this part of the chapter I argue why subsections 26(1) and (3) of the Constitution are applicable to the sale in execution of mortgaged residential properties. This analysis is important since it is not *prima facie* obvious from the wording of these subsections that they do apply to mortgage foreclosures. Moreover, especially the earlier case law was not unanimous in their approach to this question. Therefore, it is pertinent to once and for all settle that (and why) the sale-in-execution procedure is indeed one that requires the judicial oversight required by section 26(3). Doubts may arise in this regard due to the fact that the subsection does not explicitly include sales in execution within its ambit; it expressly only refers to eviction and demolition. In 3 3 2 below I argue and provide authority for the wide interpretation of section 26(3) and explain why it does in fact cover sales in execution as well.

Even though section 26(3) is expressly broad in the sense that it includes all homes, subsection (1) refers to the seemingly narrower concept of "adequate housing". It may seem that this subsection, unlike section 26(3), only protects a certain class of homes. Accordingly, it is vital to establish when this right is infringed, which enquiry will entail an analysis of the ambit of the right. Will *every* sale in execution of residential property limit the debtor's "right to have access to adequate housing" and, if so, when will it be justifiable to nevertheless have his or her home attached? I address these questions in 3 3 3 below.

One of the reasons that it is necessary to ascertain exactly what subsections 26(1) and (3) entail for mortgage foreclosures, is the fact that the housing clause underlies the application of HCR 46. Judges must ensure that the substantive requirements of section 26(1) are given effect to – in other words, that the attachment and sale in execution of the debtor's home would not unjustifiably limit his or her "access to adequate housing". This proportionality test

(informed by section 36(1)) must be conducted by taking all the relevant circumstances into consideration, as required by section 26(3) and HCR 46.

3 3 2 Judicial enquiry prior to eviction: Section 26(3)

On a procedural level, the main impact *Jaftha* had on mortgage foreclosures is that a home will not be sold "without prior court intervention".[150] Liebenberg comments as follows regarding the transformative effect of *Jaftha*:

> "*Jaftha* affirms that the interests of both creditors and debtors facing the loss of their homes must be considered and a proportional solution found in the light of the particular facts and circumstances of the case. In this respect the decision represents a transformative approach to a legal process in which the values and interests underpinning housing rights were previously considered irrelevant."[151]

Prior to the Constitution, execution orders were considered to be merely of a procedural nature.[152] However, in light of section 26(3), execution orders have acquired a significance they did not have before.[153] Therefore, *Jaftha* introduced a new substantive dimension to sale-in-execution matters, disputes that used to be characterised as devoid of circumstantial considerations.[154] The subsection, which "evinces special constitutional regard for a person's place of abode",[155] provides as follows:

> "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."

In the context of squatter evictions, the CC in *Port Elizabeth Municipality v Various Occupiers*[156] ("*PE Municipality*") emphasised that section 26(3) requires a court to "seek

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[150] CM van Heerden & A Boraine "Reading procedure and substance into the basic right to security of tenure" (2006) 39 *De Jure* 319-353 330.
[151] S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 218.
[152] See *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 5 SA 610 (C) para 20-21, where the court referred to *Entabeni Hospital Ltd v Van der Linde; First National Bank of SA Ltd v Puckriah* 1994 2 SA 422 (N) 424; *First National Bank of SA Ltd v Ngcobo and Another* 1993 3 SA 490 (D) 492; *Ledlie v Erf 2235 Somerset West (Pty) Ltd* 1992 4 SA 600 (C) 601.
[153] *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 5 SA 610 (C) para 19.
[154] See *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 5 SA 610 (C) paras 21-22, where the court confirmed that s 26 is a matter of substantive law and that an application to have property declared executable is not longer a mere procedural matter. See also *ABSA Bank Ltd v Xonti and Another* 2006 5 SA 289 (C); J van der Merwe "*Standard Bank of South Africa Limited v Rudiger Marshall Saunderson and two others* 2006 2 SA 264 (SCA)" (2006) 7 *ESR Review* 26-28 27-28.
[155] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 17 per Sachs J.
[156] 2005 1 SA 217 (CC).

concrete and case-specific solutions to the difficult problems that arise".[157] The court commented on how it may appear odd and superfluous that section 26(3) requires courts to "do what courts are normally expected to do, namely, take all the relevant factors into account".[158] The CC explained that the reason for repeating this seemingly obvious test is that it "serves a clear constitutional purpose", in other words, distinguishable from its normal meaning in private law.[159] The purpose then for adding the requirement of taking all relevant circumstances into consideration is to highlight "how non-prescriptive the provision is intended to be".[160] Consequently, the manner in which the eviction process must be managed is left as open-ended as possible, leaving courts with a discretion that is aimed at contextual sensitivity. In what follows, I analyse whether section 26(3) applies to foreclosures in a similar fashion.

My hypothesis with relation to the scope and application of section 26(3) is based on the fact that section 26(3) requires that a court must take all relevant circumstances into consideration before granting *any order* that may, in the normal course of events, lead to someone being evicted from his or her home. This wide interpretation of section 26(3) is broad enough to include not only actual eviction orders, but also execution orders that may end in eviction. The negative right contained in section 26(1) qualifies as one of the relevant circumstances – if not the central factor – referred to in section 26(3). Therefore, section 26(3) establishes the broader principle that homes should not be lost through eviction resulting from sale in execution unless a court had considered all the facts, whereas section 26(1) – read with section 36(1) – gives substantive content to the factors that should be considered under the section 26(3) enquiry.[161] Moreover, the subsection establishes that no law (including the law that regulates mortgage foreclosure) may permit arbitrary evictions. Hence, courts must apply and interpret the law relating to mortgage foreclosure in such a way that it will not permit eviction without a legitimate reason.

To include sales in execution within the ambit of section 26(3), which only refers to evictions and demolitions, may *prima facie* seem difficult. However, it has been suggested that a sale in execution is analogous to an eviction and that section 26(3) is, for this reason,

[157] Para 22 per Sachs J.
[158] Para 22 per Sachs J.
[159] Para 22 per Sachs J.
[160] Para 22 per Sachs J.
[161] See 3 3 3 below, where I elaborate on the scope of s 26(1).

also applicable to sales in execution.[162] Furthermore, the CC judgment in *Gundwana* had the effect that "the execution process is equated with eviction for the purposes of section 26(3)".[163] Judicial oversight at an early stage of the process – in other words, already at the execution stage – prevents abuses during this stage, before a purchaser in good faith seeks an eviction order.[164]

As stated above, the simplest way to explain how execution orders are subject to section 26(3) is to interpret the subsection in such a manner that any proceeding (whether a technical eviction or not) that in the normal course of events may lead to residential eviction proceedings is subject to section 26(3). This certainly includes an order declaring residential property executable. As the court in *Changing Tides 17 (Pty) Ltd NO v Erasmus and Another; Changing Tides 17 (Pty) Ltd NO v Cleophas and Another; Changing Tides 17 (Pty) Ltd NO v Frederick and Another*[165] ("*Erasmus*") held,

> "[i]t follows that it is appropriate when it would appear from the information before the court that the property in question is the defendant's home that the enquiry mandated in terms of s[ection] 26(3) of the Constitution should be undertaken when application is made for an order authorizing the attachment and sale of the affected property; and not delayed until steps are taken to evict the defendants consequent upon the execution of such an order";[166]

and further,

> "[t]he fact that the orders declaring the affected properties be immediately and directly executable … are sought because of the incidence of a contractual provision does not derogate from the duty on the court in terms of s[ection] 26(3) of the Constitution to ensure that any order made by it, which is likely to have the effect that a defendant will be evicted from his/her home, is made only after all the relevant circumstances within the notice of the court have been duly weighed and considered."[167]

The court in *Erasmus* considered it necessary to make the enquiry contemplated by section 26(3) already during the application for an execution order, and not to delay such an enquiry

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[162] *Changing Tides 17 (Pty) Ltd NO v Erasmus and Another; Changing Tides 17 (Pty) Ltd NO v Cleophas and Another; Changing Tides 17 (Pty) Ltd NO v Frederick and Another* (18153/09, 14229/09, 11973/09) [2009] ZAWCHC 175 (12 November 2009) paras 2, 3 and 7; *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 5 SA 610 (C) paras 7, 22 and 29. The Cape High Court in *Snyders* (at para 7) held that declaring residential property executable is subject to s 26(3) and it was for that reason that the court decided that it had to be a court that makes the declaration and not the registrar, since s 26(3) requires a court order. The court (at para 22) also held that it was s 26(3) that now requires sales in execution to be allowed only after all relevant circumstances had been considered.

[163] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 9 per Peter AJ, with reference to *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 41.

[164] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 9.

[165] (18153/09, 14229/09, 11973/09) [2009] ZAWCHC 175 (12 November 2009).

[166] Para 7 per Binns-Ward J.

[167] Para 8 per Binns-Ward J.

until actual eviction proceedings are instituted. What the court proposed was a kind of forward projection. According to the court, if it appears that the property is the mortgagor's home, the section 26(3) enquiry should be undertaken during the application for an execution order. This enquiry should not be postponed until actual eviction proceedings are instituted by the new owner of the property subsequent to the sale in execution auction.[168] Hence, a court should – at the time of the application for an execution order – already project into the future and ask whether the circumstances of the case would be sufficient for an eventual eviction to be allowed.[169]

Presumably, if the facts are of such a nature that an eviction would not be allowed, a sale in execution should not be allowed either. Therefore, any order that is likely to result in an eviction application should only be granted once the court had taken into account all the circumstances as contemplated by section 26(3).[170] As a result, if an execution order would affect a mortgagor's occupation of his or her home, the court has a discretion in terms of section 26(3) to grant or deny such an order.[171] This discretion, of course, depends on the proportionality of the perceived outcome of the case.

The contrary argument to this broad approach was supported by the decision of the court *a quo* in *Jaftha* and the SCA decision in *Saunderson*. The argument that these courts supported was that the application for sale in execution and the eviction application are two conceptually separate procedures based on two different causes of action. In terms of this narrow approach, section 26(3) applies to eviction but not to sale in execution. The SCA in *Saunderson* held that the high court in *Snyders* incorrectly referred to section 26(3), since it was not that section that the CC dealt with in *Jaftha*.[172] According to the SCA, the high court misinterpreted the CC judgment in *Jaftha* as if it provided authority for applying section

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[168] Para 7.

[169] The court in *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) para 12 alluded to something similar. The court suggested that the sale in execution may amount to an infringement of s 26(1) if the mortgagors were to be evicted eventually. In the landlord-tenant context, see also *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* (CCT 57/11) [2012] ZACC 2 (13 March 2012). The CC referred the matter back to the rental housing tribunal so that it could assess whether the initial decision of the landlord to cancel the lease was fair in terms of the Rental Housing Act 50 of 1999. In other words, the court did not limit its oversight over the matter to ensuring a fair eviction process, but insisted on a prior assessment of the reason for the termination of lawful occupation. This approach corresponds to what I argue in the mortgage context, namely that s 26(3) should provide protection already at the sale-in-execution stage and not only at the actual eviction stage.

[170] *Changing Tides 17 (Pty) Ltd NO v Erasmus and Another; Changing Tides 17 (Pty) Ltd NO v Cleophas and Another; Changing Tides 17 (Pty) Ltd NO v Frederick and Another* (18153/09, 14229/09, 11973/09) [2009] ZAWCHC 175 (12 November 2009) para 8.

[171] Para 10.

[172] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) paras 13-15. See also M Kelly-Louw "The right of access to adequate housing" (2007) 15 *JBL* 35-39 37-38.

26(3). Instead, the SCA confirmed that section 26(3) is applicable solely if there is an eviction subsequent to a sale in execution.[173]

This is the same argument that the court *a quo* used in *Jaftha* to justify its decision that a sale in execution does not invoke section 26(3) and that section 66(1)(a) of the MCA was, therefore, not unconstitutional for lack of judicial oversight.[174] Section 26(3) prevents unfair evictions, namely if evictions occur without due process or if the court failed to consider all the relevant circumstances.[175] The PIE Act addresses this mischief. The high court explained that a sale in execution consists of two distinct legal acts, namely the sale of the property and the transfer of ownership.[176] Until the property is transferred to the purchaser, the judgment debtor retains ownership of the property. The court explained that the judgment debtor's legal right to use the property ends when ownership is transferred to the new owner. The new owner, in his or her capacity as owner, then has the right to use the property. Once the judgment debtor's legal basis for occupation (namely ownership) has come to an end, he or she can vacate the property voluntarily. In this case the debtor's loss of access to housing is a result of his or her own free choice.[177]

The judgment debtor also can decide to remain in the house, in which case he or she will be holding over. The new owner then has to institute legal proceedings to evict the former owner – the so-called holder-over – who has become an unlawful occupier. In such a case the substantive and procedural requirements of the PIE Act must be complied with. The court held that if the judgment debtor is evicted from his or her home and, therefore, is deprived of the right of access to housing, this eviction will not be a result of the sale in execution process. Rather, it will be the result of a separate legal proceeding based on a cause of action independent from the execution sale. The eviction will take place after the court has considered all the relevant circumstances in accordance with the PIE Act.[178] It seems that the CC in *Jaftha* did not expressly reject this position.

The confusion between subsections 26(1) and (3) in cases subsequent to *Jaftha* is probably a result of the remedy that the CC employed in *Jaftha*. The words read into section 66(1)(a) of the MCA correspond to the wording of section 26(3), namely the concept of taking all

[173] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 15.
[174] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2003 10 BCLR 1149 (C).
[175] Para 40.
[176] Para 45.
[177] Para 46.
[178] Para 46.

relevant circumstances into consideration.[179] However, the SCA in *Saunderson* was correct in finding that the CC in *Jaftha* never referred to section 26(3) itself but only to section 26(1). It would have prevented much uncertainty if the CC had explained the link between section 26(3) and the amendment it made to section 66(1)(a) of the MCA. Regardless of the fact that the CC in *Jaftha* did not rely explicitly on section 26(3), Van Heerden and Boraine argue that *Jaftha* in fact mainly dealt with the negative obligation imposed by section 26(3):

> "The *Jaftha* case deals with the protection of a debtor's right to housing and not to be evicted from his/her home without an order of court made after considering all the relevant circumstances, in the context of the right of a creditor to execute against immovable property, and in particular the home of the debtor".[180]

The authors prefer to read subsections 26(1) and (3) together and suggest that any separation between the sale in execution and the eviction, as suggested by the court *a quo* in *Jaftha*, would be artificial.[181] I concur with this approach. It would not make sense to ignore the possibility of eventual eviction when having to decide whether to grant the execution order. Furthermore, some courts rather seem to refer to section 26 as a whole and choose not to rely on a specific subsection.[182] Although it is unfortunate that the CC in *Jaftha* did not base its judgment on section 26(3) expressly, it is in my view clear from the court's remedy – the words read into section 66(1)(a) of the MCA – that it in fact had the principle behind section 26(3) in mind.

It is henceforth pointless to argue that sales in execution of homes are not subject to section 26(3). The fact is that a forced sale of a debtor's home threatens the debtor's security of tenure. Whether this threat is direct or indirect does not change the fact that the threat is present. Since it is the spirit of section 26 as a whole to ensure the protection of tenure security, section 26(3) should be interpreted as wide as is necessary to give effect to the ideal that a tenure right should be limited only when a court considers such a limitation justifiable.

It is true that the loss of ownership does not translate directly into a loss of occupancy. However, the *causa* for occupation comes to an end if ownership of the home is transferred. As a result, the debtor becomes an unlawful occupier, who is subject to eviction by the new

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[179] See *Standard Bank of South Africa Ltd v Bekker and Another* [2011] ZAWCHC 330; 6628/2011, 6635/2011, 6644/2011, 7032/2011, 7047/2011 (25 August 2011) para 8, where the full court saw it as clear that the CC in *Jaftha* borrowed from the wording of s 26(3).

[180] CM van Heerden & A Boraine "Reading procedure and substance into the basic right to security of tenure" (2006) 39 *De Jure* 319-353 320 321.

[181] 323.

[182] For example, see *First Rand Bank Ltd v Siebert and Another, First Rand Bank Ltd v Nel and Another* (2635/2010, 2219/2010) [2010] ZAECPEHC 75 (17 December 2010) para 5.

owner. A sale in execution that transforms a lawful occupier into an unlawful occupier must be subject to section 26(3), since the occupier's tenure becomes less secure. Before allowing a sale in execution, the court must judge whether it is justifiable to change the debtor's status (from lawful to unlawful occupier) and so weaken his or her security of tenure. This obligation on judges is particularly important in light of the fact that both sections 25 and 26 are, as a whole, also aimed at stronger tenure security and preventing what occurred under apartheid law, namely the arbitrary and forced removal of people from their properties.

Even if one were to take a narrow approach to section 26(3) by drawing a strict conceptual distinction between eviction and sale in execution, this would not change the fact that HCR 46(1)(a)(ii) requires "all the relevant circumstances" to be considered before an execution order is granted.[183] This terminology is so close to that of section 26(3) that a strict distinction between sale in execution and eviction for section 26(3) purposes would not make a difference when it comes to applying HCR 46. Yet, since the wide interpretation of section 26(3) is generally accepted, HCR 46 should be interpreted with reference to what the relevant circumstances under section 26(3) would be.[184] The question as to what the HCR 46 test entails for sale in execution purposes is addressed in 3 4 below.

3 3 3 Access to adequate housing: Section 26(1)

It is not necessary to prove a limitation of "the right to have access to adequate housing" (section 26(1)) before invoking section 26(3) of the Constitution or HCR 46(1)(a)(ii). Rather, the court's obligation to consider "all the relevant circumstances" is triggered as soon as the debtor's "home" or "primary residence" is sought to be attached. What then is the role of the negative right contained in section 26(1)? Before HCR 46(1)(a)(ii) was amended, many courts placed a high value on the requirement that debtors who wish to be protected should prove a limitation of their right of "access to adequate housing".[185] To apply the court's discretion under the court rule, this burden of proof is no longer necessary. However, the extent to which a section 26(1) right is limited – if at all – will be one of the primary relevant circumstances that a court should consider before granting an execution order. It is helpful to repeat the wording of subsection (1): "Everyone has the right to have access to adequate housing."

[183] *Standard Bank of South Africa Ltd v Bekker and Another* [2011] ZAWCHC 330; 6628/2011, 6635/2011, 6644/2011, 7032/2011, 7047/2011 (25 August 2011) para 12.
[184] Para 13; *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) para 34.
[185] See 3 3 3 n 193 below.

If a section 26(1) right will be limited by a sale in execution of the debtor's home, such a limitation can be justifiable under section 36(1) of the Constitution. It can be justifiable even to deprive a person totally of his or her right of "access to adequate housing". The justification process in such a case will depend on how section 36(1) is applied in light of all the circumstances of the case. Whether a section 26(1) right is limited or not, a sale in execution of a debtor's primary residence will have to be justifiable in terms of HCR 46 based on "all the relevant circumstances" in any event. In addition, the degree of the limitation of a section 26(1) right will determine the extent to which the sale in execution has to be justified.

It is trite that section 26(1) also entails a negative obligation on all persons not to limit other persons' "right to have access to adequate housing".[186] The words "deprive" or "infringe" often are used to describe the limitation of a fundamental right. However, in light of the terminology used by the limitation clause (section 36), it is preferable to use the word "limit".[187] Both "infringe" and "deprive" can lead one to assume incorrectly that a fundamental right is limited only when the right is taken away completely. Yet, this is not the case, since a section 26(1) right is limited even at the slightest interference with that right.[188]

Prior to the amendment of HCR 46(1)(a)(ii), courts often expressed the view that a debtor had to prove that his or her home situation qualified as "adequate housing".[189] However, no court has given express indications as to the content of this concept, especially as regards its negative meaning. I explain here why I propose that a focus on the concept of "adequate housing" is a fruitless exercise for purposes of the negative obligation contemplated by section 26(1), at least in so far as sales in execution are concerned. The SCA in *Saunderson* held that a mortgage creditor does not have to prove the justification of a limitation of a section 26(1) right in advance. The SCA held that the CC in *Jaftha* did not decide that a section 26(1) right is limited in every case where homes are sold in execution. Rather, section 26(1) is at issue only if the execution will deprive the person of "access to adequate housing".

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[186] *Maphango and Others v Aengus Lifestyle Properties (Pty) Ltd* (CCT 57/11) [2012] ZACC 2 (13 March 2012) para 32; *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 34; *Minister of Health and Others v Treatment Action Campaign and Others (No 2)* 2002 5 SA 721 (CC) para 46; *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) para 34; *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) para 78. See also S Maass "Rental housing as adequate housing" (2011) 22 *Stell LR* 759-774 760.

[187] See also S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2006) 34-3 - 34-4.

[188] This is of course subject to the *de minimis* rule.

[189] See 3 3 3 n 193 below.

Only in such a case must the creditor justify the limitation in terms of section 36 of the Constitution.[190] Therefore, before one can judge whether an interference with the debtor's rights under section 26(1) is justified, one must establish whether section 26(1) was indeed violated. In this respect, it is necessary to establish when exactly the "right to have access to adequate housing" is limited. In what follows I argue in favour of a wide approach, namely that this right is limited under every circumstance that a home is or might be lost. I support an approach wherein more attention is given to the substantive justification enquiry (under section 36) than the threshold question (under section 26(1)).

The SCA in *Saunderson* held that section 26(1) does not confer on persons a right of access to housing *per se*. Rather, it provides only a right of access to "adequate housing", which is a relative concept.[191] According to the SCA, the CC in *Jaftha* did not decide that the ownership of all residential property is protected by section 26(1), since what constitutes "adequate housing" is a fact-based enquiry.[192] This approach adopted in *Saunderson* was supported in a number of subsequent cases.[193] Kelly-Louw explains the SCA's approach as follows:

> "[I]t seems that a court will only consider refusing an order declaring a mortgaged home of a consumer (within the context of the normal process of debt collection) specifically executable where a consumer informs and convinces the court that he [or she] would not have access to

[190] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) paras 15 and 20. This is in terms of the two stage analysis of constitutional litigation. During the first stage the party alleging an infringing of his or her constitutional right must prove that he or she has such a right and that the right was infringed by the defending party. Then, when such infringement is proved, the defending party may prove during the second stage that the limitation of the right is justifiable in terms of s 36 of the Constitution: See *S v Makwanyane and Another* 1995 3 SA 391 (CC) paras 100-102; *S v Zuma & Others* 1995 2 SA 642 (CC) 414. In general, see also S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2006) 34-18 - 34-29; I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 26 and 165-168.

[191] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 16. See also *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 1 SA 46 (CC) paras 36-37.

[192] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 17. See also *Mkhize v Umvoti Municipality and Others* 2010 4 SA 509 (KZP) para 21.

[193] See *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd and Others (No 2)* 2010 1 SA 634 (WCC) para 29-30; *FirstRand Bank Ltd v Meyer and Another* (3483/10) [2011] ZAECPEHC 8 (17 March 2011) para 25; *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 (D) para 25; *Changing Tides 17 (Pty) Ltd NO v Scholtz and Another* (2975/09) [2010] ZAECPEHC 3 (2 February 2010) paras 22-23; *First National Bank Ltd v Rossouw and Another* (30624/09) [2009] ZAGPPHC 165 (6 August 2009) para 20; *ABSA Bank Ltd v Noniki Trading CC and Another, ABSA Bank Ltd v Ikroza Enterprise Solutions CC and Others, ABSA Bank Ltd v Hqubela Trading CC and Others* (404/2011, 405/2011, 407/2011) [2011] ZAECGHC 15 (7 April 2011) para 55; *Firstrand Bank Limited v Swarts and Another* (25699/2009) [2010] ZAWCHC 35 [2010] ZAWCHC 230 (1 March 2010) paras 2-3.

> adequate housing if he [or she] were to lose his [or her] current home. Whether such a consumer will be successful will obviously depend on his [or her] specific circumstances."[194]

However, it is incorrect to assume that a section 26(1) right is limited only when the debtor, as a result of a sale in execution, will have *no* access to adequate housing. There must merely be an interference with access to adequate housing for it to qualify as a limitation of a section 26(1) right. The way in which Kelly-Louw explains the effect of *Saunderson* entails a too absolute approach, namely that an execution order will be denied only if the debtor will "not have access to adequate housing" at all. Such an approach ignores the possibility of finding reasonable alternative ways to settle the debt, even if the debtor will not be left completely homeless.

What is clear, however, is that a debtor would have to provide information to the court to indicate the *extent* to which his or her right of "access to adequate housing" is limited.[195] Yet, I suggest that a debtor does not have to prove that his or her home qualifies as "adequate housing", since the courts do not provide an indication as to what precisely this concept entails. Factors such as the identity of the debtor and the nature of the property will play a role in this enquiry, but not when deciding *whether* a section 26(1) right is limited. Instead, these factual considerations should play a role only during the justification enquiry – in other words when the court takes "all the relevant circumstances" under HCR 46 into consideration and measures the proportionality of the limitation. Therefore, a debtor would not have to prove that his or her "access to adequate housing" was infringed (except for indicating that the property is residential), but would have to show the degree of the infringement, which will impact the proportionality test.

What makes section 26(1) somewhat difficult to interpret is the fact that the primary purpose of section 26(1) – read with section 26(2)[196] – is to place a positive obligation on the state to ensure progressively that "[e]veryone has the right to have access to adequate housing". To interpret this in a negative sense (and, moreover, independently of subsection (2)) is more complex. When a person does have "access to adequate housing", such access may be limited only in terms of section 36(1) of the Constitution. "Access" is defined as "the

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[194] M Kelly-Louw "Protection of homeowners against various interest rate hikes" (2010) 22 *SA Merc LJ* 27-49 44.

[195] See *Standard Bank of South Africa Ltd v Bekker and Another* [2011] ZAWCHC 330; 6628/2011, 6635/2011, 6644/2011, 7032/2011, 7047/2011 (25 August 2011) paras 10ff, where the court discuss that the real issue is not *which* information should be placed before the court, but by *whom*.

[196] S 26(2) provides that "[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right".

means or opportunity to approach or enter a place" or "the right or opportunity to use something or see someone".[197] "Adequate" is defined as "satisfactory" or "acceptable".[198] The relevant definition of the verb "have" is to "possess, own or hold".[199] Using these definitions, I define "to have access to adequate housing" as follows and divide it into four elements:

- To have, possess, own or hold ("to have");
- the means, opportunity or right to approach, use or enter ("access to");
- a house or primary residence ("housing");
- that is adequate, satisfactory and acceptable ("adequate").[200]

It would be a difficult burden for a mortgagor to prove that he or she faces the loss of *all* "access" (ability, opportunity and means) to obtain "adequate housing", but this is basically what the SCA in *Saunderson* (and the cases that followed the SCA in this respect)[201] required before a mortgagee was asked to justify a sale in execution. However, this is neither what HCR 46(1)(a)(ii) requires, nor how the CC in *Gundwana* and the more recent high court decisions have interpreted the situation. Furthermore, "limit" does not mean that the right is taken away totally,[202] as appears from the fact that section 36(1) provides as one if its justification factors that "the nature and extent of the limitation" should be considered.[203] This factor implies that there are varying degrees of limitation. "Limitation" is defined as "a restriction" and "limited" as "restricted in size, amount, or extent".[204] Limit does not

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[197] C Soanes & A Stevenson *Concise Oxford English dictionary* (11th rev ed 2006) *s v* "access".

[198] *S v* "adequate". See General Comment 4 "The right to adequate housing" (Article 11 of the Covenant) (6th session 1991) UN Doc E/1992/23 <http://www.unhchr.ch/tbs/doc.nsf/0/469f4d91a9378221c12563ed0053547e> (accessed 06-12-2011), which contains "the most comprehensive and authoritative analysis of the meaning of 'adequate housing' in international law": See K McLean "Housing" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 4 (2nd ed OS 2006) 55-34 - 55-36.

[199] C Soanes & A Stevenson *Concise Oxford English dictionary* (11th rev ed 2006) *s v* "have".

[200] In light of the fact that I am dealing with the negative aspect of s 26(1), very little hinges on the definition of "adequate", since this dissertation concerns the situation where the debtor already is in possession of "adequate housing". To determine the minimum core content of "adequate housing" is therefore not relevant in deciding whether there was a justifiable limitation of the already existent right of access to adequate housing. In line with my argument, any loss of home will limit the debtor's access to adequate housing. The extent of the limitation will then be a determining factor in the justification enquiry.

[201] See 3 3 3 n 193 above.

[202] However, see the recent application of HCR 46(1)(a)(ii) in *FirstRand Bank Ltd v Meyer and Another* (3483/10) [2011] ZAECPEHC 8 (17 March 2011) para 25, where the court supported the concept of requiring proof that "adequate housing" will be "deprived".

[203] S 36(1)(c).

[204] C Soanes & A Stevenson *Concise Oxford English dictionary* (11th rev ed 2006) *s v* "limitation".

necessarily mean a complete taking away or eradication of a right, although it includes that. Any restriction, no matter its size or extent, qualifies as a limitation of the right.

Section 26(1) guarantees the right "to have *access* to" and not the right "to have adequate housing". It is having *access* that the section protects and not the possession of "adequate housing" itself. Limiting someone's "access" means that such a person, as a result of a sale in execution, will experience an interference (no matter how small) with his or her ability to obtain "adequate housing" again. To my mind, this construction of section 26(1) is wide enough to include every situation where a legal process results in someone losing his or her home. I do not support this approach to make it more difficult for creditors to have residential property sold in execution, but I believe that this simplifies the doctrinal explanation for determining when a home can be sold in execution.

The court in *FirstRand Bank Ltd v Folscher and Another, and Similar Matters*[205] ("*Folscher*") stated that the sale in execution of a debtor's home constitutes a significant limitation of the "fundamental right to access of a roof over a person's head".[206] In other words, this is how the full bench of the North Gauteng High Court interpreted (or translated) the wording of section 26(1). This is a broad construction of the subsection and supports my argument. This approach is confirmed by the court's statement that section 26 ensures a person's security of tenure and that any limitation must be justified under section 36 of the Constitution.[207] The court also held that the amended HCR 46 extends the protection of section 26(1) to a debtor who faces the loss of his or her "only home".[208]

Above I adopt the position that the sale in execution of any home limits section 26(1). Any reduction of the debtor's ability to obtain housing that is sufficient will amount to a limitation of section 26(1). The burden to prove such a limitation should not be too heavy; the debtor must only show that the threatened property is his or her home. However, the threshold to justify a limitation would not necessarily be too high either, depending on the facts of the case. Consequently, this approach does not provide for the affluent occupiers of mansions to prevent sale in execution of their properties. Although I suggest that section 26(1) is also limited when such homes (when they qualify as primary residences) are sold in execution, the extent of the limitation will be so small that the mere presence of a mortgage bond should

[205] 2011 4 SA 314 (GNP).
[206] Para 12.
[207] Para 13.
[208] Para 25. See also *Standard Bank of South Africa v Molwantwa and Another* (15043/2009) [2011] ZAGPPHC 108 (5 May 2011) para 11, discussed in 4 4 4 below.

qualify as a justification under section 36(1). Therefore, it is the extent to which section 26(1) is limited that will indicate the level of justification required under section 36(1) of the Constitution.[209] The degree to which the debtor's section 26(1) right is limited will be a crucial factor in the proportionality test that courts are required to conduct when taking all the relevant circumstances into consideration.

Consequently, it is necessary to establish a test for measuring the level of the infringement on the debtor's "access to adequate housing". Before the SCA delivered its decision in *Saunderson* and in a response to the CC decision in *Jaftha*, Van Heerden and Boraine put forward the following proposition:

> "The pertinent question should be: to what extent will execution render them homeless and without the possibility of obtaining a house/shelter again?"[210]

I find this submission helpful because it simplifies the matter to the basic problem, namely homelessness. The question is whether the sale in execution will render the debtor homeless. The answer to this question will indicate the extent to which the section 26(1) right is limited, if at all. Therefore, the issue of homelessness will play a central role in the justification enquiry under section 36(1). Courts should be more sensitive when it comes to cases where the debtor and his or her family will be left completely and permanently homeless. In such cases courts should be particularly careful to ascertain whether the sale in execution would be a proportionate solution; is sale truly the *only* option left?

However, section 26(1) does not place homes beyond the operation of debt enforcement. Under appropriate circumstances, it may be justifiable to render someone homeless as a result of a sale in execution of their property. Nevertheless, the degree of the court's vigilance and scrutiny of the facts will depend on how serious the debtor's predicament will be as a result of the sale in execution. In general, a debtor should be left homeless only if the court is convinced that there is no realistic alternative way to settle the debt. Furthermore, courts should be more lenient with the exercise of their discretion under section 85 of the NCA (which I discuss in 4 3 4 6 below) when deciding whether to refer the case to a debt counsellor or rearrange the debt. In general, if a home will be lost and the debtor left

[209] My analysis in 3 4 below is basically an explanation of when a sale in execution will be justifiable under mortgage circumstances. HCR 46(1)(a)(ii) is in this sense an expression of the justification test under s 36(1) of the Constitution. As I explain in 3 4 2 below, the presence of a mortgage will often *prima facie* justify the limitation of section 26(1).

[210] CM van Heerden & A Boraine "Reading procedure and substance into the basic right to security of tenure" (2006) 39 *De Jure* 319-353 345.

homeless, a court should not allow the home to be sold before the possibility of debt review and debt rearrangement had been considered. This point forms part of my central arguments, as will become clear throughout the chapters that follow.

To help courts with the proportionality-based test, one can distinguish between the case where a mortgagor faces "homelessness" and the case where the mortgagor merely faces the "loss of home". This distinction should be drawn during the section 36 enquiry, when establishing the extent to which a section 26(1) right is limited. Not every "loss of home" will result in "homelessness". In terms of the broad approach explained above, both "loss of home" and "homelessness" will amount to a limitation of section 26(1) rights. However, not every loss of home will result in the same degree of limitation of a section 26(1) right. Furthermore, the degree of the limitation (and, therefore, justification) will differ. If the process leads to permanent and complete homelessness, foreclosure will deprive and completely infringe upon the debtor's access to adequate housing. If the process leads to less severe consequences – a "loss of home" – there will be only a degree of interference with access to adequate housing (often very little). However, as argued above, even small interferences will amount to a limitation of the right. Since the degree of the limitation is a factor, it will be easier to justify a process that leads to a temporary "loss of home" than one that leads to complete "homelessness".

"Loss of home" and "homelessness" are located at the opposite ends of a continuum. The best case scenario ("loss of home") would be when a debtor can move to a new home without any major problems or any major disruption of his or her family life. Therefore, alternative accommodation is available readily and the occupants' dignity is not compromised. The justification enquiry should be simple, without requiring the creditor to convince the court of anything beyond its interest in having the security enforced. In general, the mere presence of a mortgage bond should be sufficient, subject to the abuse-of-process principle. The worst case scenario would be when a mortgagor, after sale in execution, will literally have nowhere to go. The enquiry will be more comprehensive and the justification more complicated, albeit not impossible. However, most cases probably will not fall into either of these extremes, but rather somewhere in between – closer towards either "loss of home" or "homelessness". The facts of each case, perhaps coupled with the personal circumstances of the debtor, will determine where the case falls on the continuum.

With regard to establishing whether the debtor will be left homeless, the availability of alternative accommodation is a factor the court must consider.[211] However, the debtor must provide information in this respect and a court should not without more assume that there will be no alternative accommodation available simply because the debtor makes such an allegation. For example, in *ABSA Bank Ltd v Noniki Trading CC and Another, ABSA Bank Ltd v Ikroza Enterprise Solutions CC and Others, ABSA Bank Ltd v Hqubela Trading CC and Others*,[212] the court assumed (without deciding) that section 26(1) rights would be limited. The debtor's argument was that no alternative accommodation was available to him. Yet, the debtor did not argue that he was unable to acquire alternative accommodation, for example, by purchasing or leasing a new residence. The debtor did not allege that he did not have the ability to find a substitute for the adequate housing that will be lost. Neither did the debtor explain why other adequate housing could not replace his current residence.[213] I support the methodology of this decision, for it is clear and uncomplicated. The court did not indulge in a quest to explain why a section 26(1) right is limited (or why not). Instead, the court (in line with the approach in this chapter) assumed that the sale in execution limits section 26(1) rights and based its decision on whether such a limitation was justifiable in the case at hand. The court also expected the debtor, who resisted the sale in execution, to provide information that would contradict the creditor's mortgage-backed entitlement to execution.

In *First Rand Bank Ltd v Noroodien and Others*[214] the court also considered the fact that there would be enough of a surplus available to the debtors (after the proceeds of the sale in execution had been used to settle the debt) with which they could acquire accommodation elsewhere. In my view, this factor will mostly derogate from any argument that sale in execution will infringe unjustifiably upon section 26(1), since homelessness would not be the result.

All things considered, even if the sale in execution will cause the debtor not to have any alternative accommodation, a sale in execution still can amount to a justifiable limitation of section 26(1) rights. After all, section 26(1) does not provide an absolute right, but a right that

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[211] The availability of alternatives also plays a role when unlawful occupiers are evicted. However, s 4(7) of the PIE Act states that the availability of alternative accommodation is not a relevant factor when deciding whether to grant an eviction order subsequent to mortgage foreclosure. Nevertheless, this qualification is limited to the granting of eviction orders under the PIE Act and is not a general rule for all processes where s 26(3) is the underlying constitutional provision. Accordingly, it cannot be said that the provisions of the PIE Act are applicable to the HCR 46(1)(a)(ii) test .

[212] (404/2011, 405/2011, 407/2011) [2011] ZAECGHC 15 (7 April 2011) para 57.

[213] Para 59.

[214] (9794/2011) [2011] ZAWCHC 422 (14 November 2011) para 19.

is subject to limitations – even extreme limitations, as long as they are proportionate. The arguments surrounding the importance of mortgage bonds, in combination with the qualifications concerning the prohibition of abuses and the availability of alternatives, should generally qualify as such a justification. The main difference is that if no alternative accommodation is available, a court should be more proactive to ensure that the limitation of section 26(1) rights is justified and should not accept it purely because of the presence of a mortgage bond. On the other hand, if alternative accommodation is available, the mere presence of a mortgage should more readily be accepted as *prima facie* justification, unless gross abuses of the process are evident or obvious alternative ways to settle the debt are present.

To comply with the *Saunderson* rule of practice,[215] the burden for proving the degree of the limitation rests on the debtor. In terms the *Gundwana* approach, the court will always assume a limitation of section 26(1) rights and, therefore, judicial oversight is always a must, but it is up to the debtor to give the overseeing court something to work with when deciding whether the limitation is justified.[216] If debtors provide little or no information, courts will generally have little choice but to assume that the limitation is justified by the mere presence of the creditors' real security rights. Therefore, it will count against the mortgagor if he or she did not respond to the warning given by the mortgagee in terms of the *Saunderson* rule.[217] There may be exceptions to this principle, like the situation in *Firstrand Bank Ltd v Maleke and Three Similar Cases*,[218] where the mortgagors made no appearance to defend, but where the court nevertheless had sympathy for them because of their historical predisposition and lack of knowledge. In the cases where homelessness seems inevitable, courts should be sensitive to the debtors' lack of knowledge or sophistication, which might be the reason that they did not pursue alternative routes to settle the dispute with their creditors in the first place. Conversely, in these "lack of knowledge" cases courts should also be more attentive to ensure that creditors do not abuse the state of affairs to exploit the debtors.

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[215] See 3 2 3 2 above.

[216] This approach (placing an onus on the debtors to provide information that is within their exclusive knowledge) was confirmed in *Standard Bank of South Africa Ltd v Bekker and Another* [2011] ZAWCHC 330; 6628/2011, 6635/2011, 6644/2011, 7032/2011, 7047/2011 (25 August 2011) para 26, with reliance on *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 1 SA 113 (SCA) para 19.

[217] See *FirstRand Bank Ltd v Fillis and Another* 2010 6 SA 565 (ECP) para 22, where the mortgagee gave the required warning but without any response from the mortgagor. See also *Nedbank Limited v Hlongwane and Another* (47312/2009) [2011] ZAGPPHC 39 (31 March 2011) 9.

[218] 2010 1 SA 143 (GSJ), discussed in 4 3 4 7 below.

3 3 4 Conclusion

When the subject of a sale in execution is the debtor's primary residence (home) the court may only grant the execution order after it has taken all the relevant circumstances into consideration. Procedurally, this judicial scrutiny is required by HCR 46(1)(a)(ii) as underpinned by section 26(3) of the Constitution. To consider all the relevant circumstances entails a substantive enquiry in which the court must ensure that the effect of the sale in execution would be proportionate to its purpose. This test is an expression of the constitutional principle that someone's "access to adequate housing" (section 26(1)) may only be interfered with if it is justifiable under section 36 of the Constitution. The extent to which section 26(1) would be impaired is one of the factors that will indicate the level of justification necessary. Other considerations include the purposes of the execution procedure, some of which being the effective enforcement of contractual debts and mortgage bonds, and the more general health and well-being of the credit and housing markets. In the following part of the chapter I venture into the specifics of this individualised proportionality test.

3 4 Applying High Court Rule 46(1)(a)(ii)

3 4 1 Introduction

As explained immediately above, during the HCR 46 enquiry, the underlying principle is that a limitation of section 26(1) rights should be allowed only when such a limitation would be justifiable in the circumstances of the particular case. To analyse how courts are to approach this enquiry, it is imperative to draw a distinction between two issues – a more general question and a more specific one.

The first question relates to the general justification for subjecting homes to the sale-in-execution process. Therefore, does the practice of selling homes in execution comply with the standard that "access to adequate housing" may only be deprived if justifiable under section 36 of the Constitution. This question would not have to be answered in every individual case, but can be settled once on a general level (which I do in 3 4 2 below). In other words, I explain the rational nexus between having homes sold in execution and the policy reasons underlying this practice. Secondly, after one establishes that the sale in execution of homes as a debt enforcement remedy is in line with the Constitution, a more specific test needs to occur during individual cases. Depending on the facts, it would sometimes be easier and at other times more difficult to conduct this test. The narrower, case-specific test entails that the court

should evaluate the proportionality of the result of each foreclosure case. In other words, the court must ask whether the effect of sale in execution on the occupiers of the home (the infringement of section 26(1)) is proportionate to the goal thereof (debt enforcement).

In what follows I first answer the broad question, namely whether the general practice of selling homes in execution is justified in light of the housing clause. This broad analysis includes the policy reasons behind the sale in executions of homes and establishes the legitimate goals that this remedy seeks to achieve. I then venture into the specifics of the proportionality test as required by the narrower test for every individual foreclosure case. The policy justifications elaborated on during the broad question will also play a role during the narrow individualised proportionality test. Nevertheless, it is important to distinguish the two aspects. It is my hypothesis that it is possible to recognise the general validity and necessity of mortgage bonds (and the foreclosure remedy), while at the same time ensuring that disproportionality is avoided in individual cases.

3 4 2 Broad issue: General rationale for sale in execution of mortgaged homes

Before deciding whether it would be proportionate to have the homes of debtors sold in every individual case, it is necessary to consider the general rationale behind the process as a whole. This question includes aspects such as the common law principles of mortgage law, the social values involved in the execution process and macro-economic considerations. The context within which the courts are to decide upon execution matters is crucial and it is, therefore, necessary to understand the justification for subjecting homes in general to this debt enforcement remedy.[219]

It is in the first place important to reaffirm that homes are *not* – as a point of departure – beyond the reach of the execution of debts.[220] Even section 26 of the Constitution does not establish a presumption against the sale in execution of a home.[221] In fact, no right in the Bill of Rights is absolute.[222] In the context of mortgage bonds, any challenge against the sale in

[219] Allowing residential property to be transferred subsequent to judicially sanctioned forced sales is analysed in terms of s 25 of the Constitution in 6 3 below. The issues are similar.
[220] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 19.
[221] *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 53.
[222] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) & Others* 2002 6 SA 370 (CC) para 89; *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others: Thomas & Another v Minister of Home Affairs & Others* 2000 3 SA 930 (CC) para 57; *S v Manamela & Another (Director-General of Justice Intervening)* 2000 3 SA 1 (CC). See also S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2006) 34-1 - 34-2 and the other cases cited there; I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 163.

execution of homes is a challenge against the very institution of the mortgage as a limited real right. If one over-emphasises the individual negative socio-economic effects of mortgage foreclosure, one might as well question the very justification for allowing homes to be subjected to mortgage bonds. To reason that no homes may be sold pursuant to mortgage foreclosures is to argue that people should not be allowed to conclude mortgage agreements and have mortgage bonds registered with the effect of voluntarily creating these real security rights. Consequently, if homes are placed beyond the sale in execution of debts, the practice of registering mortgage bonds over homes will become pointless. Homes could then only be purchased for cash, leased or perhaps purchased and paid for in instalments. All of these options will leave the ownership of residential property in the hands of the wealthy minority and counteract the spirit of section 26.

Even if only certain homes (for example, those below a set value) are placed beyond the execution process – for the purpose of protecting these presumably poor and, therefore, particularly vulnerable homeowners from becoming homeless – these properties no longer will be accepted by creditors as objects of security.[223] Therefore, the social value that even poor people must take financial responsibility for owning homes will go unfulfilled if they cannot obtain financing.[224] The result of this prospect would be that only those who can afford homes valued at higher than the set amount (in other words, the wealthier segment of society) will be able to obtain credit to purchase homes (and for other commercial purposes). The CC in *Jaftha* referred to this negative result as a "poverty trap".[225] Certainly, this outcome would contradict the spirit of the housing clause, which aims to achieve a greater – and not lesser – degree of access to housing. In reaction to the possibility of a family home exemption or mere uncertainty in this regard, Steyn warns that

[223] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 21.
[224] Para 21. This value was emphasised in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) paras 51 and 58.
[225] The applicants in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2003 10 BCLR 1149 (C) para 32; *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) paras 18 and 50 argued that s 67 of the MCA should be amended to include family homes up to a certain value within the list of items excluded from sale in execution. The reasoning behind this was that the section does not protect homes, whereas it protects other items necessary for a debtor's livelihood, which do not enjoy the same level of constitutional protection as housing. However, the CC (at para 51) rejected any suggestion that a certain class of homes should be excluded from the execution process, since it would lead to the so-called "poverty trap". It would prevent many poor people from generating capital in order to advance their living conditions. Conversely, see CM van Heerden & A Boraine "Reading procedure and substance into the basic right to security of tenure" (2006) 39 *De Jure* 319-353 347-352, who support the arguments made by the applicants in *Jaftha*. The authors suggest that protecting the right to housing by exempting the family home under certain circumstances may prove to be less expensive and more appropriate in some cases.

> "[a] system is required which provides greater legal certainty and, for a potential creditor, more predictability in relation to the credit risk attached to a transaction which he or she contemplates. Any continued lack of certainty surrounding the circumstances in which a mortgagee may enforce its security rights, may lead to reluctance on the part of lending institutions to finance the purchase of houses, or to advance loans against the mortgage of houses in their favour. This could create, for those who as a result are refused finance, the very poverty trap which the Constitutional Court sought to avoid."[226]

A general or specific home exemption would lead to a class of homeless persons who cannot obtain credit to purchase homes, even though they would be able to afford the monthly repayment instalments of such a loan.[227] Even when homes are not placed expressly out of the reach of sale in execution, the courts should be careful not to create perceptions that will lead creditors to be wary of extending credit to especially those who are most in need of it.[228] During their judicial oversight and discretion when it comes to granting execution orders, courts should be careful to do the balancing act in such a way that it does not create uncertainty and distrust for creditors. Therefore, courts must continue to affirm the fact that homes *can* be sold in execution. The fact that the hypothecated property is a home will not render the property beyond the scope of the execution process, but will merely trigger the care with which courts should adjudicate these matters. The residential nature of the property should not lead courts to be sceptical of granting execution orders. Instead, they should still generally be willing to grant the execution orders under circumstances where no extraordinary factors arise. If creditors have no *prima facie* expectation that they will obtain what they are lawfully entitled to and if courts, consequently, entertain the perception that the enforcement of mortgage bonds is dependent on a vague balancing test, it may lead to uncertainty. Such a situation would be reminiscent of Steyn's warning in the above-quoted passage.[229]

To hold that judicial oversight should enable a proper balancing of the opposing parties' interests[230] does not explain *how* the so-called balancing is to occur. In my view, when the

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[226] L Steyn "'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) 11 *LDD* 101-119 119.

[227] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 21.

[228] See *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) para 72, discussed in 4 4 3 2 below, where the court per Bertelsmann J emphasised that "it might create uncertainty and distrust in commercial activities and investment in the economy might be negatively affected if Courts were to be seen to interfere willy-nilly with established practices".

[229] See also L Steyn "'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) 11 *LDD* 101-119 114, who contends that "potential creditors need to know in advance the circumstances, defined as precisely as possible, in which a sale in execution of mortgaged property will constitute a limitation on the mortgagor's section 26 rights, as well as those in which such limitation will or will not be justifiable".

[230] For example, see *Mkhize v Umvoti Municipality and Others* 2010 4 SA 509 (KZP) para 24.

CC in *Jaftha* referred to a balancing act,[231] it was not alluding to some vague or general comparison – in each particular case – between the right of mortgage on the one hand and the right to housing on the other. I do not advocate an inflexible set of rigid principles. However, there ought to be a general point of departure, namely a principled or doctrinal logic that serves to provide a reasonable degree of predictability and certainty as to what courts, creditors and debtors alike can expect in these disputes.[232] It would be counterproductive to the purposes of section 26 to adopt an approach that is so uncertain that it will lead to a decrease in credit provision to those at the lower end of the market who attempt to purchase homes with mortgage financing or who want to start business ventures with capital for which they need security. Rather, creditors need to know before the time whether and how mortgage bonds will be enforced.

A solid point of departure would be to look at the context and importance of mortgage home loan financing. In addition, it is important to establish the exact context and purpose of the judicial discretion required by HCR 46.[233] In this regard, the court in *Nedbank Ltd v Fraser and Another and Four Other Cases*[234] ("*Fraser*") held that there is an "apparent tension" between two competing social values. Firstly, there is the value of having a home. To advance this value, persons' security of tenure in their homes must be protected.[235] The court also mentioned that there are people in society who cannot defend their own rights and, therefore, need judicial initiative on their behalf.[236] It is important to emphasise that the protection of tenure security is a specific and very clear transformative constitutional obligation embodied in sections 25, 26 and also 10[237] of the Constitution. Consequently, the court should be applauded for acknowledging tenure security as a social value.

Secondly, there is the social value of enforcing contracts and discharging debts. This value is embodied in the right of access to courts in section 34 of the Constitution and is promoted

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[231] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 59.
[232] See L Steyn "'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) 11 *LDD* 101-119 114.
[233] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 16. The history of judicial oversight (as analysed in 3 2 above), of course, also plays a role in establishing the context and purpose.
[234] 2011 4 SA 363 (GSJ) para 17. For a summary of the decisions in *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC), *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) and *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP), see M Kelly-Louw "Credit law" (2011) 3 *JQR* para 2.3.1.
[235] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 17.
[236] Examples of such judicial initiative are *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) and *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T), discussed in 4 3 4 7 and 4 4 3 2 below.
[237] The right to dignity. See 3 1 n 3 above.

by the court structures that are in place.[238] To enforce the payment of debts, judgments are granted and given content and effect to by the execution process.[239] However, the right to execute is not absolute and it can be limited.[240] Nonetheless, the judgment creditor's rights will enjoy "relative primacy" unless there is good reason to judge otherwise in a particular case.[241] As the court explained, if this "relative primacy" was not the case, it would lead to the situation where debtors can borrow money to purchase homes but refuse to repay the loan simply by relying on the right to housing.[242] This abuse would defeat the creditor's legitimate claims to repayment and would undermine the security and value of credit. In my view, such an abuse of the housing clause would also undermine its integrity, which explains why the courts should not tolerate unbridled reliance on section 26. My research assumes that section 26 should not avail debtors who attempt to abuse their housing rights to avoid honouring their creditors' legitimate claims.

As the court in *Folscher* confirmed, the enquiry must start with a consideration of the creditor's position in its proper context:

> "The creditor has entered into an agreement with the debtor that both parties concluded voluntarily to enable the debtor to acquire the immovable property or gain access to capital against the security of the bond registered over the property."[243]

Therefore, the individual contractual and proprietary relationship between the parties must be taken into account. The point of departure is whether the property is hypothecated with a mortgage bond as security for the judgment debt.[244] This is the first (and, apparently, most important) consideration, namely the circumstances under which the debt was incurred.[245] All other factors should be seen from this perspective, namely the terms of the mortgage bond.[246]

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[238] Although the court did not say so, this social value is also embodied in s 25 of the Constitution, since, as I argue in 6 4 2 3 below, contractual debts qualify as "property" for purposes of s 25.
[239] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 17.
[240] Para 18. The limitations include s 39 of the Supreme Court Act 59 of 1959; s 37 of the MCA; s 86 of the Insolvency Act 24 of 1936. These prohibit the execution sale of certain assets necessary for the maintenance and sustenance of the debtor and his or her means of earning a livelihood.
[241] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 20.
[242] Para 20.
[243] *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) para 38. The court quoted from *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) paras 2-3 and, with regard to the sanctity of contracts, from *Brisley v Drotsky* 2002 4 SA 1 (SCA) paras 93-94.
[244] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 26.
[245] Para 26, relying on *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) paras 58 and 60.
[246] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 26, relying on *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) paras 58 and 60.

The conflict between the rights of the individual creditor and debtor is not the only consideration that promotes social values.[247] One also has to consider the issues on a macro-economic level and look beyond the concerns of individual parties.[248] To put homes beyond the reach of execution would commercially sterilise that property and render it useless as a means to obtain credit.[249] In addition, it will prevent the entrepreneur from using his or her home as security to finance a business.

Therefore, mortgage bond finance is an "important social tool" that, amongst others, enables people to purchase homes and enjoy its capital growth over time.[250] The mortgage bond is agreed to and registered consciously, deliberately and for the benefit of both parties.[251] If creditors no longer could enjoy the assurance of mortgage security, access to housing would become too expensive and it will lead to negative consequences for the social and commercial stability of society. Therefore, the trust that courts will uphold mortgage bonds must not be undermined.[252] Furthermore, execution against homes is necessary for the attainment of the social value of housing because it facilitates credit.[253] In addition, the provision of home loans by the private sector assists the state in fulfilling its obligation concerning the provision of housing to the poor.[254] Any over-cautious hindrance in the way of private home loan provision may, therefore, counteract also the state's housing initiatives. Hence, the sale in execution of mortgaged homes cannot be regarded as the enemy of section 26 rights. In fact, this mechanism is crucial to the fulfilment of section 26 rights, although it may not seem so on the surface of every individual case.

On the other hand, abuse of the execution process is an offense against the attainment of one or both of the social values described above.[255] Therefore, a sale in execution of a mortgaged home will usually be justifiable unless there is an abuse of the process.[256] In this

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[247] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 21.
[248] Para 21.
[249] Para 21.
[250] *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) para 39.
[251] Para 39.
[252] Para 39.
[253] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 22.
[254] *Standard Bank of South Africa Ltd v Bekker and Another* [2011] ZAWCHC 330; 6628/2011, 6635/2011, 6644/2011, 7032/2011, 7047/2011 (25 August 2011) para 20.
[255] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 22.
[256] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 58. See also *Nedbank Ltd v Mortinson* 2005 6 SA 462 (W) para 33, where the court (relying on the principle laid down by the CC in *Jaftha*) held that if the immovable property was hypothecated by the debtor and if there was no abuse of the court procedure, it would appear that the limitation of s 26 rights is reasonable and justifiable. Hence, the court laid down a new rule of practice according to which the mortgagee who applies to the registrar for a default judgment has to provide specific information that will assist the registrar in determining whether there is an abuse of the procedure. Though the registrar can no longer grant execution orders, the CC in *Gundwana v*

regard, the mortgage bond does not include an agreement to forfeit the mortgagor's protection under section 26.[257] In reference to the "abuse of process" principle that was established in *Jaftha*, and after quoting from that case,[258] the CC in *Gundwana* held that the mortgage agreement does not provide the mortgagee with the right to enforce execution in bad faith.[259] Accordingly, the CC concluded that the fact that the house was willingly mortgaged does not place the case outside the scope of *Jaftha*.[260] Yet, the CC confirmed its approval of the practice of sale in execution. Froneman J commented that the constitutional considerations, namely section 26 of the Constitution, does

> "not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. 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";[261]

and further,

> "[i]t 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 should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."[262]

If property is bonded as security a judgment creditor will usually be entitled to execute the judgment against such property, unless there are extraordinary circumstances present.[263]

Steko Development and Others 2011 3 SA 608 (CC) acknowledged that the practice directions laid down in *Mortinson* are still of value. This information will often assist a court to quickly determine whether a possible abuse might be present. This information will also speed up the process and courts would consequently be able to deal with those cases where no abuse is present much faster than would be the case without this information. The amount in arrears and the size of the total debt are apparently important. See also *Standard Bank of South Africa Ltd v Bekker and Another* [2011] ZAWCHC 330; 6628/2011, 6635/2011, 6644/2011, 7032/2011, 7047/2011 (25 August 2011) paras 29-30.

[257] *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) paras 44 and 46.

[258] Para 47.

[259] Paras 44 and 48.

[260] Para 49.

[261] Para 53.

[262] Para 54. See also *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 21; *Standard Bank of South Africa Ltd v Bekker and Another* [2011] ZAWCHC 330; 6628/2011, 6635/2011, 6644/2011, 7032/2011, 7047/2011 (25 August 2011) para 15.

[263] *Standard Bank of South Africa Ltd v Bekker and Another* [2011] ZAWCHC 330; 6628/2011, 6635/2011, 6644/2011, 7032/2011, 7047/2011 (25 August 2011) para 20; *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) para 39. See also *FirstRand Bank Ltd v Meyer and Another* (3483/10) [2011] ZAECPEHC 8 (17 March 2011) para 32:

However, the result of section 26 is that it no longer is enough, in justifying sale in execution, to merely show that the property was hypothecated with a mortgage bond.[264] It is important for a court to be convinced that the procedure of direct execution against the debtor's home (which is an exceptional benefit for mortgage creditors) is not being abused.

Nevertheless, one cannot claim an abuse of the process simply because a judgment creditor seeks to have the debtor's home sold in execution and if the debt was utilised to purchase the property by way of a mortgage loan.[265] Only if there is an indication of actual abuse would the court be alerted to make a more vigilant enquiry. If there is no such indication, the execution order should normally be granted.[266] If the property is not encumbered with a mortgage the court will conduct a stricter enquiry in light of section 26(3) of the Constitution.[267] Therefore, abuses of the process might turn out to be rare in cases where the property sought to be sold in execution was hypothecated with a mortgage.[268]

Consequently, in mortgage foreclosure cases, when courts take "all the relevant circumstances" into consideration, the point of departure is the presence of a mortgage bond. More specifically, when assessing the proportionality of an individual case, the one aspect of the test is the purposes of sale in execution. This consideration includes the values that the mortgage as a social tool aims to promote. Therefore, courts can assume the general justification of having homes sold in execution for the public purposes explained here. The purpose of judicial oversight, then, is to "filter or check" that execution serves the social interests and to "safeguard against abuse of the execution process".[269] However, a particular sale in execution of a home cannot be approved simply because it serves the, no doubt, legitimate purposes of the mortgage law. A further step is required, namely the proportionality test that measures the impact of foreclosure on the individual occupiers who lose their homes. This impact must be proportionate to the broader policy goals served by sale in execution as well the purposes of the individual credit provider.

"[T]he manner in which these debts arose and the registration of the bond in each case over the property, which is of substantially greater value than that in issue in [*Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC)], does in this case give rise to an entitlement on the part of the bond-holder to an order that the property be declared executable."

[264] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 13.
[265] Para 27.
[266] Para 27.
[267] Para 27.
[268] Para 27; *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) para 37.
[269] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 24. See *Nedcor Bank Ltd v Kindo* 2002 3 SA 185 (C) 187-188, where the court confirmed that it has a duty to protect the debtor against the abuse of the creditor's limited real right. See also *Brummer v Gorfil Brothers Investments (Pty) Ltd en Andere* 1997 2 SA 411 (T).

In the following section I explain the implications of this test for how the common law of mortgage foreclosure currently functions and the difficulties this test may entail for how creditors enforce their rights under the mortgage bond. The risk with a proportionality test is that it will have to be so case-specific that it might become impossible for creditors and debtors alike to predict how their dispute will be resolved. In the next chapter I explain how that the National Credit Act provides a predictable regulatory framework for reaching proportionate outcomes in foreclosure cases without having to develop the common law. I explain there that the NCA takes away the uncertainties that case-by-case proportionality tests may otherwise cause for the credit industry.

3 4 3 Narrow issue: Case-by-case proportionality

3 4 3 1 Introduction: Limiting section 26(1) rights

In terms of the limitation clause, a person's "right of access to adequate housing"[270] may be limited only "to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[271] The clause continues by listing five non-exclusive factors:

> "(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."[272]

Factor (a), the nature of "the right to have access to adequate housing" has been quite extensively discussed throughout this chapter, especially in 3 3 3 above. Woolman and Botha, for example, list this right as one "vital to our constitutional democracy".[273] The importance and political sensitivity of tenure security cannot be denied, particular in light of its rampant violation during the apartheid era. The second factor (b) relates to the analysis in 3 4 2 above, namely the broad justifications for the limitation of housing rights by the sale-in-execution process. Both the purpose of sale in execution and the importance of this purpose is analysed

[270] S 26(1) of the Constitution.
[271] S 36(1) of the Constitution.
[272] S 36(1)(a) to (e) of the Constitution. For an analysis of the five factors, see S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2006) 34-70 - 34-92; I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 176-185.
[273] S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2006) 34-72.

there. In summary, it is reasonably clear that the objective of debt recovery can sufficiently justify the limitation of a right in the Bill of Rights.[274] Factor (c) is linked to one of the points made in 3 3 3 above, namely that the degree to which the debtor's "access to adequate housing" is limited (with reference to whether he or she will be left homeless) will play a core role in determining the level of justification necessary.[275]

Factor (d) requires that the means used to achieve the objective must be rationally connected to, or reasonably capable of achieving, that purpose.[276] The relationship should also display proportionality and causality.[277] Factor (e) requires that the limitation of a right should probably not be allowed if there are alternative measures available that will be less invasive but will still achieve the same purpose. This is probably the central element of the proportionality test, one on which most limitations will stand or fall.[278] If there is a way to achieve the purpose of sale in execution without having to sell the home, then selling the home would not be a proportionate solution. This prospect may cause difficulties for the traditional principles that govern the enforcement of mortgage bonds.

3 4 3 2 Abuse of process and the availability of alternatives

Although there may be other factors present to indicate that a specific sale in execution is unjustifiable, abuse of the process and the availability of alternatives are the two strongest indications. These two concepts can either be viewed together or as two separate tests. In the first place, it would be an abuse of the execution process for a creditor to have the debtor's home sold in execution under circumstances where the debt can be satisfied in another way. In the second place, the creditor's actions might be abusive even when they technically do not relate to the presence or absence of alternatives. For example, this will be the case where the creditor has ulterior motives and institutes the execution process with the aim of exploiting vulnerable debtors. It cannot be disputed that courts should intervene in cases where there are

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[274] 34-75 - 34-76.
[275] *S v Manamela & Another (Director-General of Justice Intervening)* 2000 3 SA 1 (CC) para 53. See also S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2006) 34-79.
[276] S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2006) 34-84.
[277] I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 183.
[278] 183-184. D Bilchitz "How should rights be limited? *Road Accident Fund v Mdeyide* 2011 2 SA 26 (CC)" 2011 *TSAR* 568-579 575 argues that "by not considering properly the availability of less restrictive means ... [one] ... ultimately fails to apply a real proportionality test".

clear irregularities and abusive practices. The facts in *Jaftha* illustrate such a scenario.[279] As Van der Walt comments,

> "The *Jaftha* decision established the significant constitutional principle that court procedures that have been established to facilitate 'normal' commercial processes should not be abused to exploit the economic and social weakness and marginality of the poor, especially when doing so simultaneously has a negative impact on state efforts to alleviate mass poverty and homelessness."[280]

The courts will not tolerate creditors who act in bad faith with the purpose of exploiting vulnerable persons. The vulnerability of debtors and the relative wealth and power of creditors will often be an indication that a court should take care to ensure that the creditor is not abusing its power by way of a normally lawful and valid procedure. However, to hold that mortgage creditors may not enforce execution in bad faith does not challenge or undermine the basic doctrinal premise or legitimacy of mortgage law; it does not even change the common law.[281] Therefore, it is not necessary for current purposes to consider this aspect in detail. On a doctrinal level it is more interesting and important to discuss the availability-of-alternatives aspect, since this does not necessarily involve bad faith or abusive attitudes on the side of the creditor, but is indicative of disproportionality.

Nonetheless, there is a conceptual link between the abuse-of-process and the availability-of-alternatives arguments. One does not have to consider the abuse-of-process concept so narrowly as to only include elements such as ulterior motives and intentional bad faith. Rather, the situation where a home is sold despite the availability of less destructive alternatives can arguably also be classified as abusive. As the court in *Folscher* explained,

> "the creditor's conduct need not be wilfully dishonest or vexatious to constitute an abuse. The consequences of intended writs against hypothecated properties, although bona fide, may be

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[279] For the facts, see 3 2 2 above. With reference to the situation in *Jaftha*, AJ van der Walt "Constitutional property law" (2006) 1 *JQR* para 2.3 comments as follows:

> "It is tolerably clear from the facts in the *Jaftha* case that the execution processes in the case were cynically designed to prey on the weakness of poor persons and families and to abuse the state support programmes designed to alleviate their plight as an easy source from which trifling, extraneous debts can be satisfied easily and in a way that simultaneously creates lucrative opportunities for making easy money. It is not for nothing that the Constitutional Court referred the allegations about unprofessional conduct in the case to the Law Society for investigation."

It is probably these circumstances that led the CC to be wary of abuse of the execution process, since section 66(1)(a) of the MCA clearly left room for abuse by creditors, especially where debtors are indigent and ignorant. Therefore, the CC held that where the process is abused, a sale in execution will be unjustifiable: See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 43.

[280] AJ van der Walt "Constitutional property law" (2006) 1 *JQR* para 2.3

[281] See *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 47.

> 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."[282]

In other words, the facts of a case might indicate that there is a disproportionate relationship between the value of the debt (the purpose of sale in execution) and the value of the property (the effect of sale in execution). In these kinds of cases, courts should be vigilant to ascertain the creditors' true motives for insisting upon sale in execution: Is it aimed at enforcing their claims in good faith or are there ulterior motives and abuses present? Although the mere enforcement of their contractual rights does not indicate bad faith, courts should be alerted by these kinds of extraordinary facts to ensure that there is no disproportionality present. In summary, when a creditor insists on having a home sold if the size of the judgment debt is disproportionate to the value of the property, such behaviour might amount to an abuse of the process and should be investigated accordingly.

3 4 3 3 Creative alternatives: Potential problems with the common law

The foundation of the proportionality test was set out in the CC's *Jaftha* judgment.[283] The CC held that if the procedural rules have been complied with and there are no alternative ways to recover the debt, a sale in execution should normally be allowed, unless the circumstances are grossly disproportionate. Such gross disproportionality would occur when the advantage for the judgment creditor (in obtaining payment) is significantly less than the advantage for the judgment debtor (in security of tenure), especially if it may result in complete homelessness for the debtor and his or her family. Therefore, it may be unjustifiable for a person to lose his or her home when the debt is trifling in amount and insignificant to the judgment creditor. The court emphasised that the enforcement of this principle will depend on the circumstances of every case.

The CC further held that if the judgment debtor willingly hypothecated his or her house as security for the debt (in other words, if a mortgage was registered over the property), a sale in execution should usually be permitted, unless the court process was abused. The court confirmed the importance of ensuring that homes may be used to raise capital. This is an important aspect of the value of a home and courts should acknowledge this in their

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[282] *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) para 40. See also DE van Loggerenberg "Civil procedure" (2011) 2 *JQR* para 3.6.

[283] The following comments are based on *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 59.

judgments. Nevertheless, even with regard to mortgage bonds, a further factor is the availability of alternative methods of debt recovery that do not require the sale of the debtor's home.[284]

Therefore, nothing in *Jaftha* diminished creditors' ability to enforce their claims by executing against debtors' homes. The CC specifically referred to the fact that mortgages will still be enforceable. The only caveats that the CC emphasised were that abuse of the process must be avoided and – significantly for current purposes – that "creative alternatives"[285] should be considered. Moreover, the court expressed concern for cases of debt *not* secured by a mortgage bond and where the debt was trifling. In other words, although the decision has an impact on mortgage debts, the CC in *Jaftha* was more concerned with selling homes for trifling, unsecured debts. From the first principles of mortgage law one can argue that the unsecured creditor does not have as strong an entitlement to the debtor's home as the mortgage creditor does. Hence, more careful scrutiny is necessary when a case concerns unsecured debts, since the likelihood of abuse is probably higher.

In 3 4 2 above I explain the basic premise that the mortgage bond should serve as the point of departure when deciding whether to grant an execution order or not. It seems that the only exceptions in this regard would be cases where the creditor is abusing the process or if alternatives to sale in execution of the home are available. The purpose of this part of the chapter is to determine how the availability-of-alternatives factor impacts the case-by-case proportionality test that sections 26(1) and 36(1) of the Constitution require. Potentially there are so many factual variables that it is, to begin with, necessary to leave room for flexibility and creativity.[286] As the CC in *Jaftha* held:

> "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."[287]

As a result, courts should ensure that execution is the "last resort", but with the importance of "debt recovery" in mind.[288] If execution is not the last resort, the implication seems to be that

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[284] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 59. In addition to the factors discussed above, the CC (at para 60) mentioned a few others (to which a court is not limited): Attempts made by the debtor to repay the debt; the financial situation of the parties; the amount of the debt; whether the debtor is employed or has a source of income; and any other relevant factor.
[285] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 59.
[286] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 25.
[287] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 59.
[288] Para 59.

it would be unjustifiable to allow a home to be sold in execution and, hence, to limit section 26(1) rights, since the result would be disproportionate. However, if execution *is* the last resort, it would be justifiable to limit the debtor's section 26(1) right. The next question is: How far should the court go to search for "creative alternatives"?[289] Furthermore, within the context of mortgage debt, which alternatives are available?

The extent to which a court can expect creditors to make use of alternatives is limited in the case of mortgage bonds. The reason for this is that the common law principles of mortgage allow the creditor to enforce its claim directly against the hypothecated property.[290] Not only is this principle *ex lege* included in the content of the limited real right of mortgage, but this state of affairs is also agreed to in the mortgage agreement. To require the creditor first to look for other assets to execute against will be contrary to the nature of the right of mortgage as a real security right and would imply a departure from the common law.

The traditional common law position has the potential to lead to the situation where a debtor's section 26(1) right of "access to adequate housing" is limited despite the fact that alternatives are (or might be) available. Presumably, this would amount to an unjustifiable limitation of section 26(1) rights, since the result would be that the home is sold despite the fact that this was not the last resort, rendering the sale in execution disproportionate. Therefore, one might argue that the common law should be developed to give effect to section 26(1) as far as possible, exactly because not doing so might threaten the debtor's security of tenure in an unconstitutional manner.[291] The development would arguably entail that creditors no longer would be entitled to direct and automatic execution against the hypothecated home, but would have the obligation to first seek to enforce their debt in less invasive ways.

The traditional common law of mortgage does not place this obligation on mortgagees and, in fact, gives them the express right *not* to seek execution against assets other than the hypothecated property. Therefore, section 26 might entail that this right of direct execution would have to be subject to exceptions in either all or at least certain foreclosure cases. Either the mortgagee would always have to prove to the court that it had unsuccessfully sought execution against other assets, or there would be a certain precondition that triggers the

[289] Para 59.
[290] See 3 2 5 above, where I discuss this substantive rule of mortgage law with reference to the procedural exception it necessitates. Also, see the general discussion of the content of mortgage bonds in 2 4 above.
[291] S 39(2) of the Constitution provides that, when the common law is developed by courts, the spirit, purport and objects of the Bill of Rights must be promoted.

creditor's obligation in this regard. Presumably, the principle would be that if the hypothecated property is a home, the mortgagee would have to convince the court that selling such home is only option left to satisfy its claim. If the common law was to be regarded as being developed in this manner, the principle would be roughly the same as with the enforcement of unsecured debts, which already requires that the court should be convinced – by way of the *nulla bona* return – that there are no or insufficient movables available before execution against the immovable property is levied. This prospect begs the question: What will be left of the nature of the limited real right of mortgage if the common law were to be developed to this extent? At the eventual sale in execution the mortgage creditor will of course still have a preference to the proceeds. Yet, the right to directly make use of its security to satisfy the outstanding debt (in effect, a procedural benefit) would be significantly qualified. The question is, therefore, whether the common law of mortgage is ready (and whether it is indeed necessary and justified) to effect this radical development, even if the Constitution may seem to require it.

The proposition that a mortgage creditor would first have to seek alternative ways to settle the debt before relying on its entitlements under the mortgage bond is particularly relevant under the following circumstances. Firstly, if the total outstanding debt (the value of the judgment debt) is small enough that execution against other assets would easily satisfy the claim, it would seem disproportionate for the creditor to insist on an execution order against the mortgaged home, even the if the mortgage bond entitles it to do so. On the other hand, if the judgment debt is quite large, it would mostly not make sense to first sell the debtor's other assets, since the proceeds would often not be enough, necessitating the home to be sold in any event. Arguably, this approach would depend of the facts of each case and a *nulla bona* return would provide the required justification to have the home sold. Furthermore, this option would presumably oblige creditors to do some sort of investigation as to how the size of the judgment debt compares to the value of the available non-residential assets.

A second factual eventuality that illustrates the debatable need to develop the common law is when the actual amount in arrears (not the total outstanding debt) can be remedied quite easily. For example, the amount outstanding can be brought up to date by having some of the debtor's movable assets sold in execution. Even though any default – regardless of the size – triggers the mortgagee's right to foreclose the bond and claim execution against the home, it would arguably be disproportionate to have such a home sold when the default can be remedied in a less invasive manner. Therefore, the development of the common law would

have to include an obligation on mortgage creditors to indicate why the arrears cannot simply be remedied by selling the debtor's movables instead of his or her home.[292] Once again, this approach would require creditors to investigate the facts of each case before electing to foreclose.[293]

Consequently, it is clear that the size of the accelerated outstanding debt as well as the size of the actual amount outstanding would be pertinent factors in any proportionality test. However, the traditional common law of mortgage does not provide for these factors to be taken into account when assessing whether an execution should be ordered. Yet, these considerations can, in view of the discretion required by HCR 46 and section 26(3), no longer be ignored; the law governing foreclosure must in some way make room for these factors. In this dissertation I argue that development of the common law is not necessary or justified, since the legislature has already intervened, by enacting the NCA, and provided the framework for debtors to avoid the sale in execution of their homes if alternatives are available.[294] If it were not for the NCA, development of the common law would have been necessary to create such an alternative. However, since the NCA provides alternatives, additional amendments to the common law are unwarranted at the moment, unless it can be shown in a particular case that the statutory provisions are inadequate. I explain and illustrate this argument in chapter 4 below. However, some recent decisions seem to indicate that courts will in fact start ignoring the right of direct execution in favour of expecting creditors to first seek execution against other assets.[295] I criticise this trend in 4 4 4 below.

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[292] For example, see *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) para 79. This apparent development of the common law was rejected in *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ). I discuss these cases in 4 4 3 below.

[293] A procedural side issue would revolve around the question on which party the obligation should be placed to provide the court with information regarding the availability of alternatives. In light of the *Saunderson* rule of practice (see 3 2 3 2 above), which was approved by the CC in *Gundwana* (see 3 2 4 above), and the decision in *Standard Bank of South Africa Ltd v Bekker and Another* [2011] ZAWCHC 330; 6628/2011, 6635/2011, 6644/2011, 7032/2011, 7047/2011 (25 August 2011), the obligation to provide the required information would seem to generally be on the debtor who wished to rely on his or her protection under s 26. Very often the facts necessary to conduct the proportionality test would be in the exclusive knowledge of the debtor: See *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 1 SA 113 (SCA) para 19.

[294] See *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 (D) para 25.

[295] For example, see *Changing Tides 17 (Pty) Ltd NO v McDonald and Another* (22859/09) [2011] ZAGPPHC 106 (5 May 2011); *Standard Bank of South Africa v Molwantwa and Another* (15043/2009) [2011] ZAGPPHC 108 (5 May 2011), discussed in 4 4 4 below.

3 4 3 4 Conclusion

In this part of the chapter I firstly provided a general justification for the existence of a process whereby creditors can enforce their rights of mortgage even against residential property. The importance of private credit provision to facilitate homeownership and allowing such creditors to have secure ways of enforcing their debts, are some of the main rationales for the sale-in-execution remedy. Another reason is the fact that debtors agree to subject their homes to the risk of sale in execution.

However, despite the legitimacy of the mortgage foreclosure remedy, it is necessary to ensure that its effect in individual cases is proportionate and, therefore, in line with section 26(1) of the Constitution. In addition to the rather obvious qualification that creditors should not be allowed to abuse the sale-in-execution process, it has become clear that the forced sale of a home should not go through if the purpose (debt enforcement) can be achieved in a less invasive manner. This latter qualification is not part of the traditional common law position, which may indicate that the common law is in need of development. In the next part of the chapter I introduce the subsidiarity principles, since they form the basis of how I suggest the research problem should be answered, with specific emphasis on a constitutional interpretation of the National Credit Act.

3 5 Subsidiarity

A mortgage debtor may wish to dispute the validity of the prospective sale in execution of his or her home because it allegedly violates his or her section 26(1) rights in a disproportionate manner.[296] It is, however, important that the defence is structured correctly and founded on the appropriate source(s) of law. In this dissertation I rely on the so-called subsidiarity principles.[297] In fact, as will become clear in due course, my main conclusions draw on the application of these principles to foreclosure scenarios. I also believe my conclusions prove why the subsidiarity principles should indeed be construed so as to be applicable to the relationship between the Constitution, the NCA and the common law. Therefore, it is at this

[296] The same can be argued with regard to s 25(1) of the Constitution, as I explain in 6 2 2 below.

[297] In general, see L du Plessis "'Subsidiarity': What's in the name for constitutional interpretation and adjudication?" (2006) 17 *Stell LR* 207-231; L du Plessis "Interpretation" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2008) 32-142 - 32-158; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128. For criticism of especially Van der Walt's notion of subsidiarity, see also K Klare "Legal subsidiarity & constitutional rights: A reply to AJ van der Walt" (2008) 1 *CCR* 129-154.

stage appropriate to provide an overview of the subsidiarity principles and explain my hypothesis[298] in this regard, since the next chapter – dealing with the National Credit Act – must be understood from a subsidiarity point of view.

Subsidiarity revolves around the question whether a party can rely directly on a section in the Bill of Rights or whether legislation and the common law should be the first resort. The difference between direct and indirect application of the Constitution is, consequently, a related issue.[299] Secondly, subsidiarity also relates to the choice between legislation and the common law. The CC has laid down certain guidelines to address the question of which source of law should be applicable, at least as the point of departure, in a particular instance. In the first place, when a party argues that a constitutional right had been infringed, he or she must rely on legislation that had been promulgated to give effect to that right.[300] In other words, the claimant may in such a case not directly rely on the constitutional provision, although the constitutional validity or effectiveness of the legislation in question may be attacked based on non-compliance with the underlying constitutional provision.[301] The legislation much also be interpreted with reference to the constitutional provision,[302] in so far as it is possible to do so. The second subsidiarity principle is that, where legislation had been promulgated to give effect to a constitutional provision, the litigant must rely on the legislation and not directly on the common law.[303] Accordingly, the common law should not be developed if legislation had already been enacted to protect the relevant constitutional right or to promote the constitutionally desired result.

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[298] For the general hypothesis of this dissertation, see 1 2 above.

[299] See 6 2 2 below.

[300] AJ van der Walt *Constitutional property law* (3rd ed 2011) 66; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 100-103, referring to *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51-52; *MEC for Education: KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) paras 39-40; *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) paras 59 per Skweyiya J and 69 per Ngcobo J; *Walele v City of Cape Town and Others* 2008 6 SA 129 (CC) paras 29-30; *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* [2009] ZACC 33 (19 November 2009) paras 47-49.

[301] AJ van der Walt *Constitutional property law* (3rd ed 2011) 66; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 101, 104 and 115, referring to *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) para 52; *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 2 SA 311 (CC) para 437; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 249; *Engelbrecht v Road Accident Fund* 2007 6 SA 96 (CC) para 15.

[302] S 39(2) of the Constitution.

[303] AJ van der Walt *Constitutional property law* (3rd ed 2011) 66-67; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 103-105, relying on *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) para 25; *Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 2 SA 311 (CC) para 96; *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) para 23; *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province,* 2007 6 SA 4 (CC) para 37; *Walele v City of Cape Town and Others* 2008 6 SA 129 (CC) para 15.

As stated earlier, subsidiarity aims to address two questions: Is there scope for direct reliance on the Bill of Rights; and should the common law be developed to bring it in line with the Bill of Rights? The answer to both questions depends on the existence of relevant legislation. If there is none, the common law must be developed. As section 8(3)(a) of the Constitution prescribes:

> "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
> (a) in order to give effect to a right in the Bill, *must* apply, or if necessary develop, the common law *to the extent that legislation does not give effect to that right*". (My emphasis.)[304]

If there is legislation that was enacted to give effect to the right, section 8(3)(a) does not authorise development of the common law, unless the legislation in question does not give sufficient effect to the right. Therefore, if legislation is applicable, subsidiarity (underpinned by section 8(3)(a)) requires that the common law should not be developed so as to do something that an act of Parliament already does, even if (or perhaps specifically when) the legislation excludes the instance that is at stake in a particular dispute. The point of this principle is that development of the common law should not be employed to duplicate or to create a parallel system when a statutory regulation already exists. Furthermore, if there is relevant legislation in existence, section 39(2) of the Constitution requires that this legislation "must" be interpreted to "promote the spirit, purport and objects of the Bill of Rights". However, if the act is not capable of constitutionally-compliant interpretation, in terms of section 172(1) of the Constitution, it must be declared unconstitutional to the extent that it does not comply with the Constitution. As a whole, therefore, subsidiarity emphasises the importance of legislation in situations where there is legislation in place to regulate certain matters. If subsidiarity were to apply to the NCA – as I argue it does – both principles place the provisions of this Act at the centre of the residential mortgage foreclosure dispute.

Thus far, subsidiarity has only been applied expressly in cases where there is legislation that was specifically enacted by Parliament to give effect to a particular right in the Bill of Rights. Examples include the Promotion of Administrative Justice Act 3 of 2000, which was promulgated to give effect to section 33 of the Constitution (the right to "just administrative action"). Subsection (3) specifically obliges Parliament to enact legislation to give effect to

[304] See T Roux "Continuity and change in a transforming legal order: The impact of section 26(3) of the Constitution on South African law" (2004) 121 *SALJ* 466-492 487 n 102, who also emphasises this last part of the sentence.

the rights contained in section 33, which was done when the Act was promulgated. The CC has time and again confirmed the application of subsidiarity to administrative law.[305] By analogy, the subsidiarity principles were subsequently expanded to also apply in other contexts, such as labour law[306] and unfair discrimination law.[307] The same goes for the relationship between the PIE Act and section 26(3) of the Constitution.[308] These areas of law enjoy the protection of provisions in the Bill of Rights and have legislation that has been enacted to give effect to those rights.

However, the NCA was not enacted to give effect to a specific right in the Constitution. The NCA does not refer to either section 25 or section 26 of the Constitution. Strictly speaking, therefore, the subsidiarity principles – as they are currently framed – should not apply to the NCA. The effect would be that debtors who wish to avoid the sale in execution of their homes due to mortgage default can choose either to rely on the protection mechanisms in the NCA (debt review,[309] reinstatement,[310] *et cetera*), or to frame a defence based on an alleged disproportionate violation of his or her section 26(1) rights. In other words, the debtor would not have to make use of the consumer protection in the Act at all. He or she can simply wait until an application for summary judgment is brought by the creditor and allege a *bona fide* defence based on section 26(1) or insist upon a development of the common law. The question is: Should the court allow this defence if no resort was made to the NCA? Can the court develop the common law so as to provide appropriate relief for the

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[305] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) para 35; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 2 SA 311 (CC) paras 95-97 and 434-437; *Walele v City of Cape Town and Others* 2008 6 SA 129 (CC) paras 29-30; *Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others* 2010 4 BCLR 312 (CC) paras 47-49. See also C Hoexter *Administrative law in South Africa* (2nd ed 2012) 115-121.

[306] *South African National Defence Union v Minister of Defence and Others* 2007 5 SA 400 (CC) paras 51-54: Members of the national defence force (who are trying to enforce their rights to collective bargaining) should rely on ch 20 of the regulations under the Defence Act 44 of 1957 (the regulations were issued in 1999) instead of directly relying on s 23(5) of the Constitution. As the CC (at para 54) explained its approach:

> "Once it is accepted that disputes that arise from collective bargaining in the SANDF should be considered first in the light of the provisions of Ch 20 of the regulations rather than s 23(5) of the Constitution ... A court will start with a consideration of the regulations rather than the constitutional provision. The regulations, of course, must be construed in the context of the Constitution as a whole."

[307] *MEC for Education, KwaZulu-Natal, and Others v Pillay* 2008 1 SA 474 (CC) paras 39-40: The relationship between s 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

[308] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) 11-23; *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 16. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 68 n 152.

[309] See 4 3 4 2 and 4 3 4 3 below.

[310] See 4 3 2 below.

debtor who proves a violation of his or her section 26(1) rights, even though the matter is already regulated by the NCA? In 4 4 4 below I critically discuss three cases, in two of which the court did exactly what I describe here (probably unaware of the subsidiarity problems with this approach). The approach in these cases would be correct if the subsidiarity principles were not to be expanded to include legislation like the NCA, which was not promulgated with a specific human right in mind. Nevertheless, I argue that subsidiarity should cover these instances as well.

I find justification for my argument in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* ("*Pharmaceutical Manufacturers*"), where Chaskalson CJ set out what was to become – in my view – the policy reason behind the CC's subsidiarity principles:

> "There are not *two systems of law*, each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court. There is *only one system of law*. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control."[311] (My emphasis.)

In this respect, I also rely on an argument made by Van der Walt in the context of applying the subsidiarity principles to section 25 of the Constitution (which aspect will become relevant in chapter 6 below). As mentioned above, one of the possible problems with the subsidiarity principles is that they seemingly exclude pre-constitutional legislation and post-constitutional legislation that was not specifically enacted to give effect to a specific section in the Bill of Rights (for my purposes, sections 26 and 25). Therefore, to make sense of the subsidiarity principles, Van der Walt suggests (in the section 25 context) as follows:

> "[The subsidiarity principles] should also apply to older, preconstitutional and partial legislation insofar as doing so would promote the purpose of these principles, namely to ensure constitution-focused application, interpretation and development of legislation and the common law, in line with the one-system-of-law principle established by the Constitutional Court."[312]

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[311] 2000 2 SA 674 (CC) para 44. This principle was applied in, amongst others, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 4 SA 490 (CC) para 22; *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as* Amici Curiae*)* 2006 2 SA 311 (CC) para 436; *South African National Defence Union v Minister of Defence and Others* 2007 5 SA 400 (CC) para 51. See also C Hoexter *Administrative law in South Africa* (2nd ed 2012) 117; L du Plessis "Interpretation" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2008) 32-152.

[312] AJ van der Walt *Constitutional property law* (3rd ed 2011) 68 (footnote omitted), with reference to AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128 106-114. For a critical response to Van der Walt notion of subsidiarity, see K Klare "Legal subsidiarity & constitutional rights: A reply to AJ van der Walt" (2008) 1 *CCR* 129-154.

Therefore, Van der Walt points to the "one-system-of-law principle" as it was expressly endorsed by the CC in *Pharmaceutical Manufacturers*. This principle underlies the rationale behind the subsidiarity principles. The CC wanted to avoid the situation where two parallel streams of law could develop, one based on the Constitution and one based on the common law. In such a dual system persons would be able to choose between relying on a constitutional right or a principle under the common law (or legislation, for that matter) when presenting a cause of action or defence. The dispute in question would, therefore, be capable of being resolved in either one of two separate systems of law. This state of affairs is precisely what the CC wants to avoid with its subsidiarity principles, because the existence of two parallel systems of law would inevitably undermine the transformative effect of the Constitution.

As Hoexter[313] mentions, subsidiarity also agrees with what Currie and De Waal[314] call the "principle of avoidance". Du Plessis[315] also states that this principle "rather crudely" informs subsidiarity. The principle of avoidance was first conceived in the CC decision of *S v Mhlungu & Others*[316] ("*Mhlungu*"):

> "I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."[317]

Accordingly, even though the Bill of Rights is always applicable to a legal dispute, it should not be applied directly unless it is necessary to do so.[318] Currie and De Waal explain that

> "a court must apply the provisions of ordinary law to resolve the dispute, especially in so far as the ordinary law is intended to give effect to the rights contained in the Bill of Rights ... They must first be applied, and if necessary interpreted generously to give effect to the Bill of Rights, before a direct application is considered."[319]

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[313] C Hoexter *Administrative law in South Africa* (2nd ed 2012) 119-120.
[314] I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 75.
[315] L du Plessis "Interpretation" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2008) 32-143 and 32-150.
[316] 1995 3 SA 867 (CC).
[317] Para 59 per Kentridge AJ, confirmed in *Zantsi v Council of State, Ciskei* 1995 4 SA 615 (CC) para 8; *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) para 21. See also C Hoexter *Administrative law in South Africa* (2nd ed 2012) 116; L du Plessis "Interpretation" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2008) 32-142 - 32-143; L du Plessis "'Subsidiarity': What's in the name for constitutional interpretation and adjudication?" (2006) 17 *Stell LR* 207-231 207 and other examples cited at 207 n 1; I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 75.
[318] I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 77.
[319] 77 (footnotes omitted). At 78 the authors also caution that the principle of avoidance is not absolute, for example, where it is clear that there are no other remedies available other that one based on the Bill of Rights directly.

Currie and De Waal seem to be willing to apply the principle of avoidance also in cases where the "ordinary law" in question was not as such intended to give effect to a specific right in the Bill of Rights, but there is nonetheless normal law applicable to the situation. Similarly, Hoexter does not seem to limit the principles of subsidiarity, but simply suggests "that priority should be given to legislation, especially legislation giving effect to a constitutional right".[320] In other words, both Currie and De Waal and Hoexter acknowledge that subsidiarity applies *especially* where there is legislation that gives specific effect to constitutional rights. However, none of them denies that the effect can be broader. The way that Du Plessis explains subsidiarity (based on *Mhlungu*) is also broad enough to accord with my argument:

> "Adjudicative subsidiarity is centred on issues: it suggests a preference for an indirect (or not strictly) constitutional mode of adjudication over a directly (or strictly) constitutional mode of adjudication whenever the solution of a legal question admits of the former (and does not of necessity require the latter). The authority of the Final Constitution is, in other words, not to be overused to decide issues that can be disposed of by invoking specific, subordinate and non-constitutional legal norms, *on the crucial condition, of course, that the solution arrived at, as well as the norm putting it forward, can withstand constitutional scrutiny*."[321] (Original emphasis.)

Hence, the question is whether the CC – when requested to do so – would expand the interpretation of subsidiarity as I explain above. Would the court insist upon a principle that debtors must rely on the NCA and that courts have to apply the NCA when adjudicating credit disputes (even those that may result in the forced sale of homes)? I submit that the CC would be willing to do so, since the alternative would patently violate the one-system-of-law principle. When applying the NCA to these disputes, courts would then of course take account of the Bill of Rights and interpret the Act accordingly. In this respect, Du Plessis's emphasised qualification in the above-quoted passage is especially important. Applying subordinate and non-constitutional norms does not at all imply that constitutional norms are ignored. One can even go further and argue that the solution arrived at *must* be inspired by constitutional goals and *must* promote the spirit, purport and objects of the Bill of Rights. This should be the case even if the Constitution is not applied directly. Therefore, subsidiarity does not refer to a policy of deference, in the sense that the Bill of Rights is ignored where

[320] C Hoexter *Administrative law in South Africa* (2nd ed 2012) 484.

[321] L du Plessis "Interpretation" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2008) 32-150. The author distinguishes between adjudicative and jurisdictional subsidiarity, the former category being the one I am currently concerned with and the latter referring to the principle that disputes should, where possible, be resolved by subordinate institutions. This aspect is irrelevant for current purposes: In general, see also L du Plessis "'Subsidiarity': What's in the name for constitutional interpretation and adjudication?" (2006) 17 *Stell LR* 207-231.

there is legislation in place. Instead, the NCA should be applied and interpreted as part of the "defined and carefully calibrated constitutional matrix" that the CC in *PE Municipality* referred to.[322]

The NCA is an integral part of the single system of law under the supreme Constitution that regulates, amongst others, the enforcement of credit agreements as well as provides for debt relief mechanisms. When the enforcement of these agreements happens to have implications for debtors' constitutional housing and property rights, these constitutional rights must primarily be given effect to through the "matrix" that is in place. In this view of the subsidiarity principles, courts would have to decide all consumer debt enforcement cases primarily with reference to the NCA. In terms of the first subsidiarity principle, since there is legislation in place (the NCA), debtors must first seek a remedy or defence within the bounds of the Act. The Act should simultaneously be interpreted so as to give full effect to the Bill of Rights.

If the Act does not incorporate the proportionality requirement of a justifiable limitation of section 26(1) rights, the court should firstly employ the various interpretative techniques – for instance, reading in – to try and read the Act in line with the Constitution. If such interpretation is not feasible, the second option is to declare the Act (or a specific provision) unconstitutional. The first option is exactly what the CC did in *Jaftha*. Even though the MCA was not specifically enacted to give effect to peoples' section 26 rights, the CC applied subsidiarity (probably without realising it) when it, instead of creating a separate constitutional defence or developing the common law, amended the applicable legislation (the MCA) through reading in so as to render it constitutionally compliant. However, if interpretive techniques like reading in are inappropriate or insufficient to resolve an apparently unconstitutional provision in the NCA, the court would have to strike out the unconstitutional section and allow the legislature to amend the Act. In the meantime, an interim development of the common law or a constitutional remedy might be appropriate, since there would be no (valid) legislative measure to regulate the situation.

The point is that the NCA was enacted by Parliament with the express purpose to, amongst others, address the negative consequences of over-indebtedness, which by implication include foreclosure and the sale in execution of homes. For the courts to manifestly ignore the framework that the legislature has put in place would be unjustifiable in view of the

[322] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 14.

democratic nature of the constitutional system. In the same way, for a debtor to bypass the NCA and rely directly on section 26(1) should not be allowed, especially because the NCA provides specific remedies to assist the debtor with the over-indebtedness that is causing his or her home to be threatened. Moreover, if the NCA provides a way to give ample effect to debtors' section 26(1) rights, then it would be inappropriate to bypass the NCA and instead develop the common law principles of mortgage law.

I argue in chapter 4 below that any foreclosure scenario that would result in a disproportionate violation of the debtor's "access to adequate housing" is sufficiently provided for in the NCA. My position is that if the NCA is interpreted and applied correctly – and, crucially, through a constitutional lens – the outcome will be proportionate. If not, the Act itself must be attacked for lack of compliance, since section 26(3) requires that no law (including the NCA) may permit arbitrary evictions. For example, as I explain in 4 4 below, factors like "trifling" amounts in arrears, which may render full-blown foreclosure and forced sale of the home disproportionate, are sufficiently provided for within the framework of the NCA. The Act provides carefully designed debt relief mechanisms that liberally give opportunities to debtors who wish to avoid the loss of their homes.[323] In addition, the right – created in the NCA – to reinstate credit agreements[324] has even been called "the beacon ... that keeps the hope alive" for debtors who wish to "weather the hard times and keep their homes, and dignity".[325] Therefore, I present that the NCA adequately gives effect to section 26 (and section 25) of the Constitution. In the one area where it does not, this deficiency can probably be easily rectified with a reading-in remedy.[326]

In conclusion, if this dissertation finds (as it does) that certain elements of the common law of mortgage is inconsistent with the Bill of Rights (specifically sections 25 and 26), the common law should presumably be developed to remedy this inconsistency. Yet, if there is legislation present that gives effect to sections 25 and 26, it is inappropriate (in view of section 8(2)(a)) to develop the common law. Instead, the focus then shifts to the applicable legislation. For purposes of the research problem that this dissertation addresses, I argue that the applicable legislation is the NCA. The NCA was not expressly enacted to give effect to a specific provision in the Bill of Rights, as opposed to PAJA, for example, which was enacted specifically to give effect to section 33. Nevertheless, I argue in this dissertation that the

[323] See *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 (D) para 25.
[324] See 4 3 2 below.
[325] *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) para 35 n 36 per Hartle J.
[326] See 4 3 4 7 below.

NCA does give effect to the requirements of sections 25 and 26 of the Constitution, at least in the context of residential mortgage foreclosures, even though this effect was not expressly anticipated by the drafters of the Act.

3 6 Conclusion

Section 26(3) of the Constitution requires procedures that would lead to an eviction from a home to be authorised by an order of court, which may only be granted after all relevant circumstances had been considered. A sale in execution of residential property qualifies as such a procedure that can result in an eviction. Therefore, section 26(3) applies to mortgage foreclosures, which is confirmed and given effect to by HCR 46(1)(a)(ii). The purpose of judicial oversight is to take "all the relevant circumstances" into consideration and, therefore, to ensure that a home is only lost when it is just and lawful. The all-the-relevant-circumstances enquiry is underlined by section 26(1) of the Constitution, which provides persons with "the right to have access to adequate housing". Consequently, the court's discretion is aimed at ensuring that section 26(1) is given effect to during mortgage foreclosure cases. Although it is established that the foreclosure of a home loan mortgage bond may lead to the sale in execution of the debtor's home, it is also clear that the forced sale of the debtor's home will limit his or her right of "access to adequate housing". However, the limitation of section 26(1) rights does not mean that the home may not be sold to satisfy the mortgage debt. Section 26(1) does not grant an absolute right and a person's rights of "access to adequate housing" can be limited if it is justifiable in terms of section 36(1) of the Constitution. Therefore, the sale in execution must accomplish a proportionate result.

After explaining the history and basis for the above-summarised approach, this chapter provided an analysis of how this principle is to be applied in the foreclosure context. I described that there are two tests in this regard. Firstly, there is a broad analysis based on the general public purpose justifications for the practice of selling homes in execution for mortgaged debts. I argued that the sale in execution process satisfies this broad enquiry, since debt enforcement and the facilitation of homeownership are valid and legitimate public purposes. However, this chapter went further and discussed the necessity to conduct individualised proportionality tests that will depend of the unique facts of each case. The size of judgment debts and the size of amounts in arrears are the most constitutionally problematic

aspects of the proportionality test. The reason for this is that the common law allows mortgage creditors to directly execute against the debtor's home, irrespective of the fact that there may be other assets available, execution against which might satisfy the debt or at least get the arrears up to date. This result may render the loss-of-home outcome of many foreclosure cases unnecessary and, therefore, disproportionate in terms of sections 26(1) and 36(1) of the Constitution. The inevitable question is whether and how the common law should be developed to address this constitutional inconsistency.

The last part of the chapter served as a bridge between this one and chapter 4 below, namely to provide details on the subsidiarity approach that I follow in the rest of the dissertation. Therefore, I already pointed towards my ultimate conclusions, namely that the NCA incorporates a proportionate result that would render any extra developments to the common law unwarranted.

CHAPTER 4
THE NATIONAL CREDIT ACT

4 1 Introduction

This chapter deals with the impact of the National Credit Act 34 of 2005 ("the NCA" or "the Act")[1] on the enforcement of mortgage bonds. The purpose is to explain how the NCA contributes to answering my main research question – in other words, when does South African law allow a home to be sold in execution of a mortgage debt? In this chapter the aim is to provide a description of certain debt relief mechanisms provided in the Act. These devices are then linked with the problems posed in the previous chapter. In other words, this chapter shows how the unconstitutional aspects of the common law of mortgage (areas where the traditional principles of foreclosure cast the net so wide as to render the outcomes disproportionate) are remedied by legislative intervention into the credit market.

The NCA repealed and substituted all previous credit consumer legislation,[2] and is furthermore seen as a complete replacement of former legislation and not merely as an amendment.[3] Consequently, the law governing credit relationships should henceforth be seen in a new light, since the entire legal dispensation was replaced. The NCA embodies one of the biggest developments in credit law since the constitutional era commenced. This Act adds a new dimension to the mortgage foreclosure procedure and directly impacts the mortgagee's right to enforce its rights, by extending comprehensive protection to the over-indebted mortgagor. For mortgage debtors who face the loss of their homes, the NCA provides a

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1 Unless indicated otherwise, sections referred to in this chapter refer to sections of the NCA. The NCA became operative in three phases and became of full effect on 1 June 2007. For general introductory purposes, see JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 1-10; JM Otto "Introduction and historical background to the National Credit Act" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) ch 1; JW Scholtz "Objects and interpretation of the National Credit Act" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) ch 2; M Kelly-Louw "Introduction to the National Credit Act" (2007) 15 *JBL* 147-159. For early comments on the NCA, see ML Vessio "The preponderance of the reckless consumer - The National Credit Bill 2005" (2006) 69 *THRHR* 649-657 S Renke & M Roestoff "The Consumer Credit Bill - A solution to over-indebtedness?" (2005) 68 *THRHR* 115-121.

2 S 172(4). The repealed legislation are the Usury Act 73 of 1968; the Credit Agreements Act 75 of 1980; and the Integration of Usury Laws Act 57 of 1996. In terms of s 172(2), read with sch 2, the NCA also partially repealed 15 other acts. For a summary of events leading up to the enactment of the NCA, see M Kelly-Louw "Introduction to the National Credit Act" (2007) 15 *JBL* 147-159 147-149. For an overview of the history of credit consumer protection in South Africa, see JM Otto "The history of consumer credit legislation in South Africa" (2010) 16 *Fundamina* 257-273.

3 *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 3 SA 581 (SCA) para 1; *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) para 15.

framework for mediating the conflict between the parties. Therefore, the NCA might contribute to preventing the detrimental effect that the loss of a home can have for over-indebted mortgagors[4] but in such a way that creditors' rights are not unjustifiably compromised.

Consumer credit law has significant implications for the ease with which mortgagees can enforce their real security rights. The protection measures aimed at protecting debtors may negatively impact the rights of credit providers, more specifically their right not to be deprived of property protected by section 25(1) of the Constitution.[5] Therefore, there are conflicting interests at stake. Even though consumers are entitled to protection, creditors (and their shareholders and investors) are equally entitled, as Otto argues, to receive the fair profits they are entitled to.[6] More specifically, creditors often have entitlements in terms of real security rights.

A large number of credit consumers are previously disadvantaged individuals with low incomes.[7] As a result of low levels of bargaining power and lack of financial sophistication, many were (and are) enticed into unaffordable credit agreements. These persons also find themselves in mortgage relationships, which fact requires courts to take a more context-sensitive approach when resolving disputes.[8] Furthermore, historically disadvantaged persons are often those who are the most vulnerable to homelessness. Nevertheless, it is evident that the NCA offers much needed protection and relief to all South Africans, regardless of their financial stature.[9]

One must moreover consider the impact of the recent global economic downturn (the so-called "credit crunch"), brought on by a subprime mortgage crisis and leading to an increased

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4 See *First Rand Bank Ltd v Dhlamini* 2010 4 SA 531 (GNP) para 30.

5 I address these aspects in 6 4 below. For example, consumer protection places a heavy burden on suppliers of goods and services – including providers of financial services – regarding compliance with the consumer protection legislation: See T Woker "Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act" (2010) 31 *Obiter* 217-231 217.

6 JM Otto "The history of consumer credit legislation in South Africa" (2010) 16 *Fundamina* 257-273 259.

7 A historically disadvantaged person is defined in s 2(6). Typically, these are groups of persons who suffered under the disadvantages of the apartheid era as a result of, amongst others, racial discrimination. The ideal to promote an accessible credit market to such persons is one of the Act's purposes as set out in s 3(a). See *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ), discussed in 4 3 4 7 below.

8 See *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) para 19.

9 The Act (save for some exceptions) generally places no ceiling on the size of the credit agreements that are regulated by it: See JM Otto "The history of consumer credit legislation in South Africa" (2010) 16 *Fundamina* 257-273 271.

level of home loan defaults and foreclosures.[10] This crisis was mainly brought on by reckless lending practices and people concluding loan agreements that were above their financial means.[11] An unregulated credit market can clearly have devastating effects.[12] Therefore, responsible lending and borrowing is crucial for economic health and sustainability.[13] The effects of this crisis can also be observed in the local South African economy.[14] As a result of the economic decline many people (more than would otherwise be the case) find themselves in over-indebted circumstances, facing foreclosure and the consequent loss of their homes.[15] Therefore, when considering how debt enforcement leads to a potential increase in residential sale in executions, one must take cognisance of the specific economic climate experienced at that point in time.[16] In an economic downturn the social impact of a recession should not be

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[10] The court in *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) para 15 took cognisance of the economic climate, especially with regard to the impact economic crises have on debtors at the lower end of the market.

[11] For an explanation of this crisis as it developed in the United States of America, see PA McCoy *et al* "Systemic risk through securitization: The result of deregulation and regulatory failure" (2009) 41 *Conn L Rev* 1327-1361. See also A Shah "Global financial crisis" *Global Issues* (30-09-2010) <http://www.globalissues.org/article/768/global-financial-crisis> (accessed 5-10-2010).

[12] See JW Singer "Property law and the mortgage crisis: Libertarian fantasies and subprime realities" (2011) 1 *Property Law Review* 7-20.

[13] See *FirstRand Bank Ltd t/a First National Bank v Seyffert and Another and Three Similar Cases* 2010 6 SA 429 (GSJ) para 10 per Willis J: "[R]esponsibly granted credit has a 'multiplier effect' in an economy ... money-lending not only creates wealth but jobs as well."

[14] Due to the global economic slowdown, as brought on by the credit crisis, the South African economy went into a recession in late 2008 for the first time since 1992: See Anonymous "South Africa goes into recession" *BBC News* (26-05-2009) <http://news.bbc.co.uk/2/hi/business/8068126.stm> (accessed 11-11-2010). However, the South African economy is not so much suffering from the direct effects of the global credit crisis but is experiencing the secondary effects, in particular due to a decrease in exports. Apparently the introduction of the NCA in 2007 played a role in preventing a direct impact on the South African banking and mortgage system and this assisted in foreclosures not being as rampant as in countries such as the United States of America: See T Woker "Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act" (2010) 31 *Obiter* 217-231 231; D Marrs "The global financial crisis and emerging economies: Role model South Africa" *Heinrich Böll Stiftung Southern Africa* (date unknown) <http://www.boell.org.za/web/144-258.html> (accessed 5-10-2010). JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 2 n 6 agree that the NCA safeguarded South Africa against the overextension of credit that the world at large experienced. However, the authors state that the Act only safeguarded South Africa to a limited extent, since a lot of the damage had by 2007 already been done. See also JM Otto "The history of consumer credit legislation in South Africa" (2010) 16 *Fundamina* 257-273 273.

[15] According to M Kelly-Louw "Protection of homeowners against various interest rate hikes" (2010) 22 *SA Merc LJ* 27-49 27-28, rising interest rates also cause many mortgagors to become over-indebted and lose their homes, and because this state of affairs is neither a result of their negligence or intent, it seems unfair. See also PS Munyai "Higher interest rates and over-indebtedness: A comparison of conventional and Islamic banking" (2010) 22 *SA Merc LJ* 405-416 , who advocates a fixed interest rate, which will result in a predictable repayment plan for debtors. The author argues – based on Islamic banking practice – that a fixed cost of credit will significantly reduce over-indebtedness, since dramatic increases in interest rates are often the primary reason for debtors becoming over-indebted.

[16] See L Fox O'Mahony & JA Sweeney "The idea of home in law: Displacement and dispossession" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 1-11 1:

> "[T]he significance of the home as dwelling place has been highlighted in the rise in repossession and foreclosure statistics following the recent crunch in the credit and housing markets."

ignored as a contextual factor when discussing these matters. The NCA introduced measures aimed at dealing with problems like this, namely by providing help for over-indebted consumers and regulating the credit providers' right to enforce their mortgage bonds. This may soften the blow that mortgage foreclosure would otherwise cause during difficult economic times. One can say that the NCA provides a softer landing zone for consumers who fall in arrears with their contractual obligations.

Since my research is not focused solely on consumer credit law, this chapter will not include all the details of the NCA, but only the main areas in which it influences mortgage foreclosures, in other words the enforcement of debt that is secured by mortgages.[17] Even though the NCA has only been in full operation for a couple of years, there has been a high number of high court decisions. Due to poor drafting[18] and uncertainties regarding the interpretation of some sections, there are still many unresolved questions, including practical problems, with the Act. Jurisprudence is developing relatively fast, though the courts are still voicing differing opinions on some disputed issues. Even though the SCA has answered some questions, many are still unclear.[19]

The main areas this chapter focuses on are, firstly, debt enforcement procedures;[20] secondly, the right to reinstate credit agreements;[21] thirdly, the impact of reckless credit;[22] and fourthly, the impact of debt review and over-indebtedness.[23] My purpose is to investigate how these measures, on the one hand, provide protection for mortgagors against the loss of their homes and, on the other hand, limit or regulate the mortgagees' contractual and

[17] The NCA also has an impact on the conclusion of credit agreements. For example, reg 31 prescribes the form intermediate and large agreements must take. This form is very detailed and comprehensive and may lead to a very lengthy credit agreement. The purpose of this form is to disclose as fully as possible to the consumer what he or she is letting him- or herself in for. For a detailed explanation of this form and also the consequences of not complying with these formal requirements, see JM Otto "Conclusion, alteration and termination of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 9-3 - 9-7. To keep the scope of my dissertation within the bounds of the enforcement of credit agreements, my discussion assumes that the agreement was validly entered into with the necessary consensus and compliance with the NCA. For an interesting discussion as regards consensus in credit agreements, see K Mould "Tacit responsibilities assigned to the drafter of a credit agreement by the National Credit Act 34 of 2005 with particular emphasis on contractual consensus: A critical analysis" (2008) 33 *JJS* 109-127.

[18] The drafting of the NCA is often criticised: For examples, see *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 3 SA 581 (SCA) para 2; *FirstRand Bank Ltd t/a First National Bank v Seyffert and Another and Three Similar Cases* 2010 6 SA 429 (GSJ) para 10.

[19] The most important SCA cases thus far are *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA); *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 3 SA 581 (SCA); *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA).

[20] See 4 3 1 below.

[21] See 4 3 2 below.

[22] See 4 3 3 below.

[23] See 4 3 4 below.

proprietary rights. Based on the subsidiarity principles,[24] my ultimate purpose is to show why the NCA renders it unjustified to develop the common law. My hypothesis is that the debt relief mechanisms of the NCA provide solutions for all the areas in which the traditional principles of foreclosure may result in disproportionality.[25] The NCA also takes away much of the uncertainty that would be caused by a case-by-case proportionality analysis in terms of sections 26(1) and 36(1) of the Constitution. Therefore, I ultimately argue that the NCA already incorporates the proportionate outcome required by the Constitution, especially if the Act is applied and interpreted through a constitutional prism.

4 2 Application and interpretation

The Act defines a mortgage as "a pledge of immovable property that serves as security for a mortgage agreement" and a mortgage agreement as "a credit agreement that is secured by a pledge of immovable property".[26] Despite this poor drafting, it is accepted that one has to interpret these definitions to mean that a mortgage is simply the limited real right that comes about as a result of the registration of a mortgage bond over immovable property.[27]

The NCA applies to every credit agreement where parties deal at arm's length and if the agreement is concluded or has an effect within South Africa.[28] The Act then provides for a number of exceptions,[29] namely credit agreements that do not fall under the NCA, none of which refer to mortgages. However, with regard to mortgages the NCA does not apply when

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[24] See 3 5 above.

[25] See 4 4 below.

[26] S 1 *s v* "mortgage" and "mortgage agreement". For the applicability of the NCA to mortgages (and in general), see JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 17-31; E van Zyl "The scope of application of the National Credit Act" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 4-1; JM Otto "Types of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 8-9; PN Stoop "Kritiese evaluasie van die toepassingsveld van die 'National Credit Act'" (2008) 41 *De Jure* 352-370; S Renke *et al* "The National Credit Act: New parameters for the granting of credit in South Africa" (2007) 28 *Obiter* 229-270 230-238.

[27] These definitions have been criticised since it is dogmatically incorrect to refer to the *pledge* of immovable property, since only movable property can be pledged. Furthermore, a mortgage serves as security for a *debt* and not as security for a credit agreement: See JM Otto "Types of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 8-9; JM Otto "The history of consumer credit legislation in South Africa" (2010) 16 *Fundamina* 257-273 273. As the court in *ABSA Bank Ltd v Brown and Another, ABSA Bank Ltd v Van Deventer and Another* (2672/2011) [2012] ZAECPEHC 8 (7 February 2012) para 28 per Eksteen J commented, "[p]erhaps the less said about the content of these definitions the better".

[28] S 4(1). This condition is subject to ss 5 and 6. S 5 deals with the limited application of the NCA to incidental credit agreements and s 6 refers to certain chapters of the Act not applicable to juristic persons. Moreover, s 4(2)(b) provides for arrangements considered not to be at arm's length.

[29] S 4(1)(a) to (d).

the consumer is a juristic person.[30] This implies that homes owned through entities such as family trusts will not enjoy the protection of the NCA.

Any agreement will be a credit agreement if it falls within one of four categories: Credit facilities, credit transactions, credit guarantees or any combination of these three.[31] A mortgage agreement is a credit transaction and it, therefore, falls into the second category.[32] Credit agreements are further categorized – based on the nature and monetary value of the agreement – as small, intermediate or large agreements.[33] A mortgage agreement is always a large credit agreement, irrespective of its monetary value.[34] Consequently, it is clear that a mortgage agreement is an agreement that falls under the application of the NCA.[35]

The purposes of the NCA[36] are important because the Act must be interpreted in a manner that gives effect to these purposes.[37] As a result, the purposes should have a real and often decisive effect on the interpretation of the Act.[38] The purposes of the Act are

> "to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers".[39]

The NCA also prescribes methods whereby it purports to achieve its purposes. Section 3(c), (g) and (i) are relevant and provide that the purposes should be achieved by

> "(c) promoting responsibility in the credit market by
> (i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and

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[30] S 4(a)(i) states that the Act does not apply to a consumer who is a juristic person with an asset value or annual turnover that equals or exceeds the threshold determined by the minister in terms of s 7(1). The threshold is currently R1 000 000: See *Government Gazette* 28893, GN 713 (1 June 2006). S 4(b) provides that the NCA does not apply to a large credit agreement where the consumer is a juristic person with an asset value or annual turnover that is below the threshold. A mortgage agreement is a large credit agreement. Therefore, both of these provisions clearly exclude consumers who are juristic persons from the Act's application when it comes to mortgages.

[31] S 8(1). S 8(2) provides for certain agreements which will not be credit agreements, none of which refer to mortgage agreements.

[32] S 8(4)(d).

[33] S 9(2) to (4). See also JM Otto "Types of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 8-22. Small agreements concern a principal debt of R15 000 or less. Intermediate agreements concern a principal debt between R15 000 and R250 000. Large agreements concern a principal debt of R250 000 or more: See *Government Gazette* GN, 713 28893 (1 June 2006).

[34] S 9(4)(a).

[35] *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 1.

[36] S 3.

[37] S 2(1).

[38] JW Scholtz "Objects and interpretation of the National Credit Act" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 2-9.

[39] S 3.

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;

...

(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

...

(i) providing for 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." [40]

The Act has express socio-economic aims that, according to Scholtz, are ambitious and perhaps idealistic.[41] In fact, it can be said that socio-economic considerations partly inspired the enactment of the NCA.[42] This socio-economic element emphasises the importance of taking the NCA into consideration when analysing the development of mortgage foreclosure under the constitutional dispensation. The role that the NCA can play to alleviate the financial and socio-economic pressures on over-indebted homeowners faced with foreclosure is potentially invaluable. Combating and preventing homelessness is after all a socio-economic aim of the Constitution, as represented in section 26. Hence, the NCA must necessarily be interpreted and applied in light of section 26 of the Constitution.[43] The NCA should arguably give the maximum level of protection to defaulting credit consumers who face the loss of their homes.[44] Consumer credit law forms part of the general trend in South Africa to extend increased protection to individuals and consumers.[45] Protection is particularly necessary in light of the unequal bargaining power that usually exists between powerful credit providers and consumers who are desperate for capital.[46]

The SCA confirmed that, even though the Act's main object is to protect consumers, the interests of credit providers should also be safeguarded and not overlooked.[47] Although the Act aims to prevent and relieve over-indebtedness, it is also clear that the Act subscribes to

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[40] See also the preamble of the NCA.

[41] JW Scholtz "Objects and interpretation of the National Credit Act" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 2-6 - 2-8.

[42] *Wesbank a Division of Firstrand Bank Ltd v Martin* (13564/2010) [2010] ZAWCHC 173 (13 August 2010) para 6.

[43] Legislation must be interpreted to promote the spirit, purport and objects of the Bill of Rights: See s 39(2) of the Constitution.

[44] See *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) para 10.

[45] For an explanation of the need for consumer protection in general, see T Woker "Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act" (2010) 31 *Obiter* 217-231. The Consumer Protection Act 68 of 2008, which came into operation on 1 April 2011, is an example of comprehensive consumer protection measures. With regard to the overlap between the Consumer Protection Act 68 of 2008 and the NCA, see N Melville & R Palmer "The applicability of the Consumer Protection Act 2008 to credit agreements" (2010) 22 *SA Merc LJ* 272-278.

[46] *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) para 3.

[47] *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA) para 17.

the eventual satisfaction of debt and not the avoidance thereof.[48] It is not the purpose of the NCA to transform South Africa into a "debtor's paradise" or "to facilitate the wholesale evasion of debt under the banner of 'consumer protection'".[49] The provisions of the Act are not "a sanctuary to hide behind" for debtors who cannot disclose a defence against their creditors' actions either.[50] Moreover, the courts have emphasised the important role of credit providers in a modern economic society.[51] There needs to be a balance of all the interests involved and the focus should never only be on the interests of either the debtor or the creditor.[52] In this respect I propose that the policy of the NCA should be seen as being neither pro-debtor nor pro-creditor, since either approach would have unjust results. When it comes to interpreting the NCA, the following approach seems to be a sound one:

> "Interpretation of the various sections of the NCA involves an attempt to balance the interests of both lenders and borrowers in such a way as to facilitate the flow of credit in a responsible manner, and to provide debt relief where appropriate. The financial stability of credit providers is in this context as important as that of the consumers. The more successful the credit provider, the more credit that is available in the capital markets and the more favourable the rates that are available to consumers. Consumers benefit when credit providers are successful. The failure of

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[48] S 3(g) embodies the fact that the NCA must also be applied in light of s 34 of the Constitution, which provides for the right of access to courts. This right guarantees that persons can approach the courts to enforce contractual agreements. S 34, titled "Access to courts", provides as follows:

> "Everyone 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."

See *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) para 40, where it was stated that the NCA limits the common law rights of creditors as well as their constitutional right of access to courts. According to *Ivoral properties (Pty) Ltd v Sheriff, Cape Town, and Others* 2005 6 SA 96 (C) para 40 the courts have a civil duty to assist people with the enforcement of their rights, including civil claims. The right to have claims enforced is incidental to the s 34 right of access to courts. See also *Chief Lesapo v North West Agricultural Bank and Another* 2000 1 SA 409 (CC) para 13. In 6 4 2 3 below I also argue that the creditor's entitlement to receive repayment of the debt is protected under s 25(1) of the Constitution – the property clause.

[49] *FirstRand Bank Ltd t/a First National Bank v Seyffert and Another and Three Similar Cases* 2010 6 SA 429 (GSJ) para 10 per Willis J.

[50] *Changing Tides 17 (Pty) Ltd NO v McDonald and Another* (22859/09) [2011] ZAGPPHC 106 (5 May 2011) para 7 per Mavundla J.

[51] See *SA Taxi Securitisation (Pty) Ltd v Nako and Others* (19/2010, 21/2010, 22/2010, 77/2010, 89/2010, 842/2010) [2010] ZAECBHC 4 (8 June 2010) para 35, where Kemp J commented as follows:

> "To interpret the Act through the lenses of 'the promotion and protection of consumers' is with respect to lose sight of the other objectives of the Act and to load the bias in favour on consumers unfairly against the rights of the credit providers and ultimately, to potentially prejudice the rights of consumers, as their well-being and accessibility to credit is premised on a healthy and profitable industry."

[52] *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 3 SA 581 (SCA) para 2; *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 10. See also HCJ Flemming *Flemming's National Credit Act* (2nd ed 2010) 60-62.

> credit providers adversely affects consumers and the flow of credit. Both groups are dependent upon each other and that is why a balancing act is necessary."[53]

Consequently, when discussing consumer protection, a fine balance must always be struck between the interests of the various parties. A hypothesis of this dissertation is that the absence of such a balance will negatively impact credit providers and consumers, directly or indirectly. Any disequilibrium must be avoided. In this regard the SCA quoted with approval the following comment by Vessio:

> "What is equally, if not more important, is an actual balancing of the interests of both credit consumers and credit grantors. The reason for the emphasis on this balance is that over-protecting the consumer may result in the investor (credit grantor) withdrawing his funding from the consumer credit market, due to the fact that the general administrative expenses of making credit available, no longer proves a lucrative venture due to stringent consumer laws. Another feature of the over-protection of the consumer may be the passing-on of administrative costs to the consumer. A subtle balance needs to be obtained. The risk of over-protecting the consumer could prove detrimental."[54]

4 3 Debt relief mechanisms

4 3 1 Debt enforcement

4 3 1 1 Introduction

One of the credit provider's most important rights is the right to enforce the credit agreement.[55] This right enables the credit provider to receive payment of the capital sum as well as the interest agreed upon. In the event of a breach of contract by the consumer, the credit provider also has the right to cancel the agreement and, in the case of mortgage

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[53] *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 1 SA 310 (GSJ) para 38 per Levenberg AJ.

[54] ML Vessio "The preponderance of the reckless consumer - The National Credit Bill 2005" (2006) 69 *THRHR* 649-657 650, as quoted in *Desert Star Trading 145 (Pty) Ltd and Another v No 11 Flamboyant Edleen CC and Another* 2011 2 SA 266 (SCA) para 2 per Ponnan JA.

[55] On debt enforcement under the NCA in general, see JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 98-117; C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) ch 12; N Campbell "The consumer's rights and credit provider's obligations" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 6-15; CM van Heerden & JM Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655-684; S Renke *et al* "The National Credit Act: New parameters for the granting of credit in South Africa" (2007) 28 *Obiter* 229-270 260-265. See also H Taylor "Enforcement of debt in terms of the National Credit Act 34 of 2005, trial and celebration? A critical evaluation" (2009) 42 *De Jure* 103-119 114-117; E Levenstein "Enforcing debt repayments will become cumbersome and prolonged" (2007) 7 *WP* 5-7. For more details on the impact of the NCA on the civil procedural aspects of debt enforcement, see H Coetzee *The impact of the National Credit Act on civil procedural aspects relating to debt enforcement* (2009) unpublished LLM dissertation Pretoria University.

agreements, claim foreclosure.[56] However, the right to enforce the credit agreement is significantly curtailed by sections 123, 129 and 130 of the NCA,[57] which therefore limit the credit provider's rights to exercise its remedies.[58] However, these rights are not absolutely forbidden, but instead "their implementation is merely curtailed".[59] Otto refers to sections 129 and 130 as "obstacles in the way of debt enforcement".[60] Even though the Act contributes significantly to the protection of debtors, it may prove to be "very cumbersome and detrimental" to credit providers.[61] When discussing debt enforcement, the role of the NCA's debt review procedure must not be overlooked, since, as Otto and Otto comment, there is "a certain degree of interplay" between these two aspects of the NCA.[62]

Prior to the agreed time, a credit agreement may only be "terminated" in accordance with section 123.[63] Mortgages are usually called up (foreclosed) due to the mortgagor (credit consumer) falling into arrears with his or her monthly instalments. Therefore, a mortgage foreclosure qualifies as the termination or cancellation of a credit agreement before the agreed-upon time. Hence, section 123 must be adhered to in order to lawfully foreclose a mortgage. The credit provider may only "enforce and terminate" the agreement if the consumer is in default, and by following the steps set out in Part C of Chapter 6 of the NCA, in other words sections 129 and 130.[64] This rule implies that termination does not consist of a single act, namely the decision of the creditor to invoke the cancellation clause. Rather, the

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56 See 2 4 4 above.

57 JM Otto *The National Credit Act explained* (2006) 85; M Kelly-Louw "The default notice as required by the National Credit Act 34 of 2005" (2010) 22 *SA Merc LJ* 568-594 568.

58 JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 99.

59 99.

60 JM Otto *The National Credit Act explained* (2006) 6.

61 JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 99.

62 99 (footnotes omitted). Debt review is discussed in 4 3 4 2 below.

63 S 123(1). A question that has been raised is whether the concept of "debt enforcement" refers to enforcing compliance with the agreement and, therefore, payment of the debt or whether it can also refer to the cancellation of the agreement. S 123 refers to "terminate", whereas ss 129 and 130 refer to "enforce". These words have led to some confusion because, at first glance, these two concepts seem contradictory. It is difficult to see how a credit agreement can be enforced and terminated at the same time. The ordinary meaning of "enforce" refers to, for example, the enforcement of payment or specific performance of a contractual obligation. In the NCA though, "enforce" probably includes the enforcement of any of the credit provider's remedies by means of legal proceedings, including foreclosure: See *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 3 SA 581 (SCA) para 12; *ABSA Bank Ltd v De Villiers and Another* 2009 5 SA 40 (C) para 13. See also JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 103-104; C van Heerden & H Coetzee "Debt counselling v debt enforcement: Some procedural questions answered: *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD)" (2010) 31 *Obiter* 756-775 770; A Boraine & S Renke "Some practical and comparative aspects of cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part 2)" (2008) 41 *De Jure* 1-15 2; CM van Heerden & JM Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655-684 655.

64 S 123(2). C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 12-4 refers to debt enforcement as a two-stage approach, namely the procedure prior to debt enforcement (s 129) and the procedure during debt enforcement in court (s 130).

termination of the agreement consists of a process and the agreement is only cancelled once all the requirements have been met and the court has granted the relevant order. In the next two sections I discuss two aspects of debt enforcement under the NCA, namely the requirements before debt enforcement and the enforcement procedure in court.

4 3 1 2 Required procedures before debt enforcement

Section 129 prescribes the procedural requirements that have to be observed before the debt can be enforced through litigation.[65] Compliance with section 129(1)(a) is seen as a gateway to debt enforcement litigation.[66] The section requires that a notice of default[67] should be provided to the defaulting consumer:

> "(1) If the consumer is in default under a credit agreement, the credit provider -
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent,[68] consumer court[69] or ombud[70] with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date".

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[65] In general, see JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 99-108; HCJ Flemming *Flemming's National Credit Act* (2nd ed 2010) 195-200; M Kelly-Louw "The default notice as required by the National Credit Act 34 of 2005" (2010) 22 *SA Merc LJ* 568-594. See also the discussion of some of the cases by M Kelly-Louw "Credit law" (2010) 1 *JQR* para 2.3; (2010) 2 *JQR* para 2.2; (2010) 3 *JQR* para 2.3; (2010) 4 *JQR* paras 2.4 and 2.5.

[66] C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 12-9. In terms of s 129(2), s 129(1) is not applicable (and, therefore, no notice is required) if the credit agreement that is being enforced is one "subject to a debt restructuring order" or subject "to proceedings in a court that could result in such an order": See C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 12-25. S 129(2) refers to a situation, for example, where a debt-restructuring order is in place but the consumer fails to perform in accordance therewith and is for that reason in default. In such a scenario the credit provider does not have to first send a s 129(1)(a) notice prior to proceeding with litigation. The reasoning behind this is that because there is a debt-restructuring order in place, a debt counsellor and the court (or at least the court) must have already reviewed the consumer's indebtedness. Therefore, requiring the credit provider to propose to the consumer something that he has already done seems redundant. Debt rearrangement is discussed in 4 3 4 3 below. The "proceedings" referred to s 129(2) does not include a pending application in terms of s 86(11), discussed in 4 3 4 4 and 4 3 4 5 bellow: See *Nitro Securitisation 3 (Pty) Limited v Desmond* 2011 JDR 0101 (ECP) para 22.

[67] The default that debtors should be notified of is not limited to falling in arrears with repayment instalments; they should be notified of any violation of the credit agreement: See *Standard Bank of South Africa Ltd v Jwara and Others* (19765/2011) [2012] ZAGPJHC 5 (8 February 2012) paras 14-15.

[68] An alternative dispute resolution agent is defined in s 1 of the NCA as "a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration".

[69] A consumer court is defined in s 1 of the NCA as "a body of that name, or a consumer tribunal, established by provincial legislation".

[70] An ombud with jurisdiction is defined in s 1 of the NCA as an ombud or statutory ombud as defined in the Financial Services Ombud Schemes Act 37 of 2004, "who has jurisdiction in terms of that Act to deal with a complaint against that financial institution".

Although section 129(1)(a) states that the credit provider "may" draw the default to the consumer's notice, implying that this duty is not compulsory but discretionary, section 129(1)(b)(i) makes it clear that legal proceedings to enforce the agreement may not commence before the notice referred to in section 129(1)(a) has been provided to the consumer.[71] Therefore, the notice is indeed compulsory. The notice of default plays an important role in the foreclosure[72] process and the content of the notice must be consistent with the provisions of the section. The notice should draw the default to the consumer's attention and propose that the consumer refer the matter to either of the institutions referred to in that section. In addition, the purpose of the notice must be made clear to the consumer.[73] The section does not require any of the listed institutions to be involved, but merely purports to make the consumer aware of these possibilities and to give him or her time to avoid litigation.[74] The notice should provide such information as would be sufficient for the

[71] *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 3 SA 581 (SCA) para 8; *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA) para 22; *Standard Bank of South Africa Ltd v Rockhill and Another* 2010 5 SA 252 (GSJ) para 1 n 1; *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 1 SA 549 (KZD) para 2; *Standard Bank of South Africa Ltd v Van Vuuren* 2009 5 SA 557 (T) para 11; *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) paras 24, 34 and 54. See also HCJ Flemming *Flemming's National Credit Act* (2nd ed 2010) 46; JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 103; N Campbell "The consumer's rights and credit provider's obligations" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 6-18. For the notice to be effective, the credit provider would have to comply with the Act as well as with the provisions of the contract: See *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA) para 56.

[72] The notice must also be given before enforcing mortgage agreements, since the section applies to all credit agreements: See C van Heerden & A Boraine "The conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act" (2011) 23 *SA Merc LJ* 45-63 51.

[73] In *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi Inc* 2009 3 SA 348 (B) para 13 the court commented that some credit providers tend to adopt a cold, mechanical and disinterested approach when purporting to comply with s 129(1)(a). These credit providers merely reproduce the words of the subsection without adding any substance, which makes it difficult for consumers to comprehend the content of the notice. The court found that it is possible that credit providers are expected to make the notice practical and understandable to consumers. It was not the legislature's intention that the credit provider must simply reproduce the words of s 129(1)(a) but rather to encourage credit providers to make sincere proposals. This implies that credit providers should apply their minds to the section instead of regurgitating it. See JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 102, who support the court's decision but comment that "courts should not expect too much of credit providers in this regard". The authors (at 102) advise credit providers "to warn consumers of the consequences of ignoring" the notice. In *African Bank Ltd v Myambo NO and Others* 2010 6 SA 298 (GNP) 313, the court held "that the notice should contain the names and contact details of persons that the consumer could contact to discuss the proposal". See also *Nedbank Ltd v Molapisane* 2011 JDR 1795 (GNP) 5-6: If debtors have problems with the content of the s 129(1)(a) notice, they should explain to the court the difficulties they experienced and why the notice was not meaningful or sufficient.

[74] HCJ Flemming *Flemming's National Credit Act* (2nd ed 2010) 198.

consumer to exercise his or her rights under section 129(1)(a).[75] It is also important that the creditor alleges compliance with section 129 in its particulars of claim.[76]

The main purpose of this notice is to enable the parties to resolve any disputes and to develop and agree on a plan to bring the payments up to date.[77] Furthermore, the purpose is to prevent wasteful legal costs when disputes can be settled outside of court.[78] Therefore, the debtor should be informed of the assistance at his or her disposal before legal action is taken.[79] The legislature intended this notice to be a compulsory procedural step to encourage parties to try and resolve their disputes before seeking court intervention.[80] After it has been suggested by academics[81] and indirectly decided by one court,[82] a full bench of the North Gauteng High Court issued a practice directive that section 129(1)(a) notices should include a notification to the debtor that if a judgment order is obtained against him or her, a sale in execution will ordinarily follow and lead to an eviction from his or her home.[83] The notice should probably also inform the debtor of the nature and extent of the default and the manner in which the creditor plans to enforce the debt.[84] This would enable the debtor to respond to the notice in a meaningful way, as section 130(1)(a)(i) requires.[85] In the case of mortgage foreclosure, it would seem that the creditor should also warn the debtor of the serious consequences that may result from foreclosure,[86] such as the fact that repayment of the debt will become accelerated. Moreover, the notice should convey a sense of urgency.[87]

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[75] M Kelly-Louw "The default notice as required by the National Credit Act 34 of 2005" (2010) 22 *SA Merc LJ* 568-594 572.

[76] For more on this procedural aspect, and the consequences of not making the correct allegations, see C van Heerden & A Boraine "The conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act" (2011) 23 *SA Merc LJ* 45-63.

[77] According to CM van Heerden & JM Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655-684 666 the notice should probably also indicate that debt enforcement will follow should the consumer fail to either respond to the notice or reject its proposals, and the notice can in all likelihood also be incorporated into a letter of demand sent to the consumer in the event of default. For a proposed example of a s 129(1)(a) notice, see C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 12-20.

[78] HCJ Flemming *Flemming's National Credit Act* (2nd ed 2010) 198.

[79] *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) para 26, with approved reference to M Kelly-Louw "Consumer credit" in WA Joubert & JA Faris (eds) *LAWSA* Vol 5 Part 1 (2nd ed 2010) para 143.

[80] *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) para 18.

[81] M Kelly-Louw "The default notice as required by the National Credit Act 34 of 2005" (2010) 22 *SA Merc LJ* 568-594 573; CM van Heerden & JM Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655-684 666.

[82] *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) para 5.6.

[83] *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) paras 47 and 53.

[84] *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) para 27.

[85] Para 27.

[86] Para 28.

[87] Para 29.

When a consumer is in arrears by only one or a few instalments after he or she has for a long period complied with his or her obligations, it is the purpose of section 129 (and other provisions of the NCA) to not "bring down" such a consumer.[88] However, where the consumer abuses this protection in order to evade payment, it should similarly not be allowed to "bring down" the credit provider. If a consumer does not fulfil his or her obligations, the credit provider who complies with the NCA should generally be entitled to enforce its rights by way of the legal proceedings contemplated by the Act.[89] Therefore, when applying section 129 the courts should strive to find a balance between the interests of the parties. The purpose of the Act, namely to resolve the dispute or to bring payment up to date, should always be key, and parties should endeavour to not compromise each other's rights.[90]

Either the notice referred to above ("a section 129(1)(a) notice") or, in the alternative, a notice in terms of section 86(10) ("a section 86(10) notice") must be provided.[91] Before either of these notices is provided, the credit provider may not take any steps to legally enforce the agreement. In addition to providing either of these notices, the credit provider must also meet the requirements set out in section 130 before it can take any steps to enforce the agreement.[92]

Non-compliance with section 129 should not be considered a defence on the merits for purposes of providing a *bona fide* defence against summary judgment applications.[93] The reason for this is that the courts are obliged to merely adjourn the matter pending the credit provider's compliance with steps ordered by the court.[94]

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88 *Imperial Bank v Kubheka* (28713/08) [2010] ZAGPPHC 3 (4 February 2010) para 55 per Legodi J.

89 Para 58.

90 Para 58.

91 The relevance and application of the s 86(10) notice is discussed in 4 3 4 4 below, where I also distinguish between the two notices in more detail.

92 S 129(1)(b)(ii).

93 Applications for summary judgments are provided for in HCR 32. A defence that lacks substance can – by means of this procedure – be disposed of without going through a delayed trial. In order to prevent summary judgment, the consumer must satisfy the court that he or she has a *bona fide* defence: See AC Cilliers *et al Herbstein and Van Winsen the civil practice of the High Courts and the Supreme Court of Appeal of South Africa* Vol 1 (5th ed 2009) 516-517 and on summary judgment applications in general, 517-544.

94 S 130(4)(b) provides that if the credit provider does not comply with the provisions of the NCA as contemplated by s 130(3)(a), in other words, if it did not comply with s 129(1), the court must

> "(i) adjourn the matter before it; and
> (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed".

According to CM van Heerden & JM Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655-684 674, the powers conferred on the court by this subsection clearly leave the court with no discretion and it is therefore peremptory ("must"). However, this matter has not completely been settled, since

Section 129 is silent on the method by which notice of the consumer's default must be brought to his or her attention, except that it must be in writing.[95] A question that has been raised regarding the notice is whether it has to physically reach the consumer's attention in order to be effective.[96] The courts have come up with differing interpretations regarding what

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there has been some contradictory case law regarding whether non-compliance with s 129 provides the consumer with a defence against the application for summary judgment. Some earlier cases recognised non-compliance with s 129 as a *bona fide* defence, prompting the courts to refuse summary judgment applications: See *BMW Financial Services (South Africa) (Pty) Ltd v Dr MB Mulaudzi Inc* 2009 3 SA 348 (B); *Standard Bank of South Africa Ltd v Van Vuuren* 2009 5 SA 557 (T) ("*Van Vuuren*") para 11; *Firstrand Bank Limited v Smith* (4752/2008) [2008] ZAFSHC 89 (4 September 2008) para 9. However, in later cases this approach was overturned: In *Standard Bank of South Africa Ltd v Rockhill and Another* 2010 5 SA 252 (GSJ) ("*Rockhill*") paras 16-20 the court held that even though s 129(1)(a) is an obstacle to commencing debt enforcement, it is not a *bona fide* defence as contemplated by HCR 32(3)(b). A *bona fide* defence must be one which, if proved at the trial, would constitute a good defence to the action. Non-compliance with s 129(1)(a) will never be a good defence against the credit provider's claim for judgment and an execution order. Therefore, non-compliance cannot be a *bona fide* defence, but can only lead the court to postpone the matter by way of adjournment in terms of s 130(4)(b). The court held (at para 18) that its "hands are tied and [that] it [must] act in accordance with section 130(4)(b)". As a result, the court adjourned the application and ordered steps that had to be taken before the credit provider could apply for summary judgment, namely that the requirements of ss 129 and 130 had to be fulfilled again. This approach was followed in *First Rand Bank Ltd t/a FNB Home Loans v Makhoba* (55443/10) [2011] ZAGPPHC 199 (14 October 2011) paras 11-13; *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) para 61; *First Rand Bank Ltd v Dhlamini* 2010 4 SA 531 (GNP) paras 32-33; *First Rand Bank Ltd v Bernardo and Another* (608/09) [2009] ZAECPEHC 19 (28 April 2009) paras 8-9. See also C van Heerden & A Boraine "The conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act" (2011) 23 *SA Merc LJ* 45-63 60. However, the SCA in *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA) recently, without discussing this issue, dismissed an application for summary judgment due to non-compliance with s 129(1)(a) instead of adjourning the matter. Whether this implies that the SCA prefers to allow non-compliance as a *bona fide* defence is – to my mind – still unclear, since the issue was not argued before the court.

[95] S 130(1)(a) provides guidance by referring to the "delivery" of the notice. The word "delivered" is not defined in the NCA but is defined in reg 1 as "unless otherwise provided for ... sending a document by hand, by fax, by e-mail, or registered mail to an address chosen in the agreement by the proposed recipient, if no such address is available, the recipient's registered address". The Act itself also deals with the concept of delivery and provides in s 65(1) that "[e]very document that is required to be delivered to a consumer in terms of this Act must be delivered in the prescribed manner, if any". However, in the case of a s 129(1)(a) notice no method of delivery is prescribed and s 65(2) therefore applies. It provides that the credit provider must

> "(a) make the document available to the consumer through one or more of the following mechanisms
> (i) in person at the business premises of the credit provider, or at any other location designated by the consumer but at the consumers' expense, or by ordinary mail;
> (ii) by fax;
> (iii) by email; or
> (iv) by printable web-page; and
> (b) deliver it to the consumer in the manner chosen by the consumer from the options made available in terms of paragraph (a)."

In *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA) para 57 the SCA per Cloete JA held that "[a] consumer could hardly complain if the method of delivery of a document chosen by him or her proves ineffective." S 96 also deals with the address for delivery of a notice: See *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA) paras 22-31. Although the NCA never refers to the term *domicilium citandi et executandi*, the credit provider may still insert such a clause into the credit agreement so that the address recorded in the agreement serves as the consumer's *domicilium citandi et executandi*: See CM van Heerden & JM Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655-684 665.

[96] In general, see C van Heerden & A Boraine "The conundrum of the non-compulsory compulsory notice in terms of section 129(1)(a) of the National Credit Act" (2011) 23 *SA Merc LJ* 45-63; M Kelly-Louw "The default notice as required by the National Credit Act 34 of 2005" (2010) 22 *SA Merc LJ* 568-594.

exactly it takes for section 129(1)(a) to be complied with.[97] The issue in case law revolved around whether it is the responsibility of the credit provider to make sure that the notice comes to the actual attention of the consumer, or whether it is sufficient for the credit provider to duly post it to the address chosen by the consumer. The second option would imply that the credit provider can comply with section 129(1)(a) regardless of whether the consumer actually receives the notice. On the other hand, the first option emphasises actual knowledge of the contents of the notice. There are high court decisions in favour of both approaches, namely that of actual knowledge[98] and that of due postage being sufficient.[99]

The SCA recently put the debate to rest by holding that it was the legislature's intention that the sending of a document by registered mail amounts to proper delivery.[100] According to the SCA, this approach does not contradict the purposes of the Act.[101] Therefore, the current approach is that the risk of non-receipt of the section 129(1)(a) notice rests with the

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[97] For example, a problematic question is whether it constitutes a defence if the consumer claims that the notice got lost in the post: See JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 105.

[98] Case law in favour of default coming to the actual attention of the consumer includes *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D); *Imperial Bank v Kubheka* (28713/08) [2010] ZAGPPHC 3 (4 February 2010); *First Rand Bank Ltd v Dhlamini* 2010 4 SA 531 (GNP); *Nedbank Limited v Dhlamini* (23028/2010) [2010] ZAGPPHC 117 (15 September 2010).

[99] Case law deciding that due postage of the notice by way of registered mail is sufficient to comply with s 129 include *Munien v BMW Financial Services (SA) (Pty) Ltd and Another* 2010 1 SA 549 (KZD); *Standard Bank of South Africa Ltd v Mellet and Another* (3846/09) [2009] ZAFSHC 110 (30 October 2009); *First Rand Bank Ltd v Bernardo and Another* (608/09) [2009] ZAECPEHC 19 (28 April 2009); *First National Bank Ltd v Rossouw and Another* (30624/09) [2009] ZAGPPHC 165 (6 August 2009); *Starita v ABSA Bank Ltd and Another* 2010 3 SA 443 (GSJ); *Standard Bank of South Africa Ltd v Rockhill and Another* 2010 5 SA 252 (GSJ). Otto and Otto as well as Van Heerden agree with this approach as being perfectly reasonable, since the NCA gives the consumer the option to select the mode of delivery: See JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 105-108; JM Otto "Kennisgewing kragtens National Credit Act: Moet die verbruiker dit ontvang? *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D)" (2010) 73 *THRHR* 136-144; JM Otto "Notices in terms of the National Credit Act: Wholesale national confusion. *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors; Munien v BMW Financial Services; Starita v Absa Bank Ltd; FirstRand Bank Ltd v Dhlamini*" (2010) 22 *SA Merc LJ* 595-607; C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 12-15. For a contrary view, see M Sawyer "The curious complexities in notifying defaulting debtors" (2008) 8 *WP* 49-50. For a further analysis on this issue, see also S Tennant "A default notice under the National Credit Act must come to the attention of the consumer unless the consumer is at fault" 2010 *TSAR* 852-862.

[100] *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA) para 30. Maya JA (at para 31) justified this finding by stating the following:

> "It appears to me that the legislature's grant to the consumer of a right to choose the manner of delivery inexorably points to an intention to place the risk of non-receipt on the consumer's shoulders. With every choice lies a responsibility and it is after all within a consumer's sole knowledge which means of communication will reasonably ensure delivery to him [or her]. It is entirely fair in the circumstances to conclude from the legislature's express language in s 65(2) that it considered despatch of a notice in the manner chosen by the appellants in this matter sufficient for purposes of s 129(1)(a) and that actual receipt is the consumer's responsibility."

However, on the facts of this case the credit provider could not prove that it had properly sent the notice by registered mail: See paras 33-37 and 49-55.

[101] *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA) para 32.

consumer.[102] This approach makes it easier for mortgagees to comply with their obligations under section 129, whereas it may lead to mortgagors not physically becoming aware of their right to apply, amongst others, for debt counselling. This state of affairs may even detract from the protection that the Act contemplates for over-indebted consumers.[103] However, a consumer who did not have actual knowledge of the notice can rely on section 85 of the NCA by alleging his or her over-indebtedness and requesting the court to allow a debt review to be conducted.[104] If the legislature's intention was something other than how the SCA interpreted section 129, it would have to amend the Act to clarify its intention.

4 3 1 3 Enforcement procedures in court

Section 130 prescribes the debt enforcement procedures during litigation and, in conjunction with section 129, entails the requirements for debt enforcement by the credit provider.[105] The credit provider may only enforce the credit agreement (in other words, send the section 129(1)(a) notice) if the consumer has been in default for at least 20 business days.[106] In addition, litigation may only commence once at least 10 business days have lapsed since the notice of default[107] was provided.[108] Therefore, the consumer has 10 days to respond to the notice of default.[109] The 10 days must be calculated from the day that the section 129(1)(a) notice was provided until the day that summons is served, and not the day that summons is

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[102] This approach has already been followed in, for example, *Andrews v Nedbank Ltd* (CA: 39 / 2010) [2010] ZAECGHC 101 (27 October 2010) paras 10-12. However, where the creditor sends the notice to an address other than the one chosen by the debtor, the risk of receipt moves to the creditor, who must therefore show that the debtor actually received the notice: See *Greeff v Firstrand Bank Ltd* (744/2010) [2011] ZANCHC 8 (20 May 2011) para 44.

[103] See the line of argument in *First Rand Bank Ltd v Dhlamini* 2010 4 SA 531 (GNP) paras 23-31.

[104] See 4 3 4 6 below. A court may be willing to exercise its discretion in favour of the consumer if he or she can provide proof of *bona fide* ignorance of the s 129(1)(a) notice.

[105] See JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 108-112.

[106] S 130(1). With regard to the calculation of days, see s 2(5)(a) to (c).

[107] Either the s 129(1)(a) notice described in 4 3 1 2 above, or the s 86(10) notice discussed in 4 3 4 4 below. S 130(1)(a) refers to a notice as contemplated in s 86(9), but it is widely accepted that this is a typing error, since s 86(9) does not refer to any notice whatsoever. Therefore, this section refers to the s 86(10) notice: See *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) para 28; *Coetzee and Another v Nedbank Ltd* 2011 2 SA 372 (KZD) para 5 n 5.

[108] S 130(1)(a). C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 12-10 submits that in the s 129(1)(a) notice the credit provider must indicate to the consumer that he or she must respond to it within 10 days. The author (at 12-26) further argues that the 20 and 10 day periods run concurrently and not consecutively. See also JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 109; S Renke *et al* "The National Credit Act: New parameters for the granting of credit in South Africa" (2007) 28 *Obiter* 229-270 262.

[109] The parties are free to agree to a longer period of time: See *Standard Bank of South Africa Ltd v Rockhill and Another* 2010 5 SA 252 (GSJ) paras 6-15.

issued.[110] In the case of a section 129(1)(a) notice, debt enforcement may only proceed if the consumer did not respond to such a notice, or the consumer responded to such a notice by rejecting the credit provider's proposals.[111] The court has no discretion to determine any credit dispute (including mortgage foreclosure) unless the relevant requirements (section 129) have been complied with.[112]

There are a couple of circumstances under which debt enforcement proceedings – and, in other words, foreclosure – may not be instituted. If the credit provider nevertheless institutes litigation under these circumstances, the court is obliged to adjourn the matter and order steps that the credit provider must take before it can commence with litigation.[113] The Act specifically forbids the court to hear applications that are brought under these circumstances.[114]

As discussed in 4 3 1 2 above, the credit provider may not institute proceedings if it did not comply with section 129(1) of the NCA, namely the notification requirements.[115] Furthermore, a court may not hear the matter if it is before the Tribunal,[116] nor may it decide a case that is before a debt counsellor, an alternative dispute resolution agent, a consumer court or the ombud with jurisdiction.[117] If the credit provider had sent the section 129(1)(a) notice and the consumer agreed to one of the proposals made therein and acted in good faith

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[110] *Nedbank Limited v Mokhonoana* 2010 5 SA 551 (GNP) paras 14-15.
[111] S 130(1)(b).
[112] S 130(3)(a).
[113] S 130(4)(b) states that, if the court finds that the credit provider approached the court in circumstances contemplated in s 130(3)(c), the court must

> "(i) adjourn the matter before it; and
> (ii) make an appropriate order setting out the steps the credit provider must complete before the matter may be resumed".

In terms of 130(3)(c)(i), the court must be satisfied that it is not being approached under any of these circumstances. For example, the court has accepted it as a *bona fide* defence against a summary judgment application that the consumer was party to debt review proceedings instituted in terms of s 86: See *Firstrand Bank Limited v Smith* (4752/2008) [2008] ZAFSHC 89 (4 September 2008) paras 8-9.
[114] S 130(3)
[115] S 130(3)(a).
[116] According to s 130(3)(b) the court must be satisfied that "there is no matter arising under that credit agreement, and pending before the Tribunal, that could result in an order affecting the issues to be determined by the court". S 130(4)(d) describes what the court may do if the matter is pending before the tribunal: It may

> "(i) adjourn the matter, pending determination of the proceedings before the Tribunal; or
> (ii) order the Tribunal to adjourn the proceedings before it, and refer the matter to the court for determination".

However, the court is only prevented from considering the debt enforcement if the matter before the Tribunal has the potential to result in an order affecting the issues to be determined by the court. For more on the Tribunal, see JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 35-37.
[117] S 130(3)(c)(i).

in fulfilling it, enforcement may not occur either.[118] Moreover, if the parties had agreed on a plan to resolve the dispute and the consumer complied with such plan, the credit provider is also barred from enforcing the mortgage.[119] In addition, litigation may not take place if the arrears had been brought up to date.[120] The court must dismiss the matter if the credit agreement has been suspended, or is subject to a debt rearrangement order or agreement, and if the consumer has complied with such order or agreement.[121]

For the most part, sections 129 and 130 of the NCA prescribe a higher level of procedural compliance for mortgagees who wish to enforce their credit agreements and call up the bonds. The general purpose of this arrangement is to protect consumers and to allow them the opportunity to either repay the debt or find alternatives to settle their disputes with the credit providers (with the help of, for example, a debt counsellor). These procedural requirements can have the effect of either resolving the dispute or at least postponing the enforcement of the credit agreement and ultimate sale of the property. On the one hand, this may assist an over-indebted consumer prevent (or at least postpone) the loss of his or her home, whereas, on the other hand, it may place a limitation on the ease with which a credit provider can enforce its rights, including its personal right of claim and its real security right of mortgage. The point is that the procedural requirements of sections 129 and 130 serve as a foundation to ensure that full debt enforcement (with the ensuing sale in execution of the home) is prevented if possible. Therefore, the procedure incorporates a framework for finding a proportionate solution to the debtor's default, which is the very purpose of sections 26(1) and 36(1) of the Constitution.

4 3 2 Right to reinstate credit agreements[122]

In 3 4 3 3 above I explain that the common law of mortgage foreclosure may lead to a disproportionate result. This would be the case if the creditor is allowed to insist on selling the mortgaged home despite the fact that the actual amount in arrears is small enough to be satisfied in a less invasive way. In what follows I discuss the solution that the legislature has put forward in this regard. The NCA provides an interesting new right for debtors who are in

[118] S 130(3)(c)(ii)(bb).
[119] S 130(3)(c)(ii)(cc).
[120] S 130(3)(c)(ii)(dd). See also 4 3 2 below.
[121] S 130(4)(e).
[122] See C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 12-44 - 12-46; JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 116-117.

default, namely the right to reinstate a credit agreement that is in the process of being enforced due to the debtor having fallen in arrears. The relevant provisions are section 129(3) and (4), which read as follows:

> "(3) Subject to subsection (4), a consumer may -
> (a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default charges and reasonable costs of enforcing the agreement up to the time of reinstatement; and –
> (b) after complying with paragraph (a), may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.
> (4) A consumer may not re-instate a credit agreement after -
> (a) the sale of any property pursuant to -
> (i) an attachment order; or
> (ii) surrender of property in terms of section 127;
> (b) the execution of any other court order enforcing that agreement; or
> (c) the termination thereof in accordance with section 123."

The wording of these subsections is, to say the least, awkward in the sense that they deal with the reinstatement of a credit agreement *before* it has been cancelled. On face value this does not make sense, as Otto comments:

> "It escapes my mind how, first, an agreement which has not been cancelled can be reinstated. Secondly, it is not clear how a person can resume possession of a thing which has been repossessed pursuant to an attachment order, if the agreement was *not* cancelled to justify such an attachment order in the first place."[123]

To my mind, the only way to explain and apply the right of reinstatement is to accept that the concept "cancelled" should not be given its usual technical meaning. To do so would render the section meaningless. The term "reinstatement" would then also be, in the words of Otto, "a misnomer".[124] Therefore, to give effect to the purpose of this provision, one has to ignore this oddity. I suggest that, for purposes of this provision at least, "cancelled" refers to a credit agreement that has been enforced and, hence, cancellation that has resulted in termination of the relationship between the debtor and creditor. In the context of mortgage bonds, a "cancelled" mortgage agreement, then, refers to that point in the proceedings after the property had been sold in execution and transferred to the auction purchaser. Up until the point that the foreclosure process is completed, the agreement is not yet "cancelled" for

[123] JM Otto *The National Credit Act explained* (2006) 98, similarly repeated in JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 117 (original emphasis).
[124] See JM Otto *The National Credit Act explained* (2006) 98 n 135, repeated in JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 116 n 165.

purposes of reinstatement. At least for mortgage foreclosure purposes, this is the most logical way that this provision can be interpreted.

This interpretation is supported by section 130(3)(c)(ii)(dd) of the NCA, the effect of which is clearer. The section provides that a creditor may not enforce a credit agreement where the amounts in arrears had been brought up to date:

> "(3) Despite any provision of law or contract to the contrary, in any proceedings commenced in a court in respect of a credit agreement to which this Act applies, the court may determine the matter only if the court is satisfied that -
> (c) that the credit provider has not approached the court -
> (ii) despite the consumer having -
> (dd) brought the payments under the credit agreement up to date, as contemplated in section 129(1)(a)."

Therefore, these provisions[125] provide mortgage debtors with a very useful tool to escape the full effects of acceleration clauses and foreclosure. Previously, the common law allowed mortgage creditors to claim accelerated payment of the debt even if the default was subsequently purged, since foreclosure could only be stopped by paying the full outstanding debt.[126] After a mortgage creditor had called up the bond, the hypothecated property could be redeemed (set free from the execution process) if the debtor paid the amount claimed (the judgment debt).[127] In mortgage circumstances, this could not be done by getting only the actual amount in arrears up to date, but only by repaying the entire outstanding balance.[128] However, it can be assumed that most struggling homeowners who want to redeem their homes and save them from execution cannot pay the full outstanding amount to prevent the sale in execution. Consequently, it is to be welcomed that the NCA now provides for a right to reinstate a credit agreement (including a mortgage agreement) by simply getting the amounts that are overdue (as well as permitted charges) up to date. This has the result of redeeming the property from the sale-in-execution process, even after it has been attached.

This right of reinstatement cannot be waived by agreement or excluded by any rule of the common law.[129] Significantly, the section 129(1)(a) notice that was sent to initiate enforcement of the debt also loses its effectiveness after the arrears had been repaid and the

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[125] S 129(3) and (4), read with s 130(3)(c)(ii)(dd).
[126] For example, see the application of this principle in *Boland Bank Ltd v Pienaar and Another* 1988 3 SA 618 (A), where the creditor's right to accelerate was respected despite the debtor's ability and willingness to purge the default.
[127] See 2 4 5 above.
[128] For credit agreements that fell under the ambit of the Credit Agreements Act 75 of 1980, s 12 provided a right of redemption, in terms of which the returned goods could be redeemed by, amongst others, getting the amount in arrears up to date: See JM Otto *The National Credit Act explained* (2006) 98.
[129] S 130(3): "Despite any provision of law or contract to the contrary ... "

agreement reinstated.[130] Accordingly, a new notice would have to be sent if the debtor were to default once more.

It was argued in *Nedbank Ltd v Barnard*[131] that a debtor who wants to reinstate his or her credit agreement must first approach the creditor to obtain information regarding the extent of his or her default. Moreover, it was argued that the debtor must inform the creditor of his or her intention to reinstate the credit agreement. Consequently, the contention was that the credit agreement cannot be regarded as automatically reinstated when the debtor simply purges the default.[132] However, the court rejected this argument, since there is nothing in the NCA that requires the parties to consult with each other before reinstatement.[133] In other words, the debtor can unilaterally reinstate the agreement by paying the amount in arrears as well as the permitted charges. Reinstatement occurs automatically (*ex lege*) once the required amounts are paid.[134]

In the mortgage context, the right to reinstate was discussed in *Nedbank Ltd v Fraser and Another and Four Other Cases*[135] ("*Fraser*"). The court dealt with reinstatement in light of the problem that occurred in *ABSA Bank Ltd v Ntsane and Another*[136] ("*Ntsane*"), namely where the amount in arrears is so small that it seems unjustifiable to allow a creditor to accelerate payment of the outstanding debt and thereby cause the debtor to lose his or her home. In *Ntsane* it was regarded as an abuse of the process to enforce an acceleration clause if the amount in arrears is small enough to be capable of satisfaction in a way other than to have the debtor's home sold in execution. However, *Ntsane* was decided prior to the NCA coming into operation and there was consequently no statutory right of reinstatement available to the debtor, who was in default by only R18,46.

In view of reinstatement being presented as a (or, to my mind, *the*)[137] solution to the problem of minor arrears, the court in *Fraser* held that an agreement can be reinstated even after the judgment order had been granted. Therefore, the judgment can be "overtaken" by

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[130] *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) paras 33-34.
[131] (1142/08) [2009] ZAECPEHC 45 (1 September 2009) para 14.
[132] Para 14.
[133] Para 15.
[134] Para 15.
[135] 2011 4 SA 363 (GSJ).
[136] 2007 3 SA 554 (T). See 4 4 3 2 and 4 4 3 4 below, where I discuss in detail the decision in *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) and the criticism against it by the court in *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ).
[137] I explain the position I take in this regard in more detail in 4 4 below.

such a reinstatement.[138] The court held that the prohibition on reinstating the agreement after execution of an order (that enforced the agreement)[139] refers to both the sale in execution and registration of the transfer of ownership to the purchaser.[140]

The court compared this procedure with the common law right to redeem property that has been attached and that is in the process of execution.[141] In terms of this principle, a debtor can redeem the attached property for as long as the debtor remains owner. The right of redemption is only extinguished when the property is registered in the name of the purchaser after the sale.[142] A purchaser consequently purchases a property at a sale in execution subject to the debtor's right of redemption.[143] The public sale by way of auction should be allowed to fail if the purpose of execution (namely to give effect to judgment debts) can be achieved by, for example, the exercise of a right of redemption.[144]

The court held that section 129(3) of the NCA applies in a similar way to redemption.[145] The debtor can redeem the home from the execution process by paying the outstanding amounts in arrears, along with charges and costs.[146] Consequently, to redeem the property in terms of section 129(3), the debtor is not required to pay the full outstanding debt, but only the amounts that are overdue.[147] This is a statutory right of reinstatement to which the sale in execution is subject.[148] Therefore, the court held that if the total amount that has been accelerated is significant enough to justify the execution order, but if the possibility exists that the amount in arrears might reasonably be paid to reinstate the credit agreement, sections 129(3) and (4) should be brought to the attention of the debtor.[149] The court suggested that this notification might be included in the order declaring the property executable.[150]

It seems that the right of reinstatement is qualified under circumstances when the consumer's obligations had been rearranged,[151] when he or she defaulted on such repayment plan, and subsequently brought the arrears up to date. In other words, debt rearrangement will

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[138] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 39.
[139] S 129(4).
[140] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 40.
[141] Para 40.
[142] Para 40.
[143] Para 40.
[144] Para 40.
[145] Para 41.
[146] Para 41.
[147] Para 41.
[148] Para 41.
[149] Para 42.
[150] Para 42.
[151] On debt rearrangement, see 4 3 4 3 below.

fall away if the debtor is in default of the credit agreement as well as the rearranged plan.[152] If the amount in arrears concerning the rearrangement plan is purged, the rearranged payment scheme will not be reinstated and debt enforcement can therefore continue.[153] Only the purging of the amount in arrears concerning the original credit agreement will lead to reinstatement. Nevertheless, it seems that a court may be willing to refuse to grant a summary judgment against a debtor who is willing and able to comply with the rearranged payment plan, despite his or her momentary (but purged) default in terms of such a plan.[154]

The approach taken in *Fraser* concerning the impact of section 129(3) and (4) on mortgage foreclosure has, however, been questioned by the court in *Dwenga v First Rand Bank Ltd and Others*[155] ("*Dwenga*"). In this case, in between receipt of the section 129(1)(a) notice and issuing of summons, the debtor purged the amount in arrears. In fact, on the date that default judgment was granted against him, his loan had a credit balance. The court acknowledged that the credit agreement was reinstated, but only because the section 129(1)(a) notice did not warn the debtor that the creditor was relying on the acceleration (or foreclosure) clause in the bond. However, the court questioned whether the situation would have been different had the creditor properly warned the debtor that it was foreclosing the bond.

The court in *Fraser* interpreted the term "amounts that are overdue"[156] as the actual amounts in arrears and not the accelerated amount of the full outstanding mortgage debt. In an *obiter* statement,[157] the court in *Dwenga* questioned whether this interpretation is correct. The basis for this scepticism of the *Fraser* approach is the principle that a foreclosure clause grants a mortgagee the right to refuse to accept the late repayment of the mortgagor. Therefore, the court stated that if a mortgagee would start proceedings to foreclose the bond, only repayment of the full accelerated debt would reinstate the credit agreement. Nevertheless, although the court seemed to prefer this reading (based on the traditional principles surrounding acceleration clauses), it also pointed to the fact that this interpretation conflicts with the purposes of the NCA:

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[152] S 88(3)(a) to (b).
[153] *Firstrand Bank Ltd formerly known as First National Bank of Southern African Ltd v Fester and Another* [2011] ZAWCHC 363;14597/2011 (15 September 2011) para 4, citing and quoting from *FirstRand Bank Ltd v Fillis and Another* 2010 6 SA 565 (ECP) para 14-16.
[154] *Firstrand Bank Ltd v Britz and Another* (5243/2011) [2012] ZAFSHC 13 (9 February 2012) paras 22 and 26.
[155] (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011).
[156] S 129(3)(a).
[157] The *obiter* nature of this criticism is evidenced by that fact that it is mentioned in a footnote: See *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) para 35 n 36.

> "It does not appear to me to be proper that the consumer is at the mercy of a mortgagee who can decide at whim after it has sought to rely on the acceleration clause whether to indulge him or not by accepting instalments and holding off execution for as long as it feels so inclined."[158]

The court commented further that this state of affairs would not fall inside the ambit and structures of the NCA and that it would render the debtor without the protection that the NCA provides. In fact, the court referred to the right of reinstatement as "the beacon ... that keeps the hope alive" for debtors who wish to "weather the hard times and keep their homes, and dignity".[159] Accordingly, the court seemed to have suggested that its interpretation of the principles concerning acceleration clauses is incompatible with the NCA and, without saying so expressly, the court implied that this might have to change. All of these comments were of course *obiter* speculation that had no effect on the outcome of the particular case.

The court's difficulty with the view that the right of reinstatement can also be used to reverse foreclosure is somewhat surprising. The reason for this is that earlier in the judgement the court held (not *obiter*) that, though an acceleration clause is valid,

> "the principal obligation to which it is accessory – which is in the nature of a credit agreement - must necessarily yield to the relevant provisions of the NCA pertaining to the enforcement of the foreclosure remedy which avails the mortgagee in the case of the mortgagor's default under the bond."[160]

Therefore, the court recognised that the principles surrounding foreclosure must yield to the NCA. As far as the common law principles of acceleration clauses are incompatible with the NCA's right of reinstatement, the common law must be seen as having been amended. This prospect is strengthened by the fact that the right of reinstatement expressly overrides any law or agreement to the contrary.[161] Therefore, the scope of the right to reinstatement cannot be limited with reference to "law or agreement to the contrary".

In my opinion, the term "all amounts that are overdue"[162] does not have to be interpreted as meaning the entire accelerated outstanding debt. In fact, it is more likely that amounts overdue refer to amounts in arrears. This interpretation is also in line with the consumer protection aims of the NCA. A narrower interpretation would, as the court in *Dwenga*

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[158] *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) para 35 n 36 per Hartle J.
[159] Para 35 n 36 per Hartle J.
[160] Para 21 per Hartle J (footnote omitted).
[161] S 130(3)(c)(ii)(dd).
[162] S 129(3)(a).

conceded, render the right of reinstatement useless for debtors who wish to save their homes.[163]

In my view, the *Fraser* approach also finds support in simple logic. If a debtor would indeed be required to repay the full outstanding debt to reinstate the agreement, the agreement would not be reinstated by that repayment. In fact, the debt would be completely satisfied, the bond would be cancelled and the transaction with the bank would, therefore, be over. This principle is trite and was true even prior to the NCA. One does not pay the full outstanding debt so as to have the agreement continued, but to end the credit relationship. If the reinstatement hinged on the requirement of paying the full accelerated debt, the right or reinstatement would serve no purpose and would add nothing new to existing law. One can assume that the legislature would have been aware of this and would, hence, not have meant "amounts that are overdue" to refer to the full outstanding debt.

In conclusion, despite the court's hesitance to accept *Fraser* on face value, I do not regard the court in *Dwenga*'s attitude as truly being in opposition to that of *Fraser*. Although the matter has not been completely settled by a higher court (like the SCA), I predict that the approach in *Fraser* will be followed. The *Fraser* approach is moreover supported by section 130(3)(c)(ii)(dd), which prohibits courts from even determining matters where the amounts overdue were brought up to date. In other words, even though a mortgagee might elect to foreclose the bond, the mortgage agreement can be fully reinstated by the debtor merely getting the amounts in arrears ("overdue") up to date. A repayment of the full outstanding debt is not necessary.

As part of the same *obiter* discussion, the court in *Dwenga* also mentioned that it would probably not be possible to reinstate the agreement after judgment had been granted.[164] The reason is that the granting of judgment would have terminated the agreement, thereby ending the period in which section 129(3) allows a debtor to reinstate the agreement. Therefore, in this respect the court rejected the approach favoured in *Fraser*, namely that the agreement is capable of reinstatement after judgment has been granted and even up until the property is transferred to the auction purchaser.

However, I argue that the court in *Dwenga* was wrong in finding that reinstatement is impossible after the granting of judgment. The reason for this is that section 129(4) expressly

[163] *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) para 35 n 36.
[164] Para 35 n 36.

states that reinstatement is possible until the property is sold or until the court order that enforces the agreement has been executed. In other words, the earliest possible point at which reinstatement would no longer be possible is after the enforcement of the judgment. Therefore, in between the judgment being granted and it being enforced, reinstatement is still available. The granting of judgment itself does not end the debtor's right to reinstate the agreement. Neither the wording of the Act nor its purposes justifies a narrower interpretation.

Whether the court in *Fraser* was correct in stating that reinstatement is possible after the auction sale, is unclear. The approach in *Fraser* was based on an analogy with the common law right of redemption, which does allow for redemption up until the property is registered in the name of the purchaser. I have no objection against the wide way in which *Fraser* interpreted section 129(4). It would make sense to argue that the right of reinstatement provides at least as much protection as the common law right of redemption. The concept of "sale" in section 129(4) can, as *Fraser* interpreted it, include the actual transfer of the property as well. This wide reading does not contradict the purposes of the Act, nor do the purposes necessitate a narrower application of the right of reinstatement. Nevertheless, this question has not been answered conclusively and one would have to wait for the SCA to make a decision.

In my view, this remedy can and should be interpreted as widely as the language of the NCA allows and as much as is necessary to give effect to the aims of the Act. Also, a wide interpretation of the right of reinstatement is necessitated by sections 25 and 26 of the Constitution. Therefore, reinstatement should be read and applied in such a way that it promotes constitutional objectives. This dissertation emphasises the value of the right to reinstate credit agreements when it comes to ensuring a proper constitutional balance between the rights of debtors and creditors.

4 3 3 Reckless credit[165]

The NCA prohibits a credit provider from entering into a reckless credit agreement with a prospective consumer.[166] Mortgage loans should consequently not be extended in a reckless manner either. One can expect that credit providers would in future be more careful when assessing whether to grant credit to potential borrowers. For current purposes I do not go into the details regarding the methods one should use to determine reckless credit[167] or how to ensure that credit providers avoid granting such credit.[168] Instead, I focus on the effect reckless credit can have on the rights of the parties, since it can potentially have far-reaching implications for mortgage foreclosures.[169]

Reckless credit is defined in the NCA as credit granted under the circumstances described in section 80.[170] Section 80(1) provides that a credit agreement is reckless if, at the time it was made or at the time the amount of credit was increased

> "(a) the credit provider failed to conduct an assessment as required by section 81(2),[171] irrespective of what the outcome of such an assessment might have concluded at the time; or

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[165] See C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 11-40 - 11-51; C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 12-41; CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415; A Boraine & C van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 650-656; JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 77-79; JM Otto *The National Credit Act explained* (2006) 65-67; ML Vessio "Beware the provider of reckless credit" 2009 *TSAR* 274-289; PN Stoop "South African consumer credit policy: Measures indirectly aimed at preventing consumer over-indebtedness" (2009) 21 *SA Merc LJ* 365-386 367-368; M Kelly-Louw "The prevention and alleviation of consumer over-indebtedness" (2008) 20 *SA Merc LJ* 200-226 218-222.

[166] S 81(3).

[167] For example, see reg 24(8)(a) to (d), which refers to some factors debt counsellors should give consideration to when assessing whether there was reckless credit.

[168] The assessment mechanisms are provided for in s 82.

[169] For example, see M Kelly-Louw "Credit law" (2010) 2 *JQR* para 2.1; South African Press Association "Absa guilty of reckless lending" *News24* (30-04-2010) <http://www.fin24.com/PersonalFinance/Money-Clinic/Absa-guilty-of-reckless-lending-20100430> (accessed 17-11-2010), where it was reported that a bank was found "guilty of reckless lending" after it had granted a loan to a pensioner despite knowing that the instalments would be more that the mortgagor's monthly income. When the bank tried to foreclose due to default, the pensioner approached the magistrates' court, which held that the loan should be "scrapped".

[170] S 1 *s v* "reckless credit".

[171] S 81(2), referred to in s 80(1)(a) and (b), requires the credit provider to not enter into a credit agreement without first taking reasonable steps to assess

> "(a) the proposed consumer's -
> (i) 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;
> (ii) debt re-payment history as a consumer under credit agreements;
> (iii) existing financial means, prospects and obligations; and
> (b) 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."

(b) the credit provider, having conducted an assessment as required by section 81(2), entered into the credit agreement with the consumer despite the fact that the preponderance of information available to the credit provider indicated that -
   (i) the consumer did not generally understand or appreciate the consumer's risks, costs or obligations under the proposed credit agreement; or
   (ii) entering into that credit agreement would make the consumer over-indebted."[172]

Reckless credit is brought into the realm of debt enforcement (and, therefore, mortgage foreclosure) by section 130(4)(a), which provides that if a court determines – during any debt enforcement proceeding – that the agreement was reckless as described in section 80, the court must grant an order as contemplated by section 83. A debt counsellor who accepted an application for debt review[173] must determine – if such a determination is sought – whether any of the consumer's agreements appears to be reckless.[174] Furthermore, if the debt counsellor concludes[175] that a consumer is over-indebted and he or she also finds that one or more agreements appear to be reckless, he or she may recommend to the magistrates' court that such agreements be declared reckless.

A court may declare a credit agreement reckless during any court proceeding in which a credit agreement is being considered.[176] It may act *mero motu* in this regard, since an

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Whether the appropriate steps were followed must "be determined objectively on the facts and circumstances of any given case": See *Horwood v Firstrand Bank Ltd* [2011] ZAGPJHC 121; 2010/36853 (21 September 2011) para 5. S 81(1) obliges the consumer to fully and truthfully provide any information requested by the credit provider.

[172] S 80(2) provides that when determining whether an agreement is reckless, the criteria in s 80(1) must be applied as it existed at the time the agreement was established. Regard must also not be given to the ability of the consumer to meet the obligations under the agreement, or his or her ability to understand or appreciate the risks, costs and obligations under the agreement at the time the determination is being made. For example, if the consumer did not have the required understanding at the time of the agreement coming into existence, the fact that he at a later stage did have the understanding may not be taken into account. Therefore, the assessment entials an *ex post facto* enquiry: See CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 399-400. In terms of s 130(4)(a), if it is determined that the agreement was in fact reckless, the court must make an order as contemplated in s 83.

[173] See 4 3 4 1 and 4 3 4 2 below.

[174] S 86(6)(b). Reckless credit and over-indebtedness are two distinct concepts, though they overlap in some instances: See C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 11-1 - 11-2. For an overview of the two concepts, see S Renke *et al* "The National Credit Act: New parameters for the granting of credit in South Africa" (2007) 28 *Obiter* 229-270 244-250. In terms of item 4(2) of Sch 3 to the NCA, the provisions of Part D of Ch 4 of the Act ("Over-indebtedness and reckless credit") are applicable to all credit agreements, even those pre-dating the NCA. However, the provisions that regulate reckless credit are not applicable to credit agreements pre-dating the NCA.

[175] In terms of s 86(7)(c)(i).

[176] S 83(1). See also C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 11-45.

allegation of reckless credit is not a requirement.[177] There are two circumstances under which a court can declare a credit agreement reckless, each with its own consequences.[178]

In terms of the first option[179] credit agreements can be declared reckless when the credit provider failed to conduct the required assessment[180] or, having conducted the assessment, entered into the agreement despite the fact that the available information indicated that the consumer did not generally understand or appreciate the relevant risks, costs and obligations. As a consequence of a finding in this regard, the court may grant an order setting aside all or part of the consumer's rights and obligations under the agreement.[181] The court should grant this order in accordance with what it determines to be just and reasonable under the circumstances. In the alternative, the court may grant an order suspending the force and effect of the agreement until a date determined by the court.[182]

The second option[183] that a court has for declaring an agreement reckless will arise if the credit provider conducted the required assessment but entered into the agreement despite the relevant information indicating that entering into that credit agreement would cause the consumer to become over-indebted. Therefore, it is the very act of concluding the particular credit agreement that made the consumer over-indebted. Under these circumstances (if concluding the agreement made the consumer over-indebted) a court may only grant a remedy if it also concludes that the consumer is still over-indebted at the time that the court has to decide on the matter.[184] In that case, the court has a discretion[185] to either suspend the force and effect of the agreement until a date determined by the court[186] or restructure the consumer's obligations in accordance with section 87.[187]

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[177] JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 78.
[178] See also A Boraine & C van Heerden "To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments" (2010) 13 *PELJ* 84-124 96-98.
[179] As the first option, s 83(2) deals with the consequences of reckless credit if it is declared as such under s 80(1)(a) or (b)(i).
[180] In terms of s 81(2).
[181] S 83(2)(a). Even though it seems that the Act here provides for the contract to be cancelled, it only refers to the setting aside of the consumer's rights and obligations and not the credit provider's rights and obligations: See HCJ Flemming *Flemming's National Credit Act* (2nd ed 2010) 133.
[182] S 83(2)(b) read with s 83(3)(b)(i).
[183] As the second circumstance, s 83(3) deals with the consequences of reckless credit if it is declared as such in terms of s 80(1)(b)(ii). The consequences of this option are set out in s 83(3)(a) and (b)(i) to (ii).
[184] S 83(3)(a) to (b). See also *Standard Bank of South African Ltd v Kelly and Another* (23427/2010) [2011] ZAWCHC 1 (25 January 2011) para 7; C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 11-50.
[185] The court, in exercising its discretion in terms of s 83, must also consider the factors provided in s 83(4).
[186] S 83(3)(b)(i).
[187] S 83(3)(b)(ii). Debt rearrangement is discussed in 4 3 4 3 below.

The second option has less harsh consequences because a complete or partial setting aside of the consumer's rights and obligations is not an option available to the court.[188] However, suspension and debt rearrangement are available. Should the court decide to suspend the force and effect of the agreement, such suspension has certain implications.

During the period of suspension the consumer is not required to make any payments as required under the suspended agreement.[189] Furthermore, the consumer may not be charged with any interest, fee or other charge under the agreement during that time.[190] Since the force and effect of the agreement is suspended, the subsection also provides that no rights of the credit provider under the agreement or any law are enforceable.[191] The credit provider is consequently also prohibited from calling up the mortgage bond during the period of suspension. After the suspension of the agreement ends, all the rights and obligations of the credit provider and consumer are revived.[192] They are also fully enforceable, except to the extent that a court may order otherwise.[193] However, after the suspension ends, the credit provider may not charge the consumer for any amounts (interests, fees or other charges) that would have accrued if the agreement had not been suspended.[194]

In *Standard Bank of South African Ltd v Kelly and Another*,[195] the consumers opposed the credit provider's application for summary judgment by arguing that the credit was granted in a reckless manner.[196] The consumers averred that the credit provider did not do the necessary assessments before it granted the credit.[197] The order that the consumers requested – namely that the force and effect of the credit agreement be suspended[198] – could only be granted after the court had also enquired as to the consumer's over-indebtedness.[199] Therefore, the court

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[188] A Boraine & C van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 650-656 654.
[189] S 84(1)(a).
[190] S 84(1)(b).
[191] S 84(1)(c).
[192] S 84(2)(a)(i).
[193] S 84(2)(a)(ii). See A Boraine & C van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 650-656 654, who argue that since the court may order otherwise, it is possible to suspend the agreement more than once. For example, this may be the case when the consumer's financial position did not improve during the period of suspension: See the authors (at 656). However, the Act is silent on this issue. I argue that there will have to be exceptional circumstances present to suspend the agreement for a second time (if at all), since a second rearrangement might contravene the protection that the creditor would enjoy under s 25(1) of the Constitution: See 6 4 5 below.
[194] S 84(2)(b).
[195] (23427/2010) [2011] ZAWCHC 1 (25 January 2011).
[196] Para 1.
[197] Para 5.
[198] S 83(2)(b) read with s 83(3)(b)(i).
[199] *Standard Bank of South African Ltd v Kelly and Another* (23427/2010) [2011] ZAWCHC 1 (25 January 2011) para 7.

would first have to determine whether the consumers were in fact over-indebted in terms of section 79 of the NCA. The court held that it is unlikely that it would relieve a consumer of his or her obligations to the extent that it would amount to an unjustified enrichment of the consumer at the expense of the credit provider.[200] Describing when a court will relieve a consumer from all or part of his or her obligations under a reckless credit agreement, the court held that such a decision

> "will in general be informed by the statute's policy of promoting equity in the credit market and by the consideration of assisting the consumer to fully repay responsibly undertaken debt at the expense, if necessary and appropriate, of subordinating the rights of reckless creditors."[201]

The court held that such a determination must be made based on the particular facts of each case.[202] Accordingly, a court should not only look at the transaction as one that qualifies as reckless credit in the abstract. Rather, the court should also look at the character and effect of the transaction in the context of "the consumer's overall credit exposure".[203] This must be done in the manner contemplated by the section 79 enquiry into the consumer's over-indebtedness.

Furthermore, the court held that it would not be appropriate to grant summary judgment if there was a prospect that the consumer may obtain an order of reckless credit and relief in terms of section 83(2).[204] However, the consumer – in his or her defence against the summary judgment application – has to set out facts in support of the defence.[205] In this case, the consumers argued that the credit provider did not conduct the required assessment, since the consumers provided "limited financial information" to the credit provider.[206] However, they did not explain what the limited information was.

Of course, the NCA does not provide a fixed format by which credit providers should make these assessments. Accordingly, the consumers' "broad-brush allegations" were not sufficient to convince the court that the information presented to the credit provider would be inadequate to amount to a proper assessment.[207] Moreover, no information was presented to the court that would indicate a basis upon which a debt review may be conducted. Such a review would be necessary before the section 83(2)(b) relief can be granted. However, the

[200] Para 8.
[201] Para 8.
[202] Para 8.
[203] Para 8.
[204] Para 9.
[205] Para 9.
[206] Para 12.
[207] Para 12.

information presented was not capable of persuading a court to allow a debt review.[208] Therefore, the consumers did not set out facts that would be sufficient to constitute a *bona fide* defence against the summary judgment application.[209] Also, the court held it against the consumers that they did not explain why they had not responded to the suggestions made in the section 129(1)(a) notice. In the absence of such an explanation, it would be unfair to deny the credit provider the relief it is entitled to.[210] From this case it seems clear that an allegation of reckless credit will be treated in much the same way as an allegation of over-indebtedness.[211]

The consequences of reckless credit – suspension and setting aside – are discussed from a constitutional property perspective in 6 4 6 below. There I analyse the nature and implications of these remedies in more detail, with the purpose of illustrating how courts should go about deciding when and how to use which remedy so that it complies with both the NCA and the Constitution.

[208] Para 14.
[209] Para 15. See also *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 1 SA 310 (GSJ) paras 56-57, where court held that the debtor did not provide the information necessary to substantiate the defence.
[210] *Standard Bank of South African Ltd v Kelly and Another* (23427/2010) [2011] ZAWCHC 1 (25 January 2011) para 16. See also *Absa Bank v Trustees for the Time Being of the Coe Family Trust and Others* (24190/2009) [2010] ZAWCHC 206 (1 September 2010) 2, where the consumer alleged reckless credit as a defence against summary judgment. The argument was based on no assessment being done, as well as the fact that the consumer was a student who earned no income at the time the credit was granted. The court refused to grant the summary judgment based on its opinion that the issues that were raised needed to be argued in front of a trial court. The mortgage agreement contained a clause wherein the consumer agreed that he truthfully provided all the information necessary to the credit provider. The court did not set aside or suspend the obligations under the agreement. It only referred the matter to a trial court, since there were matters pertaining to the law of contract that had to be decided on.
[211] I discuss over-indebtedness as a *bona fide* defence in 4 3 4 6 below.

4 3 4 Over-indebtedness[212]

4 3 4 1 Introduction

The legal concept of over-indebtedness is new to South African law.[213] The possibility of being declared over-indebted is described as a "second chance" given to over-committed consumers.[214] An evaluation of possible over-indebtedness can be initiated in one of two ways.[215] Firstly, the consumer can apply for debt review prior to the credit provider instituting debt enforcement proceedings.[216] Secondly, during debt enforcement proceedings the consumer can allege his or her over-indebtedness and request the court to refer the matter for debt counselling.[217]

The main reasons for over-indebtedness seem to be irresponsible and unrestrained spending by consumers as well as reckless and unrestrained lending practices by creditors.[218] Whereas the two problems arguably fuel each other, the NCA aims to prevent and remedy both.[219] Section 79(1) defines the concept of over-indebtedness as follows:

> "(1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's -
> (a) financial means, prospects and obligations;[220] and

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[212] In general, see JM Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399-408; JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 58-64. N Campbell "The consumer's rights and credit provider's obligations" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 6-11 - 6-12; C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 11-4 - 11-26; JM Otto "Over-indebtedness and applications for debt review in terms of the National Credit Act: Consumers beware! *Firstrand Bank Ltd v Olivier*" (2009) 21 *SA Merc LJ* 272-278; PN Stoop "South African consumer credit policy: Measures indirectly aimed at preventing consumer over-indebtedness" (2009) 21 *SA Merc LJ* 365-386 368-371; H Taylor "Enforcement of debt in terms of the National Credit Act 34 of 2005, trial and celebration? A critical evaluation" (2009) 42 *De Jure* 103-119 113; ML Vessio "Beware the provider of reckless credit" 2009 *TSAR* 274-289 275-277; M Kelly-Louw "The prevention and alleviation of consumer over-indebtedness" (2008) 20 *SA Merc LJ* 200-226; MA du Plessis "The National Credit Act: Debt counselling may prove to be a risky enterprise" (2007) 32 *JJS* 74-92.

[213] It is, for instance, not the same as being declared insolvent.

[214] JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 58. See *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) para 5.

[215] JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 59.

[216] See 4 3 4 2 below.

[217] See 4 3 4 6 below.

[218] PS Munyai "Higher interest rates and over-indebtedness: A comparison of conventional and Islamic banking" (2010) 22 *SA Merc LJ* 405-416 407.

[219] Ss 3(c) and (g) of the NCA. See also PS Munyai "Higher interest rates and over-indebtedness: A comparison of conventional and Islamic banking" (2010) 22 *SA Merc LJ* 405-416 308.

[220] The term "financial means, prospects and obligations" is also defined for purposes of this part of the Act. S 78(3) provides that it includes

(b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment."[221]

It can be assumed with a fair level of certainty that over-indebtedness is one of the main reasons why consumers default on their credit agreements. One would imagine that defaulters who are not over-indebted should in general be able to fulfil their obligations. When a consumer is in default but not over-indebted or a victim of reckless credit, it is conceivable that a credit provider should be able to enforce the credit agreement without much trouble.[222] In the absence of over-indebtedness or reckless credit, any default may possibly be a result of debtors acting in bad faith and abusing the protection that the law offers, or simply poor personal financial planning. Providing protection for those who abuse the system is not the purpose of my research and case law also illustrates the courts' intolerance towards bad faith.[223] Hence, I focus on instances where there is a direct link between mortgage default and over-indebtedness. The law should strive to assist those who honestly struggle due to factors beyond their direct control.

"(a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person;
(b) the financial means, prospects and obligations of any other adult person within the consumers' immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily-
  (i) share their respective financial means; and
  (ii) mutually bear their respective financial obligations; and
(c) if the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose."

[221] S 79(2) requires that when determining over-indebtedness, the criteria must be applied as they exist at the time this determination is being made. Furthermore, the debt counsellor must, in terms of reg 24(7)(a) to (c), consider the following:

"(a) A consumer is over-indebted if his/her total monthly debt payments exceed the balance derived by deducting his/her minimum living expenses from his/her net income;
(b) Net income is calculated by deducting from the gross income, statutory deductions and other deductions that are made as a condition of employment;
(c) Minimum living expenses are based upon a budget provided by the consumer, adjusted by the debt counsellor with reference to guidelines issued by the National Credit Regulator."

MA du Plessis "The National Credit Act: Debt counselling may prove to be a risky enterprise" (2007) 32 *JJS* 74-92 78 argues that an objective test should be applied when assessing whether the consumer is over-indebted and this must be done in terms of the reasonable person standard. The author (at 83) also suggests that the enquiry should not be limited to the income, *et cetera* of the debtor, but should include those of the family or household that share the debtor's financial responsibilities.

[222] CM van Heerden & JM Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655-684 668.

[223] See 4 3 4 6 below, where I discuss the way courts have treated matters where over-indebtedness was raised as a defence against applications for summary and default judgments.

In this context, the root cause of many a homeowner's mortgage foreclosure is the fact that these homeowners are over-indebted. They can no longer afford to continue paying the full instalments on their bonds and they subsequently default. It follows that if there are fewer over-indebted homeowners, there should in theory also be fewer homeowners facing the loss of their homes as a result of foreclosure. Preventing future over-indebtedness (as well as reckless credit granting) and thereby reducing future home loan defaults, may go a long way in sustaining a stable mortgage market where as few persons as possible lose their homes. Consequently, it is one of the NCA's purposes to prevent future over-indebtedness as much as possible.[224] A positive development in this regard is the adoption by many credit providers (including the four largest banks) of the Credit Industry Code of Conduct for Combating Over-indebtedness ("the Code").[225] Without going into detail, the parties to the Code essentially committed themselves to the fight against over-indebtedness, as well as to rehabilitating over-indebted consumers. It seems that the NCA has left these institutions with no choice but to change the way they conduct business. This may have been the legislature's purpose with instituting a debt review process.[226] Credit providers are probably realising that it is also in their best interest to rather try and preserve the relationship with their clients, even if it means compromises on their part.

As much as the law can strive to prevent the problem of homeowners becoming over-indebted and facing the loss of their homes, the fact is that we are currently faced with many homeowners who are already over-indebted. It is probably over-optimistic to expect a future where all over-indebtedness can be completely prevented. Therefore, the Act does not only have a preventative function, but it is also rehabilitative in nature.[227] The debt review process is aimed at assisting those consumers who find themselves in over-indebted circumstances as a result of a change in their financial circumstances or reckless credit having been granted them. Debt counselling should help ensure that consumers utilise their incomes effectively and efficiently so that all their debts are eventually settled.[228]

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[224] S 3(c)(i).

[225] See *Credit Industry Code of Conduct for Combating Over-indebtedness* (date unknown) <http://www.octagon.co.za/PressOffice/CreditIndustryCodeofConduct/tabid/816/language/en-ZA/Default.aspx> (accessed 26-01-2011). The Code came into operation on 1 January 2011.

[226] In *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) para 46 Pillay J infers from the scheme of debt review and enforcement that it was intended that most cases should be settled out of court (through debt counselling) and that only a few should reach the ultimate stage of enforcement by litigation.

[227] JM Otto "The history of consumer credit legislation in South Africa" (2010) 16 *Fundamina* 257-273 272.

[228] MA du Plessis "The National Credit Act: Debt counselling may prove to be a risky enterprise" (2007) 32 *JJS* 74-92 65.

In terms of the common law, mortgagees are technically entitled to enforce their security rights before considering other options, since this is traditionally the very nature and purpose of the mortgage as a security right. However, as a result of the NCA, as well as social needs, mortgagees are compelled to accept the fact that their security rights can no longer be enforced as ruthlessly and easily as before or without taking into account alternative ways of settling disputes, for example mediation.[229] Therefore, debt review has a significant impact on debt enforcement procedures. When debt review commences it has the effect of creating a moratorium on the enforcement of the credit agreement.[230] Consequently, there is an intricate interaction between debt enforcement and debt relief.[231] The purpose of this process is to determine whether a consumer is over-indebted or not and, if he or she is found to be over-indebted, to have his or her debt rearranged. This also implies the avoidance of the severe impact traditional debt enforcement can have, especially relating to the loss of property.

Debt review is brought into the realm of debt enforcement and mortgage foreclosure by the application of section 130(4)(c). In terms of this section, if there is a debt review pending, the court may adjourn the matter[232] or make an order declaring the consumer over-indebted and relieving such over-indebtedness[233] instead of allowing the enforcement of the mortgage bond. Furthermore, in terms of section 130(3)(c)(i), the court may not determine the matter unless it is satisfied that the credit provider has not approached the court during the time that the matter was before (amongst others) a debt counsellor.[234]

There is a distinction between the case where the matter is under a pending debt review as contemplated by section 130(4)(c) and the case where the matter is before a debt counsellor as contemplated by section 130(3)(c)(i). If it is before a debt counsellor (following the section 129(1)(a) notice) the court may not determine the matter at all, unless the debt review is terminated.[235] However, when it is subject to pending debt review (therefore, independent of

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[229] The Code also involves affiliation with the National Debt Mediation Association. See <http://www.ndma.org.za/StandardContent.aspx?pid=106> (accessed 01-02-2011).
[230] C van Heerden & H Coetzee "Debt counselling v debt enforcement: Some procedural questions answered: *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD)" (2010) 31 *Obiter* 756-775 766.
[231] CM van Heerden & JM Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655-684 668.
[232] S 130(4)(c)(i).
[233] S 130(4)(c)(ii) to (iii). The court can either order the debt counsellor to directly report to it, or – if the particular agreement is the consumer's only credit agreement – order the debt counsellor to discontinue the review. After either of these, the court may then make an order of over-indebtedness in terms of s 85(b) and relieve the debt in terms of s 87. See 4 3 4 6 below.
[234] C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 12-34 - 12-35 argues this section contemplates the scenario where the consumer reacted to the s 129(1)(a) notice by approaching a debt counsellor.
[235] See 4 3 4 4 below.

debt enforcement proceedings) the court has a discretionary choice between the options as contemplated by section 130(4)(c). In summary, where debt review is underway, a court may either not determine the matter at all (if debt review is being conducted subsequent to the section 129(1)(a) notice) or the court has the discretion to (amongst others) postpone the matter (if debt review was commenced prior to debt enforcement). Consequently, debt review results in limiting the enforceability of credit agreements and hence also in effect suspends mortgage foreclosure.

4 3 4 2 Applying for debt review

Every credit consumer has the right to apply for debt review.[236] If a consumer wants him- or herself to be declared over-indebted he or she must apply to a debt counsellor.[237] Debt review is not aimed at relieving the debtor from his or her contractual obligations.[238] Instead, the main purpose of debt counselling is for the debt counsellor to attempt the creation of a debt rearrangement agreement that is acceptable to all credit providers. If a voluntary agreement cannot be reached the counsellor must make recommendations to a magistrate on how the debtor can be assisted.[239] However, in terms of section 86(2) an application to a debt counsellor may not be made if, at the time of such application, the credit provider had already proceeded to take steps[240] to enforce the agreement. Hence, if an application for debt review

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[236] S 86(1). The debt review process is set out in s 86 read together with regs 24 to 26. Details of the debt review procedure itself are not relevant for purposes of this dissertation, but only the possible conclusions and consequences for mortgage foreclosure. For an in depth analysis as well as criticism of the debt review process, see DW de Villiers "*National Credit Regulator versus Nedbank Ltd* and the practice of debt counselling in South Africa" (2010) 13 *PELJ* 128-204; M Roestoff *et al* "The debt counselling process – closing the loopholes in the National Credit Act 34 of 2005" (2009) 12 *PELJ* 246-305.

[237] S 86(1). In terms of s 86(4)(b)(i) the debt counsellor,

> "[o]n receipt of an application in terms of subsection ... must notify ... all credit providers that are listed in the application" of such application being made. In terms of s 84(5) the applying consumer as well as each credit provider must
> (a) comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt rearrangement; and
> (b) participate in good faith in the review and in any negotiations designed to result in responsible debt rearrangement."

[238] *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 10; *Kuhl v Imperial Bank Ltd* (5639/2010) [2012] ZAFSHC 10 (9 February 2012) para 25.

[239] MA du Plessis "The National Credit Act: Debt counselling may prove to be a risky enterprise" (2007) 32 *JJS* 74-92 78.

[240] As contemplated by s 129.

is made, such an application will not apply to the specific credit agreement that is already in the process of being enforced.[241]

Section 86(2) has raised some questions, due to an apparent contradiction. One of the steps required by section 129 is that of proposing to the consumer that he or she should approach a debt counsellor. However, on a reading of section 86(2) it seems that as soon as the section 129(1)(a) notice is given, the consumer is barred from applying for debt review. This seems to be an anomaly, since the step that informs the consumer of his or her right to approach a debt counsellor is the same step that impedes his or her right to apply. Some authors conclude that the steps required by section 129 as referred to in section 86(2) do not include the step of notifying the consumer.[242] In summary, their reasoning is that the section 129(1)(a) notice has to be provided before enforcement of the debt. The notice itself is not a step "to enforce that agreement" but a step taken prior to any steps of enforcement.[243] Therefore, up until the point of summons being served, the consumer still has the right to apply for debt review.[244] After this point, the consumer can only obtain debt relief by alleging over-indebtedness in terms of section 85.[245] Also, the reference in section 129(1)(a) to a debt counsellor may imply that the debt review process is contemplated by that section.[246]

The alternative argument to the above-explained position is based on the literal interpretation of section 86(2), namely that as soon as the consumer receives notice in terms of section 129(1)(a), he or she is barred from applying for debt review (for purposes of that specific agreement). Such a consumer can only make use of debt review if he or she alleges

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[241] In *Reid v Standard Bank of SA Ltd* [2011] ZAKZPHC 34; AR 6/11 (12 August 2011) para 9(c) the court implied (probably *obiter*) that, even though steps in terms of s 129 preclude the debtor from applying to a debt counsellor, there is no indication in the Act that when such application is in any event made, it is invalid. For current purposes it is not necessary for me to take a position in this regard.

[242] JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 99-100; C van Heerden & DJ Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D)" (2010) 73 *THRHR* 502-517 511-512; C van Heerden & H Coetzee "Debt counselling v debt enforcement: Some procedural questions answered: *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD)" (2010) 31 *Obiter* 756-775 767-768; C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 11-10; C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 12-18 - 12-20; CM van Heerden & JM Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655-684 667-668; A Boraine & S Renke "Some practical and comparative aspects of cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part 2)" (2008) 41 *De Jure* 1-15 9; JM Otto "Over-indebtedness and applications for debt review in terms of the National Credit Act: Consumers beware! *Firstrand Bank Ltd v Olivier*" (2009) 21 *SA Merc LJ* 272-278 276-278.

[243] *National Credit Regulator v Nedbank Ltd and Others* 2009 6 SA 295 (GNP) 318-319.

[244] C van Heerden & H Coetzee "Debt counselling v debt enforcement: Some procedural questions answered: *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD)" (2010) 31 *Obiter* 756-775 768.

[245] See 4 3 4 6 below.

[246] C van Heerden & DJ Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D)" (2010) 73 *THRHR* 502-517 513.

over-indebtedness during court proceedings in terms of section 85.[247] Though the authors referred to earlier disagree, the courts prefer this interpretation.[248]

The interpretation favoured by the authors seems to advance the position of consumers because it gives them the opportunity (10 business days) to still apply for debt review even after he or she has received the section 129(1)(a) notice, but before the creditor takes further steps in terms of section 129(1)(b). However, at the moment it seems like credit providers are favoured by the way most courts interpret section 86(2) because according to their interpretation, once the credit provider serves the section 129(1)(a) notice, the consumer can no longer postpone enforcement by applying for debt review in terms of section 86. The consumer would (in terms of section 85) have to allege over-indebtedness and get the court to provide him or her with relief in terms of that section.[249]

The court in *BMW Financial Services (SA) (Pty) Ltd v Mudaly*[250] provided a feasible explanation. According to Wallis J, the invitation extended by the section 129(1)(a) notice to

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[247] Otto used to prefer this interpretation: See JM Otto *The National Credit Act explained* (2006) 85 n 25. However, in JM Otto "Over-indebtedness and applications for debt review in terms of the National Credit Act: Consumers beware! *Firstrand Bank Ltd v Olivier*" (2009) 21 *SA Merc LJ* 272-278 276-278 the author reconsidered the matter and agreed with the first interpretation as supported by Van Heerden, Boraine and Renke: See JM Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399-408 405; CM van Heerden & JM Otto "Debt enforcement in terms of the National Credit Act 34 of 2005" 2007 *TSAR* 655-684 667; A Boraine & S Renke "Some practical and comparative aspects of cancellation of instalment agreements in terms of the National Credit Act 34 of 2005 (Part 2)" (2008) 41 *De Jure* 1-15 9. The reason for Otto's earlier argument is that he believed the role of the debt counsellor subsequent to the s 129(1)(a) notice to be only that of bringing disputes between the parties to an end and to facilitate a friendly rearrangement of payments, but not to conduct a debt review, since s 86(2) does not refer to a debt review. After reconsidering, he agrees that the prohibition on debt review in s 86(2) is probably only aimed at legal proceedings to enforce the credit agreement as mentioned in s 129(1)(b) and not the giving of notice provided for by s 129(1)(a): See also JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 99-100, where the author (along with his co-author) confirms that he has retracted from the view expressed in the first edition of his book. In this second edition of his book, Otto (assisted by Otto) (at 100) states that this position "fits in neatly" with *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE). However, Otto and Otto (at 101) point to the potential danger of the approach that the academics favour, namely that credit providers may start the enforcement proceedings immediately after consumers default. This they would do in order for debt review to be prevented. In this regard, the authors moreover emphasise that many credit providers are not "callous", but in fact sympathetic towards debtors. This sympathy is apparently inspired by the fear for damaging their reputations and losing their clients; in other words, commercial considerations.

[248] *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) para 37; *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 5 SA 618 (KZN) para 11; *National Credit Regulator v Nedbank Ltd and Others* 2009 6 SA 295 (GNP) 318-319; *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 (D) para 21; *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) 519; *Nedbank Ltd v Motaung* (22445 / 07) [2007] ZAGPHC 367 (14 November 2007); *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZN) para 10. At least one judgment preferred the interpretation given by the authors, namely *Starita v ABSA Bank Ltd and Another* 2010 3 SA 443 (GSJ) para 12.

[249] See 4 3 4 6 below.

[250] 2010 5 SA 618 (KZN) para 11. Wallis J decided *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZN) para 10 in a similar fashion. See also C van Heerden & H Coetzee "Debt counselling v debt enforcement: Some procedural questions answered: *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD)" (2010) 31 *Obiter* 756-775.

approach a debt counsellor is not an invitation to apply for the general process of debt review. It is only aimed at reaching a consensual negotiation between the two parties with the help of a debt counsellor.[251] The purpose is not for the consumer – after receiving the notice – to apply for the general debt review process in terms of section 86 and thereby stalling the enforcement proceedings that has already commenced. Of course, regarding his or her other credit agreements the consumer can still apply for debt review, but that review would exclude the agreement pertaining to which the section 129(1)(a) notice has already been provided. Wallis J, whose approach is probably technically correct,[252] is also critical of the arguments made by most academic authors.[253]

However, Van Heerden and Lötz[254] are sceptical of this interpretation. They argue that it is unlikely that the legislature would have expected the debt counsellor to assist in reaching a consensual negotiation without doing some kind of debt review. Van Heerden and Coetzee[255] also argue that this strict interpretation of Wallis J "leaves one with a slight feeling of unease".[256] This "unease" is due to the lack of consumer awareness. Accordingly, despite efforts at consumer education, many consumers will only be alerted of the possibility of debt review when they receive the section 129(1)(a) notice. Many will not know that they are required to apply for debt review before receiving the notice. If a consumer does approach a debt counsellor (after receiving the notice) and the counsellor establishes that the consumer is so over-indebted that a comprehensive debt review is necessary, it is unclear what the consumer's position is.[257] The only option may be for the debt counsellor to inform the consumer that debt review is no longer possible and that the only way to find assistance is to allege his or her over-indebtedness in court in terms of section 85. The authors insist that clarity is necessary regarding the interaction between sections 129(1)(a) and 86(2).[258]

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[251] This is also the approach Otto used to support but retracted from: See JM Otto *The National Credit Act explained* (2006) 85 n 25. See also 4 3 4 2 n 247 above.
[252] HCJ Flemming *Flemming's National Credit Act* (2nd ed 2010) 143-145 and 197 also favours this approach.
[253] *BMW Financial Services (SA) (Pty) Ltd v Mudaly* 2010 5 SA 618 (KZN) para 12.
[254] C van Heerden & DJ Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D)" (2010) 73 *THRHR* 502-517 512.
[255] C van Heerden & H Coetzee "Debt counselling v debt enforcement: Some procedural questions answered: *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD)" (2010) 31 *Obiter* 756-775 767.
[256] This comment was made in response to the similar approach of Willis J in *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD).
[257] C van Heerden & H Coetzee "Debt counselling v debt enforcement: Some procedural questions answered: *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD)" (2010) 31 *Obiter* 756-775 767.
[258] 767.

To the same effect, Van Heerden and Lötz[259] point out that in practice many consumers will probably only approach a debt counsellor for the first time after he or she had received the section 129(1)(a) notice. This practicality may be the reason for some authors' preference for allowing a debt review even after the section 129(1)(a) notice had been sent. Therefore, it can be said that this interpretation is a result of practical necessities and not, as such, based strictly on statutory interpretation. However, the purposes of the NCA, which tend to be in favour of consumer protection, may reinforce these authors' more consumer-friendly approach. Van Heerden and Lötz comment that if one follows the interpretation that a debt review is precluded once the section 129(1)(a) notice is sent, it may cause difficulties for consumers who have not had enough time to apply for debt counselling. This would especially be the case if a credit provider reacts very quickly to a default and immediately sends the notice.[260] Expensive and time consuming litigation would then follow. Moreover, by the time that the case reaches the court the consumer's over-indebtedness may have increased, leaving him or her worse off.[261]

The SCA recently delivered a decision on this point that will hopefully settle the matter. In the high court[262] the parties agreed that taking steps to enforce the agreement does not include providing the section 129(1)(a) notice. However, the court was not satisfied with this approach and declined to make such an order due to the fact that insufficient argument was presented. The court stated that even the steps in section 129(1)(a) are preliminary to debt enforcement. It also held that the purpose of s 86(2) is to prevent consumers from applying for debt review and thereby frustrate a credit provider who has already started to enforce the credit agreement.[263] In *Nedbank Ltd and Others v The National Credit Regulator and Another*[264] the SCA dismissed an appeal against this finding by the high court.

It seems that courts will choose to follow the direction taken in almost all other case law (including the SCA decision), namely that the section 129(1)(a) notice prevents the consumer from applying for general debt review in terms of section 86. To avoid possible prejudice to

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[259] C van Heerden & DJ Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D)" (2010) 73 *THRHR* 502-517 510.
[260] 512.
[261] 512; C van Heerden & H Coetzee "Debt counselling v debt enforcement: Some procedural questions answered: *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD)" (2010) 31 *Obiter* 756-775 767.
[262] *National Credit Regulator v Nedbank Ltd and Others* 2009 6 SA 295 (GNP) 318-319. For a discussion of the high court decision and its impact on the debt counselling process, see DW de Villiers "*National Credit Regulator versus Nedbank Ltd* and the practice of debt counselling in South Africa" (2010) 13 *PELJ* 128-204.
[263] JM Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399-408 405 is disappointed that the court did not expressly answer this question.
[264] (662/2009, 500/2010) [2011] ZASCA 35 (28 March 2011).

consumers as a result of this approach, section 85 provides them with the right – when the agreement is enforced in court – to allege their over-indebtedness and convince the court to allow a debt review to be conducted. In the third revised issue of her work, which was published after the SCA's judgment, Van Heerden[265] does not repeat the position she took in the previous issue.[266] However, it seems that Van Heerden is still sceptical of the SCA's approach,[267] especially if one considers her criticism (in case notes co-authored with Lötz[268] and Coetzee[269]) of this approach when it was followed in earlier cases.

For purposes of this dissertation I accept the approach that was taken by the SCA. Any negative results for the consumer are sufficiently mitigated by the consumer's right to allege his or her over-indebtedness in court and thereby request the court to refer the matter for debt counselling.[270]

Above I explain how important it is that a debtor institutes debt review timeously, in other words, prior to receiving the section 129(1)(a) notice. If this occurs, the debt counsellor must notify the creditor of the consumer's application for debt review and the commencement of the debt review process.[271] The consequence of receiving this notice is that, from that point on – while the debt review is running – the credit provider may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement.[272] However, the right to enforce will recommence when the consumer defaults under the credit agreement[273] and when either one of two events occur.[274] The first event is either one of the following:[275]

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[265] C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 11-11 - 11-15.
[266] C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 11-10.
[267] C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 12-22 - 12-23.
[268] C van Heerden & DJ Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D)" (2010) 73 *THRHR* 502-517 512.
[269] C van Heerden & H Coetzee "Debt counselling v debt enforcement: Some procedural questions answered: *BMW Financial Services (SA) (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD)" (2010) 31 *Obiter* 756-775 767.
[270] See 4 3 4 6 below.
[271] This notice is required by s 86(4)(b)(i).
[272] S 88(3). This is also the case when a credit provider receives a notice of court proceedings contemplated by ss 83 (reckless credit) or 85 (over-indebtedness).
[273] S 88(3)(a).
[274] S 88(3)(b).
[275] S 88(3)(b)(i). S 88(1) provides that when a consumer has applied for debt review in terms of s 86(1) or if he or she has alleged over-indebtedness in court, such a consumer may not incur any further charges under a credit facility or enter into any further credit agreements, except for a consolidation agreement, until one of three events has occurred.

(1) If the debt counsellor rejects the application and the time period within which the consumer can directly apply to the magistrates' court in terms of section 86(9) has expired without the consumer applying to such court;[276] or

(2) if the court has determined that the consumer is not over-indebted or rejects the debt counsellor's proposal or the consumers' application.[277]

In the alternative to either of the above occurring, the second possible event that allows the credit provider to proceed with enforcement is when the consumer defaults on any obligation in terms a rearrangement agreement made between the credit provider(s) and consumer, or defaults on a rearrangement ordered by a court or the Tribunal.[278]

For the success of the debt review process, it is important that the debt counsellor properly complies with the NCA and accurately advises the consumer on what he or she must do. If the debt counsellor does not conduct the review process correctly, it may have a seriously detrimental effect on the consumer's situation. A court might be sympathetic and order the debt counsellor to re-do the review in accordance with the NCA, which is what happened in *Changing Tides 17 (Pty) Ltd NO v Erasmus and Another; Changing Tides 17 (Pty) Ltd NO v Cleophas and Another; Changing Tides 17 (Pty) Ltd NO v Frederick and Another*[279] ("*Erasmus*"). In this case the court gave an extensive discussion of how the sale in execution

[276] S 86(1)(a).

[277] S 86(1)(b). There is a third event, as provided for by s 86(1)(c), but which is not relevant for current purposes.

[278] S 88(3)(b)(ii). In *FirstRand Bank Ltd v Fillis and Another* 2010 6 SA 565 (ECP) paras 15-16, especially para 14 the court per Eksteen J stated as follows:

> "The Act provides very extensive protection to a consumer who has become over-indebted, whether it be of his or her own making or through circumstances beyond his or her control. Not only does a rearrangement afford him or her alleviation from the onerous monthly obligations that he or she has in all seriousness undertaken to his or her credit providers, but he or she also enjoys the protection of section 103(5) against the ravaging effect of escalating interest whilst he or she remains in default under the credit arrangement. If, however, he or she fails to embrace this opportunity, or he or she is, notwithstanding this very considerable assistance, unable to comply with his or her restructured debt commitment, the Act permits the common law to run its course."

See also *Kuhl v Imperial Bank Ltd* (5639/2010) [2012] ZAFSHC 10 (9 February 2012) para 21; *Firstrand Bank Ltd formerly known as First National Bank of Southern African Ltd v Fester and Another* [2011] ZAWCHC 363;14597/2011 (15 September 2011) paras 4-5; *Firstrand Bank Ltd v Grobler* (A249/10) [2011] ZAFSHC 45 (17 March 2011) para 8-10. For example, see *FirstRand Bank Ltd v Meyer and Another* (3483/10) [2011] ZAECPEHC 8 (17 March 2011), where the mortgage debtors were granted a debt rearrangement order, but again fell into arrears. Accordingly, the creditor instituted judicial proceedings to enforced its right of security in terms of s 88(3)(b)(ii). It does not seem like consumers can apply for a second rearranging of their debt. However, it seems that if a debtor defaults on a rearranged payment plan, but purged such arrears and is willing and able to continue to comply with the plan, a court might be willing to not grant summary judgment against the debtor but allow the new repayment plan to continue: See *Firstrand Bank Ltd v Britz and Another* (5243/2011) [2012] ZAFSHC 13 (9 February 2012) paras 22 and 26.

[279] (18153/09, 14229/09, 11973/09) [2009] ZAWCHC 175 (12 November 2009).

(that would follow debt enforcement) would impact the consumer's housing rights.[280] Yet, the court did not decide the case on this aspect, but rather on the fact that the debt counsellor did not conduct the review properly. It seems that the strong housing considerations indirectly influenced the court to order the debt review to be re-done, something that the Act technically does not provide for. The credit provider was also not at fault in this regard and, on the face of it, it seems unfair that the credit provider's rights were denied because the debt counsellor failed to fulfil his or her obligations correctly. However, the importance of the housing considerations probably justified this postponement of the enforcement of the credit provider's rights.

A similar situation occurred in *Nedbank Limited v Hlongwane and Another*[281] ("*Hlongwane*"). However, in this case the court found in favour of the credit provider. There was no evidence that the debt counsellor proceeded with the debt review as required and, as a result of this, the consumers were prejudiced. The difference between this case and *Erasmus* is that in *Hlongwane* there was no indication whatsoever that the consumers' housing rights would be impacted. In the absence of information regarding the consumers' housing rights, the court could not justifiably refuse the credit provider that which it was lawfully entitled to, namely a judgment order and a sale in execution order.

This situation indicates the importance of debt counsellors conducting the review process correctly. If this is not done, the chances are that the courts will not deny the rights of the credit providers, especially where they did everything the law requires. Housing issues might play a mitigating role, but this is no guarantee and it would depend on the discretion of the court and the circumstances of each case.

4 3 4 3 Debt rearrangement

The debt counsellor is an office created by the NCA to facilitate the investigation into whether a consumer is over-indebted and whether there was reckless credit.[282] The

[280] The housing aspect of the case is discussed in 3 3 2 above.
[281] (47312/2009) [2011] ZAGPPHC 39 (31 March 2011).
[282] A debt counsellor is defined in reg 1 as "a neutral person who is registered in terms of section 44 of the Act offering a service of debt counselling". Reg 1 also defines debt counselling as "performing the functions contemplated in section 86 of the Act". For a discussion on the registration of debt counsellors, see further E van Zyl "Registration and the consequences of non-registration" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 5-8 - 5-9 and 5-17. The NCA regulations were published in *Government Gazette* 28829, GN R489 (31 May 2006). On the function of the debt counsellor in general, see also MA du Plessis "The National Credit Act: Debt counselling may prove to be a risky enterprise" (2007) 32 *JJS* 74-92.

counsellor's purpose is to make a recommendation for debt relief, for example, by way of debt rearrangement. If the debt counsellor accepts an application for debt review, he or she must determine whether the consumer appears to be over-indebted.[283] If the consumer seeks a declaration of reckless credit, the debt counsellor must also determine whether any of the credit agreements appears to be reckless.[284] The debt counsellor must make his or her determinations within 30 business days after the counsellor receives the application.[285] In making his assessment, the debt counsellor must refer to the definition of over-indebtedness.[286]

Section 86(7) describes the three different conclusions the debt counsellor can come to as a result of the assessment in terms of section 86(6). It also describes the way the debt counsellor must respond to each of the possible conclusions. Firstly, the debt counsellor can come to the conclusion that the consumer is not over-indebted.[287] The counsellor must then reject the application, even if he or she concluded that a particular credit agreement was reckless at the time it was entered into.[288] The word "must" indicates that the debt counsellor has no choice other than to reject the application under these circumstances. Nevertheless, the consumer may still apply directly to the magistrates' court[289] for an order as contemplated in section 86(7)(c) – the third option discussed below. Hence, a rejection by the debt counsellor is not the final word for a consumer who believes he or she is entitled to relief.

Secondly, the counsellor can find that the consumer is not over-indebted but that he or she is nevertheless experiencing, or is likely to experience, difficulty satisfying all his or her

[283] S 86(6)(a). For the SCA's summary of the debt review process, see *Nedbank Ltd and Others v National Credit Regulator and Another* 2011 3 SA 581 (SCA) para 21ff.
[284] S 86(6)(b). In *Ex parte Ford and Two Similar Cases* 2009 3 SA 376 (WCC) para 16 the court was dissatisfied with the fact that the debt counsellor, during the debt review process, did not also consider whether there was reckless credit involved. Therefore, even though the debt counsellor is conducting the review only with the purpose of investigating the indebtedness, he or she should also specifically indicate that the issue of reckless credit was considered as well as his or her finding in this regard. See also C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 11-8 n 30.
[285] Even though reg 24(6) requires the debt counsellor to make his or her determinations within 30 business days, s 86(10) implies that the debt counsellor may receive some leniency in this regard, since the credit provider may only terminate the debt review process after 60 business days. See 4 3 4 4 below.
[286] See 4 3 4 1 above, where I quote the definition of over-indebtedness.
[287] S 86(7)(a).
[288] This implies that the debt counsellor can only recommend that the agreement should be declared reckless in the case where he or she also recommends that the consumer should be declared over-indebted. However, an agreement can still be declared reckless (but only by the court) in terms of s 83, regardless of whether the consumer is over-indebted or not. See 4 3 3 above.
[289] S 86(9).

obligations in a timely manner.[290] In such a case the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt rearrangement. The word "may" indicates that making this recommendation is discretionary. Under this paragraph the counsellor can in any event only make a recommendation to the parties, and whether they respond accordingly is up to them, since it is voluntary. If the counsellor makes a recommendation in terms of section 86(7)(b) and all the parties concerned accept the proposal, the debt counsellor must record it in the form of an order.[291] The proposal must be filed as a consent order in terms of section 138.[292] However, if the parties do not agree to the debt counsellor's proposal, the counsellor must refer the matter to the magistrates' court, accompanied by his or her recommendation.[293]

Thirdly, the debt counsellor can conclude that the consumer is indeed over-indebted.[294] The debt counsellor may then issue a proposal recommending that the magistrates' court grant either or both of the following orders. The first order that the debt counsellor can recommend is that one or more of the consumer's credit agreements be declared as reckless credit.[295] The second is that one or more of the consumer's obligations ought to be rearranged.[296]

Debt rearrangement is particularly significant for purposes of this dissertation, since it provides a way to prevent the sale in execution of a home under circumstances where the situation can be salvaged by restructuring the debt. Therefore, debt rearrangement is a mechanism that ensures that sales in execution do not have disproportionate results. The reason for this is that if a final execution order is granted, the assumption is that debt rearrangement had been considered as a way to avoid sale in execution, but that it was not a viable option. In the alternative, the debt was restructured, but the debtor could also not keep up with this compromised repayment plan.

Debt restructuring is, in my view, the most significant and far reaching creative alternative and to full-blown mortgage foreclosure; it provides a solution that is less invasive than selling

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[290] S 86(7)(b). This implies that consumers who do not experience a problem yet, but foresee that they might experience problems in the near future, can utilise the debt counselling process to avoid the problem that lies ahead: See MA du Plessis "The National Credit Act: Debt counselling may prove to be a risky enterprise" (2007) 32 *JJS* 74-92 80.
[291] S 86(8)(a).
[292] S 138(b) provides that, in the case of filing consent orders, a court may, without hearing any evidence, confirm such resolution as a consent order.
[293] S 86(8)(b).
[294] S 86(7)(c).
[295] S 86(7)(c)(i).
[296] S 86(7)(c)(ii).

the home. The proposition is that if the debt cannot be rearranged in a reasonable manner, then there are no further alternatives left, hence rendering the sale of the home the only proportionate solution. Consequently, debt review largely absorbs the nuanced case-by-case proportionality test that sections 26 and 36 of the Constitution require.

There are four ways in which debt rearrangement can be structured. Firstly, the period of the agreement can be extended together with reducing the amount of each payment due.[297] Also, the dates on which payments are due can be postponed during a specified period.[298] Moreover, the period of the agreement can be extended, together with a postponement of the dates on which payments are due.[299] The consumer's obligations can also be recalculated.[300] It seems that a determining qualification would be that a debt rearrangement scheme may not amount to the creditor being deprived of the amount that it is ultimately entitled to under the agreement.[301] Moreover, the NCA does not allow for a reduced interest rate as one of the possibilities in which debt can be rearranged, since this would amount to reducing the actual amount of the total debt, which is not allowed.[302]

It is only a court or the Tribunal that can declare a consumer over-indebted and grant the rearrangement order. The debt counsellors may only conduct an investigation and make a proposal accordingly. Section 87 concerns the court's power to rearrange a consumer's obligations and is applicable in the situations contemplated by sections 86(8)(b) and 86(9).[303] The section is firstly applicable if the debt counsellor finds that the consumer is over-indebted and makes certain proposals to the court on how to rearrange the consumer's debt. Secondly, section 87 is applicable if the consumer is not over-indebted but is experiencing, or is likely to experience, difficulty to satisfy all his or her obligations, and the parties have rejected the proposal made by the debt counsellor to voluntarily consider and agree to a plan of debt rearrangement. Thirdly, it is also applicable if the debt counsellor rejected the application for debt review, concluding that the consumer is not over-indebted and, following such conclusion, the consumer applies directly to the magistrates' court for an order that he or she

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297 S 86(7)(c)(ii)(aa).
298 S 86(7)(c)(ii)(bb).
299 S 86(7)(c)(ii)(cc).
300 S 86(7)(c)(ii)(dd). Recalculation is only possible if there were contraventions of Part A or B of Ch 5 or Part A of Ch 6 of the NCA.
301 *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 19.
302 *First National Bank v Adams and Another* (11945/2011) [2011] ZAWCHC 474 (23 September 2011) 14-15; *SA Taxi Securitisation (Pty) Ltd v Mongezi Moni and Others* (CA 265/10, CA 266/10, CA 267/10) [2011] ZAECGHC 11 (28 April 2011) paras 35-36.
303 S 87(1).

is over-indebted and an order rearranging his or her debt accordingly and/or alleges that the agreement is reckless.

The court must conduct a hearing and have regard to the proposal and information before it as well as the consumer's financial means, prospects and obligations.[304] The court may then reject the relevant recommendation or application.[305] The court may also, if it does not reject the recommendation, make one of three orders. Firstly, if it concludes that the credit agreement is reckless, the court may declare it reckless and make an order as contemplated in section 83(2) or (3).[306] Secondly, it may order that the consumer's obligations be rearranged in any manner contemplated by section 86(7)(c)(ii).[307] Thirdly, the court may make a combination of the two orders.[308]

To summarise, section 87 can have the effect that a credit agreement be declared reckless, setting aside all or some of the consumer's obligations or suspending the force and effect thereof until a date determined by the court. Furthermore, it can have the effect that the consumer is declared over-indebted, restructuring the consumer's obligations. If the consumer is declared over-indebted, his or her obligations can be rearranged by extending the period of the agreement and reducing the amount of each payment, postponing the dates for payments during a specific period, extending the period and postponing the payments, or recalculating the obligations. Consequently, when applied correctly and under appropriate circumstances, debt review and especially the rearrangement of the consumer's obligations may help defaulting homeowners to alleviate their financial struggles. On the other hand, a rearrangement order may also put a strain on the rights of the credit provider.[309] Therefore, debt rearrangement should be aimed at finding the appropriate (and, as I argue, proportionate) balance between the opposing interests at stake.[310]

[304] S 87(1).
[305] S 87(1)(a).
[306] S 87(1)(b)(i). See 4 3 3 above.
[307] S 87(1)(b)(ii).
[308] S 87(1)(b)(iii).
[309] Whether these limitations on creditors' rights are justifiable is analysed in 6 4 5 below.
[310] *First National Bank v Adams and Another* (11945/2011) [2011] ZAWCHC 474 (23 September 2011) 3.

4 3 4 4 Termination of debt review by credit provider[311]

It is clear that on-going debt review places an obstacle in the way of the creditor who approaches the court to foreclose the mortgage. The debt review process does not terminate by the mere passing of time and a credit provider can, therefore, not assume – after a period of time – that the debt review is no longer running.[312] The problem is that a credit provider may not enforce its debt during the time that the consumer is under debt review.[313] As a result, when debt review is underway it is not possible to commence litigation by simply sending the section 129(1)(a) notice.[314] However, this restriction on the credit provider's rights is balanced by a remedy that the Act makes available. Section 86(10) provides that if a credit agreement is under review and the consumer is in default under this agreement, the credit provider may, in respect of that agreement, give notice to terminate the review. Accordingly, the only way to terminate debt review is to provide the section 86(10) notice.[315] Van Heerden and Coetzee comment that termination seems to be a unilateral procedure available to the credit provider.[316]

Accordingly, if a creditor has duly terminated the debt review, it is not precluded by section 88(3) from enforcing the credit agreement. The reason for this is that section 88(3) is expressly made subject to section 86(10) and (11), and the creditor's right to validly terminate the debt review, therefore, overrides the restriction imposed on debt enforcement during the duration of the debt review.[317] Consequently, compliance with section 86(10) will enable the credit provider to proceed with legal action to enforce the credit agreement.[318]

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[311] See C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 11-24 – 11-33; C van Heerden & H Coetzee "Perspectives on the termination of debt review in terms of section 86(10) of the *National Credit Act* 34 of 2005" (2011) 14 *PELJ* 37-65.

[312] *Coetzee and Another v Nedbank Ltd* 2011 2 SA 372 (KZD) para 15. See also M Kelly-Louw "Credit law" (2011) 2 *JQR* para 2.2.1.

[313] S 88(3). See also ss 130(3)(c)(i) and 130(4)(c).

[314] *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) para 34; *Coetzee and Another v Nedbank Ltd* 2011 2 SA 372 (KZD) para 13.

[315] It seems reasonably clear that the requirements for the delivery and receipt of the s 86(10) notice is the same as that of the s 129(1)(a) notice discussed in 4 3 1 2 above: See *Wesbank, A division of Firstrand Bank Ltd v Jogee* (5722/2010) [2012] ZAKZDHC 2 (27 January 2012) paras 8-17; *Firstrand Bank Ltd (Formerly known as First National Bank of Southern Africa) v Alexander* (16901/2010) [2011] ZAWCHC 410 (17 October 2011).

[316] C van Heerden & H Coetzee "Perspectives on the termination of debt review in terms of section 86(10) of the *National Credit Act* 34 of 2005" (2011) 14 *PELJ* 37-65 40.

[317] *First Rand Bank Ltd v Noroodien and Others* (9794/2011) [2011] ZAWCHC 422 (14 November 2011) para 9. See also M Roestoff & A Smit "Non-compliance with time periods – should the debt review procedure lapse once a reasonable time has expired? *Pelzer v Nedbank Limited* unreported case no 14160/09 (GNP)" (2011) 74 *THRHR* 501-509 505 and 508.

[318] S 129(1)(b)(i) read with s 130(1)(a). See also *Standard Bank of South Africa Ltd v Mellet and Another* (3846/09) [2009] ZAFSHC 110 (30 October 2009) para 5.

However, incorrect termination will render subsequent enforcement proceedings unlawful.[319] Moreover, the consumer's other credit agreements continue to be subject to the debt review. If a debt review is referred to a magistrate in terms of section 86(7)(c) after the review had been validly terminated, such a referral to a magistrate has no effect, since the termination ended the review process.[320]

If the consumer is no longer in default – for example, if he or she has paid all outstanding arrears – debt review cannot be terminated by that particular credit provider. However, if the consumer is still in default, the debt review can be terminated by providing the notice of termination to the consumer, the debt counsellor and the National Credit Regulator.[321] The notice may only be given at least 60 business days after the date on which the consumer applied for the debt review in terms of section 86(1).[322] Even if the debtor was not in default on the date of the application but fell in arrears later, the creditor may still terminate the debt review 60 business days after the application was made and does not have to wait 60 business days after the debtor went into default.[323]

To summarise, there are two possible scenarios under which the credit provider must give different notices in order for it to proceed with debt enforcement.[324] The section 86(10) notice is the one I describe here, but it is helpful to briefly distinguish it from the section 129(1)(a) notice. The two differ as follows, depending on the applicable scenario: Firstly, in the case where the consumer is not already under debt review, the credit provider must give a section 129(1)(a) notice recommending (amongst others) debt review. After 10 business days, if the consumer does not respond or responds by rejecting the proposals, the credit provider may proceed to enforce the debt. Secondly, in the case where the consumer is already under debt review and 60 business days have lapsed, the credit provider may terminate the debt review

[319] C van Heerden & H Coetzee "Perspectives on the termination of debt review in terms of section 86(10) of the *National Credit Act* 34 of 2005" (2011) 14 *PELJ* 37-65 40.
[320] *Nitro Securitisation 3 (Pty) Limited v Desmond* 2011 JDR 0101 (ECP) para 20.
[321] Regarding the National Credit Regulator in general, see JW Scholtz "Consumer credit institutions" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) ch 3. In its summons, the credit provider must alleged that the debt review was terminated in term of s 86(10) and that all the specific requirements of s 86(10) was complied with: See *Standard Bank of South Africa Ltd v Allard and Another* (I 1766/2010) [2011] ZAWCHC 47 (3 March 2011) paras 9-19.
[322] See *Standard Bank of South Africa Ltd v Mellet and Another* (3846/09) [2009] ZAFSHC 110 (30 October 2009) paras 6-7, where there was no indication as to when this date was. The court was consequently unable find whether there was compliance with s 86(10) and because the onus for proving such compliance rests with the credit provider, the court could as a result not find in its favour. Therefore, the institution of legal proceedings was premature, since the debt review process was never terminated but still validly underway.
[323] *Gelderbloem and Another v Changing Tides No 17 (Pty) Ltd* (19179/2001) [2011] ZAWCHC 396 (27 October 2011) para 13.
[324] This illustrates the difference between the two notices: See *Standard Bank of South Africa Ltd v Mellet and Another* (3846/09) [2009] ZAFSHC 110 (30 October 2009) para 10.

(with regard to that specific agreement) with a section 86(10) notice. Then, 10 business days after giving the section 86(10) notice, the credit provider may proceed with the enforcement of the debt. Therefore, if a section 86(10) notice is provided, it is not necessary to also issue a section 129(1)(a) notice, since the two are alternatives.[325] No legal proceedings to enforce the agreement may commence prior to giving a 129(1)(a) notice or, in the alternative, a section 86(10) notice.[326]

Section 86(10) implies that a debt review has to be concluded within a period of 60 business days (although regulation 24(6) gives the debt counsellor 30 days). However, if the credit provider proceeds with enforcement subsequent to this notice, a magistrate may grant an order that the debt review should in any event continue.[327] The court may also subject the continued debt review to any conditions it considers just under the circumstances.

The purpose of section 86(10) is to allow the credit provider to insist upon timely compliance by the debt counsellor with the debt review process and, if there is a failure to efficiently comply with the debt review process, to allow the credit provider to pursue debt recovery in court.[328] It is also aimed at avoiding the situation where consumers hide behind the debt review process to avoid their obligations.[329] Moreover, it will prevent the situation where a debtor abuses debt review to obtain an illegitimate benefit.[330] However, the purpose of section 86(10) cannot be to allow the credit provider, without good reason, to counteract

[325] Para 10. In *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) the credit provider gave both a s 129(1)(a) notice and a s 86(10) notice. This is unnecessary but not problematic.

[326] S 129(1)(b). See 4 3 1 2 above. The s 86(10) notice is a necessary first step before the credit provider can proceed with litigation – similar to a s 129(1)(a) notice: See *ABSA Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) para 31.

[327] S 86(11). In *Changing Tides 17 (Pty) Ltd NO v Scholtz and Another* (2975/09) [2010] ZAECPEHC 3 (2 February 2010), the consumers, relying on s 86(11), requested the court to condone their failure to finish the debt review within 60 days and allow it to continue (despite termination thereof) because this failure was not due to their own fault. The court held (at para 17) that s 86(11) does not constitute a defence against the credit provider's summary judgment application if it has validly terminated the debt review in terms of s 86(10), and there was consequently no *bond fide* defence.

[328] *Changing Tides 17 (Pty) Ltd NO v Erasmus and Another; Changing Tides 17 (Pty) Ltd NO v Cleophas and Another; Changing Tides 17 (Pty) Ltd NO v Frederick and Another* (18153/09, 14229/09, 11973/09) [2009] ZAWCHC 175 (12 November 2009) para 29.

[329] MA du Plessis "The National Credit Act: Debt counselling may prove to be a risky enterprise" (2007) 32 *JJS* 74-92 83. The author (at 84) also explains that the time periods for debt review, which are imposed by the Act, serve to avoid an unjustified moratorium from valid obligations.

[330] In *Posthumous v First National Bank Ltd and Others* [2011] ZAKZDHC 35; 7773/2011 (29 July 2011) para 39 the debtor had made no attempt to reduce the outstanding amount in arrears but was receiving rental income from the property. According to the court, this state of affairs implied an intention on the part of the debtor to continue exploiting the property for profit, with the added benefit of not repaying the debt. Such abuse should clearly not be allowed.

the operation of the debt review process.[331] Apparently it should only be in unusual cases that credit providers give notice in terms of section 86(10) – in other words, only if the debt review process is not completed within 60 business days and the debt counsellor has not applied to the magistrates' court in terms of either section 86(7)(c) or (8)(b).[332] As a result, it would ordinarily be inappropriate to terminate debt review if the relevant applications are already pending before a magistrates' court and being prosecuted with reasonable efficiency.[333]

A further purpose of the section 86(10) notice is evidently to enable the consumer (and/or debt counsellor) to, after receiving such a notice, urgently apply to a magistrate for a rearrangement order,[334] or if this had already been done, to apply[335] for the debt review to continue despite termination.[336] This is the reason why section 130(1)(a) requires 10 business days to lapse between the notice being given and enforcement proceedings being instituted.[337]

Section 86(10) and (11) is a good example of how the NCA seeks to strike a balance between the interests of credit providers and consumers. In *FirstRand Bank Ltd v Mvelase*[338] the court described this "push-pull tension" as follows:

> "[W]henever sections of the NCA tip the scales in favour of the consumer, countervailing rights of the credit provider in other sections sway the balance in favour of the latter, and *vice versa*."[339]

Pending debt review tips the scale in favour of the consumer and against the credit provider, since the credit provider is prohibited from enforcing its rights under the agreement while the review is pending. To obtain a fair balance, section 86(10) provides the credit provider with a countervailing right, namely to terminate a debt review that is not concluded within 60 business days. This measure tips the scale back in favour of the credit provider, since it

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[331] Para 30. See also *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC) paras 15, 48 and 52, where Blignault J held that a credit provider may only terminate the debt review if it is acting in good faith.
[332] *Changing Tides 17 (Pty) Ltd NO v Erasmus and Another; Changing Tides 17 (Pty) Ltd NO v Cleophas and Another; Changing Tides 17 (Pty) Ltd NO v Frederick and Another* (18153/09, 14229/09, 11973/09) [2009] ZAWCHC 175 (12 November 2009) para 30.
[333] Para 30.
[334] In terms of s 86(7)(c) or (8)(b).
[335] In terms of s 86(11).
[336] *Changing Tides 17 (Pty) Ltd NO v Erasmus and Another; Changing Tides 17 (Pty) Ltd NO v Cleophas and Another; Changing Tides 17 (Pty) Ltd NO v Frederick and Another* (18153/09, 14229/09, 11973/09) [2009] ZAWCHC 175 (12 November 2009) para 32.
[337] Para 32.
[338] 2011 1 SA 470 (KZP) para 20.
[339] Para 20. This was quoted with approval by the SCA in *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 15.

provides a way for it to stop a debt review that is being abused or that shows no potential for solving the debtor's over-indebtedness.[340] However, if termination is not ideal because the dispute can still be settled by way of debt review, the consumer can rely on section 86(11) and request a magistrate to have the review continued. Therefore, section 86(11) balances out any prejudice that section 86(10) might cause. However, if there is no realistic prospects of a resumption of the debt review resulting in a rearrangement plan that will over time reduce the debtor's indebtedness, it would not be appropriate to order a resumption of the debt review.[341]

In what follows I discuss two cases that illustrate the importance of the creditor's right to terminate debt review. In fact, in both cases section 86(10) was *not* applied because the creditors did not terminate the debt reviews. This state of affairs lead the courts to protect the creditors in other ways not provided for by the NCA, these being criticised by some authors (with whom I concur). These cases also illustrate how the termination mechanism serves as a balance between the rights of debtors and creditors. It specifically prevents the debt review process from being abused or continuing for an unreasonably long time.

In *First Rand Bank v BL Smith*[342] ("*BL Smith*") the credit provider was notified by the debt counsellor that the consumer was undergoing debt review.[343] Therefore, the credit provider was prohibited from enforcing by litigation or other judicial process any right or security under the credit agreement.[344] The debt counsellor did not reject the application for debt review but found the consumer to be over-indebted and made a proposal regarding a possible settlement. However, the debt counsellor did not refer the matter to a magistrate[345] and neither the consumer nor the counsellor took any further steps. Consequently, the process simply stalled. The Act unfortunately does not provide any time period within which the debt counsellor is supposed to follow one of the steps contemplated by section 86(8). There is no sanction for not following such step either. Until the debt counsellor follows one of the steps

[340] See *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 15.
[341] See *First Rand Bank Ltd v Noroodien and Others* (9794/2011) [2011] ZAWCHC 422 (14 November 2011) paras 16 and 18, where the proposed rearranged monthly payments would not even have been enough to cover the monthly interest. This fact convinced the court that it was reasonable for the creditor to have terminated the debt review and that a resumption of the review would not be appropriate.
[342] (24205/08) WLD (31 October 2008) (copy on file with author). For a discussion of the case, see M Roestoff "Enforcement of a credit agreement where the consumer has applied for debt review in terms of the National Credit Act 34 of 2005 – *First Rand Bank v Smith* (unreported case number 24208/08 (WLD))" (2009) 30 *Obiter* 430-437. See also M Roestoff "Termination of debt review in terms of section 86(10) of the National Credit Act and the right of a credit provider to enforce its claim: *Standard Bank of South Africa Ltd v Kruger* (unreported case number 45438/09 (GSJ)) and *Standard Bank of South Africa Ltd v Pretorius* (unreported case number 39057/09 (GSJ))" (2010) 31 *Obiter* 782-792 786-788.
[343] This was done in terms of s 86(4)(b)(i).
[344] S 88(3).
[345] This is required in terms of s 86(8).

in section 86(8), none of the events in section 88(3) could occur. Therefore, section 88(3) resulted in the credit provider not being able to enforce its mortgage agreement. Hence, the inactivity and refusal of the debt counsellor and/or consumer to follow one of the steps resulted in the creation of a moratorium.[346]

This state of affairs appeared to reveal a loophole in the Act, since a consumer would be able to prevent the credit provider from ever instituting legal proceedings against him or her.[347] It would be possible for dishonest consumers to frustrate the legitimate rights of credit providers by starting the debt review process and then stopping it before any conclusion could be reached. The court referred to this as a "permanent moratorium",[348] since the credit provider would – due to factors outside of its control – never be able to enforce its rights through litigation. However, the court held that such a construction could not have been the intention of the legislature, since it would lead to an absurdity.[349] As a result, the court found that in order to construe the Act to make commercial sense, it must have been intended that the debt review process be followed to its conclusion.[350] The effect of the notice should expire if the process is not concluded within a reasonable time. According to the court three months would be a reasonable time.[351] The court compared this to the period of 60 business days afforded by section 86(10), after which termination of the review can take place.

The court did not apply section 86(10) directly, since the credit provider never terminated the debt review with a section 86(10) notice. The court only regarded the 60 business day time period as a guideline for establishing a reasonable time frame within which it would allow the section 86(4)(b)(i) notice to prevent legal enforcement of the credit provider's rights.

Roestoff argues that the issue in this case could have been resolved by applying section 86(10) as regards the termination of debt review.[352] The author states that the reason why the credit provider should have been unable to institute action was that it did not terminate the

[346] *First Rand Bank v BL Smith* (24205/08) WLD (31 October 2008) (copy on file with author) para 13.
[347] Para 15.
[348] Para 15.
[349] Para 16. In an *obiter* statement the court (at para 25) also found that such a permanent moratorium on litigation to enforce the credit agreement may amount to an infringement of s 25(1) of the Constitution. It is possible that a moratorium like this would amount to an arbitrary deprivation of property, since the court was willing to consider the "right to recover payment" as property of the credit provider. Consequently, a permanent stay of the right to recover property may have amounted to an arbitrary deprivation of property. See 6 4 4 below.
[350] *First Rand Bank v BL Smith* (24205/08) WLD (31 October 2008) (copy on file with author) para 18.
[351] Para 24.
[352] M Roestoff "Enforcement of a credit agreement where the consumer has applied for debt review in terms of the National Credit Act 34 of 2005 – *First Rand Bank v Smith* (unreported case number 24208/08 (WLD))" (2009) 30 *Obiter* 430-437 436-437.

debt review with a section 86(10) notice. The period of 60 business days provided for in that section is, therefore, an indirect time period within which the steps in section 86(8) has to be taken. This termination can be effected regardless of whether the events in section 88(3) occur. As a result, Roestoff argues that there is no absurdity or loophole in the Act. Credit providers are sufficiently protected from potential abuse of the debt review process by section 86(10). Therefore, a problem similar to the one experienced by the credit provider in *BL Smith* can be avoided by the credit provider terminating the debt review 60 business days after the review has started.

In another case, *Pelzer v Nedbank Ltd*[353] ("*Pelzer*"), the apparent *lacuna* that the court had to deal with was the fact that the NCA's regulations did not provide that a debt review lapses due to non-compliance with certain time periods. Therefore, the question that the court had to answer was whether a debt review automatically falls away after a reasonable time has passed or whether it can continue indefinitely.[354] The court found that a debt review should be completed within a reasonable time because "[i]t could never have been the intention of the legislature that the process can drag on forever and thus be abused".[355]

The court agreed with Flemming[356] that if there is no prescribed time limit, the "reasonable time principle" is applicable.[357] In other words, the court held that a debt review lapses after a reasonable time has expired.[358] This was seemingly the only way to give effect to the purposes of the Act, namely that there should be a balance between protecting debtors and giving effect to the claims of creditors.

In their discussion of *Pelzer*, Roestoff and Smit[359] make the same point as Roestoff[360] does in her discussion of *BL Smith*. In both decisions the courts seemed to have missed the fact that section 86(10) provides the solution to the debt review process possibly continuing indefinitely and being abused. To prevent reviews from continuing longer than would be

[353] 2011 4 SA 388 (GNP).
[354] Para 1.2.
[355] Para 6.3.
[356] HCJ Flemming *Flemming's National Credit Act* (2nd ed 2010) 152-153, with reference to *First Rand Bank v BL Smith* (24205/08) WLD (31 October 2008), not available online (copy on file with author).
[357] *Pelzer v Nedbank Ltd* 2011 4 SA 388 (GNP) paras 6.7-6.8.
[358] Para 7.2.
[359] M Roestoff & A Smit "Non-compliance with time periods – should the debt review procedure lapse once a reasonable time has expired? *Pelzer v Nedbank Limited* unreported case no 14160/09 (GNP)" (2011) 74 *THRHR* 501-509.
[360] M Roestoff "Enforcement of a credit agreement where the consumer has applied for debt review in terms of the National Credit Act 34 of 2005 – *First Rand Bank v Smith* (unreported case number 24208/08 (WLD))" (2009) 30 *Obiter* 430-437 436-437.

reasonable, the creditor can simply, after 60 business days, terminate the debt review.[361] As in *BL Smith*, it was unclear why the creditor in *Pelzer* did not make use of the termination remedy. Roestoff and Smit suggest that the reason for not terminating the debt review was because the case had already been referred to a magistrate in terms of section 87. However, when this case note was published the SCA had not yet conclusively decided that termination is possible even after the matter had been referred to a magistrate.[362] Therefore, as the legal position is now, there was no impediment to termination in either of these cases. However, *Pelzer* illustrates (like *BL Smith*) how significant the creditor's right to terminate is, especially since the NCA does not provide for an automatic expiry of the debt review process after a specific (or reasonable) period.[363] The only way for creditors to stop debt reviews that are being drawn out unreasonably or being abused is to terminate them in terms of section 86(10).

4 3 4 5 Problems with the timing of termination[364]

There are two stages to the debt review process. The first is when the matter is before a debt counsellor. The second stage commences when the debt counsellor has done his or her assessment and refers the matter to a magistrate[365] with his or her recommendations. The question is whether the debt review can only be terminated during the first stage until the point of making the necessary application to the magistrates' court or whether it can also be done during the second stage while the application is still pending before a magistrate and where the 60 business days have lapsed.

The answer to this question is particularly important considering the backlog that is being experienced in the magistrates' courts.[366] Applications for the restructuring of credit agreements (in terms of the debt counsellors' recommendations) are left pending for months

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[361] M Roestoff & A Smit "Non-compliance with time periods – should the debt review procedure lapse once a reasonable time has expired? *Pelzer v Nedbank Limited* unreported case no 14160/09 (GNP)" (2011) 74 *THRHR* 501-509 505 and 509.

[362] This issue is discussed in 4 3 4 5 below.

[363] *Coetzee and Another v Nedbank Ltd* 2011 2 SA 372 (KZD) para 15. See also M Kelly-Louw "Credit law" (2011) 3 *JQR* para 2.2.2; (2011) 2 *JQR* para 2.2.1.

[364] See C van Heerden & H Coetzee "Perspectives on the termination of debt review in terms of section 86(10) of the *National Credit Act* 34 of 2005" (2011) 14 *PELJ* 37-65 40ff. For a discussion of some of the case law referred to here, see also M Kelly-Louw "Credit law" (2010) 3 *JQR* para 2.2; (2010) 4 *JQR* para 2.3.2.

[365] In terms of s 86(7)(c) or (8)(b).

[366] Apparently more than 200 000 consumers have applied for debt review, but only 26 000 of these have been completed in the three years since the process was made available: See H Wasserman "How new debt rules work" *Fin24* (10-12-2010) <http://www.fin24.com/Money/Money-Clinic/How-new-debt-rules-work-20101210> (accessed 03-02-2011).

before they reach a magistrate. As a consequence, credit providers have started to invoke section 86(10), terminating the pending debt reviews, since these matters have not reached completion in the courts within 60 business days.[367] If the termination can be effected during the second stage, credit providers are legally entitled to terminate these debt reviews and proceed with litigation.[368] This would leave over-indebted consumers who have applied for debt review with no other option than to urgently apply to a magistrate in terms of section 86(11) and attempt to convince the magistrate to allow the continuation of the debt review. This stance would put extra strain on persons who are over-indebted and consequently already under financial and other pressures. It would also slow the process down further, since many magistrates would have to devote significant time to hearing these urgent applications, instead of focussing their time on the actual applications for debt rearrangement.

Nonetheless, if the termination can only take place during the first stage (while the matter has not been referred to court yet), these consumers who are waiting upon the court (that is experiencing delays in processing all the applications for debt rearrangement) need not fear that their debt reviews will be terminated. The problem with this view, however, is that it may lead to extremely long waiting periods and the prejudice suffered by the credit provider may start to outweigh the consumer's interest. And while the matter is pending in the magistrates' court, there would be no remedy available to the credit provider, whereas the consumer can technically not be compelled to make payments towards his or her debt.[369]

The high courts have adopted different interpretations of section 86(10).[370] For current purposes I do not venture into the technical interpretational issues. Instead, I focus on the

[367] See H Wasserman "FNB plays hardball over debt review" *Fin24* (11-08-2010) <http://www.fin24.com/Money/Money-Clinic/FNB-plays-hardball-over-debt-review-20100811> (accessed 03-02-2011); M Roestoff "Termination of debt review in terms of section 86(10) of the National Credit Act and the right of a credit provider to enforce its claim: *Standard Bank of South Africa Ltd v Kruger* (unreported case number 45438/09 (GSJ)) and *Standard Bank of South Africa Ltd v Pretorius* (unreported case number 39057/09 (GSJ))" (2010) 31 *Obiter* 782-792 789; F Haupt *et al* "The debt counselling process: Challenges to consumers and the credit industry in general" Report submitted by the University of Pretoria Law Clinic to the National Credit Regulator (April 2009) <http://www.ncr.org.za/The_debt_counselling_process.php> (accessed 10-01-2010) 206.

[368] A typical debt review process would probably take longer than 60 business days: See *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC) para 26, where Blignault J describes how this approach enables a credit provider to derail the entire debt review process with a single unilateral act, irrespective of the reasonableness of either party's conduct.

[369] S 88(3).

[370] The case law deciding that the debt review may only be terminated before the matter has been referred to a magistrate are *Wesbank, a Division of FirstRand Ltd v Papier (National Credit Regulator as Amicus Curiae)* 2011 2 SA 395 (WCC); *SA Taxi Securitisation (Pty) Ltd v Skosana* (49609/10) [2011] ZAGPPHC 41 (31 March 2011); *SA Taxi Securitisation (Pty) Ltd v Ndobela* (9162/2010) [2011] ZAGPJHC 14 (15 March 2011) 11; *Wesbank a Division of Firstrand Bank Ltd v Martin* (13564/2010) [2010] ZAWCHC 173 (13 August 2010); *SA Securitisation (Pty) Limited v Matlala* (6359/2010) [2010] ZAGPJHC 70 (29 July 2010); *Changing Tides 17*

general effect that either approach has on the parties' rights and obligations. Convincing arguments have been raised in favour of both approaches in the case law. The two opposing interpretations of section 86(10) relate to the balancing of the rights, protections and obligations of credit providers and consumers in such a way as to best achieve the purposes of the NCA.[371] If the termination can only be effected during the first stage, it weighs heavily in favour of the consumer, whereas if the termination can also take place during the second stage, it weighs heavily in favour of the credit provider.[372] The SCA has recently provided certainty on this matter and held that it is possible to terminate the debt review even after the matter has been referred to a magistrate and is pending before that court.[373]

(Pty) Ltd NO v Erasmus and Another; Changing Tides 17 (Pty) Ltd NO v Cleophas and Another; Changing Tides 17 (Pty) Ltd NO v Frederick and Another (18153/09, 14229/09, 11973/09) [2009] ZAWCHC 175 (12 November 2009); *Standard Bank of South Africa Limited v Kruger; Standard Bank of South Africa Limited v Pretorius* 2010 4 SA 635 (GSJ). See also M Roestoff "Termination of debt review in terms of section 86(10) of the National Credit Act and the right of a credit provider to enforce its claim: *Standard Bank of South Africa Ltd v Kruger* (unreported case number 45438/09 (GSJ)) and *Standard Bank of South Africa Ltd v Pretorius* (unreported case number 39057/09 (GSJ))" (2010) 31 *Obiter* 782-792 789 and C van Heerden & H Coetzee "*Wesbank v Deon Winston Papier and the National Credit Regulator*" (2011) 44 *De Jure* 463-479, who welcome this interpretation of s 86(10). This first line of cases follows a purposive approach. They suggest that it counteracts the purposes of the NCA if termination is allowed after the matter has been referred to a magistrate. Practically speaking, very few cases can be completed within 60 business days.

Conversely, the cases that have decided that the debt review can be terminated even if the matter is already pending before a court, follow a literal interpretation of s 86(10). These cases are *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP); *FirstRand Bank Ltd t/a First National Bank v Seyffert and Another and Three Similar Cases* 2010 6 SA 429 (GSJ); *Firstrand Bank Ltd v Collett* 2010 6 SA 351 (ECG); *FirstRand Bank Ltd v Evans* 2011 4 SA 597 (KZD); *SA* Taxi *Securitisation (Pty) Ltd v Nako and Others* (19/2010, 21/2010, 22/2010, 77/2010, 89/2010, 842/2010) [2010] ZAECBHC 4 (8 June 2010). See also *Firstrand Bank Ltd v Munsamy* (26346/2010) [2011] ZAWCHC 320 (7 March 2011) para 7.

[371] *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) para 59(a).

[372] One of the latest decisions on this question was *Wesbank, a Division of FirstRand Ltd v Papier (National Credit Regulator as Amicus Curiae)* 2011 2 SA 395 (WCC). My gratitude to Lienne Steyn for bringing this case to my attention, as well as supplying me with a copy of the judgment on the day it was delivered. The court decided that the debt review cannot be terminated after the matter has been referred to a magistrate. See also the news media's reporting on the decision: H Wasserman "Court strikes blow for indebted" *Fin24* (02-02-2011) <http://www.fin24.com/Money/Money-Clinic/Court-strikes-blow-for-indebted-20110202> (accessed 03-02-2011). I am indebted to Gustav Muller for bringing this news report to my attention.

[373] *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) paras 11-12, followed in *Firstrand Bank Ltd t/a Wesbank v Nel* (7170/10) [2011] ZAGPPHC 191 (14 September 2011). However, the debt review cannot be terminated after the debt rearrangement order had been granted: See *Firstrand Bank v Raheman and Another* (5345/2010) [2012] ZAKZDHC 3 (10 February 2012) para 9. As a result of the uncertainty (prior to the SCA judgment) with regard to the termination process, the four major South African banks (ABSA Bank, First Rand Bank, Nedbank and Standard Bank) agreed with the National Credit Regulator to not enforce credit agreements for a certain period of time and under certain conditions. The open letter by the National Credit Regulator addressed to debt counsellors, notifying them of the moratorium, as well as information regarding the details of the moratorium is available online: See National Credit Regulator "Conditional moratorium by banks on terminations and legal enforcement of mortgage and related agreements under debt review" *Debt Restructuring Services* (10-12-2010) <http://www.drssa.co.za/Conditions%20of%20Moratorium.pdf> (accessed 24-01-2011). One of the stated purposes of the moratorium was to attempt to prevent the loss of as many homes as possible. Furthermore, it purported to allow time for unresolved debt reviews (falling under the application of the moratorium) to be completed. The moratorium was intended to apply from 6 December 2010 to 30 June 2011, during which time the applicable credit agreements would not be enforced. To enjoy the benefits of the moratorium consumers had to comply with the requirements set up by the agreement, the details of which are

However, another possibility has come up – one that might soften the potentially drastic effect of the SCA's approach. Although the SCA's approach is to my mind correct, it can have the effect that many pending debt reviews are terminated and, therefore, never brought to fruition, even though they might have resulted in viable debt rearrangement orders. This result would arguably contravene the principle established by sections 26 and 36 of the Constitution, namely that a home should only be sold in execution if the effect would be proportionate, that is, if there are no viable alternatives left. If debt review can be validly terminated even though debt rearrangement might still be a viable solution, the proportionality test would not be satisfied, rendering this interpretation of section 86(10) constitutionality unacceptable.

Nonetheless, the NCA provides a way to prevent this disproportionate result. The possibly negative outcome of this literal interpretation of section 86(10) is in the first place countered by the possibility that a magistrate might order that the debt review should be continued even after it was terminated.[374] Secondly, it might be possible to still convince the high court to refer the matter for debt review by the debtor alleging his or her over-indebtedness during the proceedings to enforce the debt.[375] A third possibility might be that a court can hold that a termination of the debt review is void despite the fact that it was lawfully instituted after 60 business days. This would arguably be the case where the credit provider acted in bad faith when it terminated the debt review.

The court in *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga*[376] held that a proviso should be read into section 86(10), namely that a credit provider may only terminate a debt review if it is acting in good faith. In the absence of special circumstances, if the consumer is conducting debt review in good faith and in a reasonable manner, the credit provider would be acting in bad faith if it terminates such a debt review.[377]

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not relevant for current purposes since the moratorium, at the time of completing this dissertation, had already ended.

[374] S 86(11).

[375] S 85. See 4 3 4 6 below.

[376] 2011 1 SA 374 (WCC) paras 15, 48 and 52.

[377] Para 51. See also *Standard Bank of South Africa Ltd v Allard and Another* (I 1766/2010) [2011] ZAWCHC 47 (3 March 2011) paras 34-35 (the court denied an application for summary judgment because a trial court, after hearing all the evidence, might find that the termination of the debt review was not in line with the good faith requirement); *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 1 SA 310 (GSJ) paras 63-64 and 67 (it may be possible that if a creditor does not act in good faith, the magistrate may order debt review to resume despite its termination. However, the creditor's bad faith would not entitle the debtor, whose obligations had been suspended, to retain possession of the object of security, while at the same time being allowed to not pay); *Nitro Securitisation 3 (Pty) Ltd v Desmond* 2011 JDR 0101 (ECP) paras 24-26 (if the debt review was terminated in terms of s 86(10) and the debtor then launches an application in terms of s 86(11) to

The issue of good faith was also considered in *SA Taxi Securitisation (Pty) Ltd v Ndobela*.[378] The argument was that the creditor should not be allowed to "just frustrate the process".[379] In this case the debt counsellor made a proposal as to how the debtor's obligations could be rearranged. This proposal was sent to the creditor, who elected to ignore it. Instead of making a counter proposal or informing the debt counsellor of its rejection of the proposal, the creditor just waited 60 business days and then terminated the debt review as well as the credit agreement.[380] It was argued that the creditor has an obligation to engage with the debtor in good faith in an attempt to find a solution to the debtor's financial problems. Furthermore, it was argued that the creditor may not simply sit back and wait 60 business days and then terminate the debt review. Doing so constitutes bad faith, which will render the termination invalid.[381]

The court held that the debt review process, and particularly section 129, places a duty on the creditor to become "proactive" as soon as it becomes clear to it that the debtor is falling in arrears with his or her monthly instalments.[382] However, this duty is balanced by the fact that section 86 requires the debtor to take certain steps the moment that he or she realises that his or her financial situation has deteriorated to the extent that there is the possibility of not being able to keep up with the monthly obligations.[383] The court agreed that the failure to act in good faith can render the termination of a debt review invalid.[384] Whether bad faith was present will depend on the facts of the case.[385] The court held that

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have the debt review resumed, the court would have a discretion to deny an application for summary judgment that was brought by the creditor before the s 86(11) application was finalised. If there is a reasonable prospect that the debtor will have success with the s 86(11) application, a court should be hesitant to grant a summary judgment if the delay in finalising the application is solely due to the backlog in the courts. If the creditor proceeds to enforce its remedy with "undue haste" in such circumstances, it may be regarded as acting in bad faith. However, on the facts of this case, the court did not find such bad faith present since the s 86(11) seemed not to have been "pursued with any measure of urgency"); *Wesbank, a Division of FirstRand Ltd v Papier (National Credit Regulator as Amicus Curiae)* 2011 2 SA 395 (WCC) para 7 (if the credit provider terminates the debt review a week before a magistrate is about to give a debt rearrangement order, such a termination would probably not be in good faith). For an example of a case where the court exercised its discretion by not granting a summary judgment despite the valid termination of the debt review, see *Nedbank Ltd v Van Rooyen* 2011 JDR 1327 (GNP) (the debtor was *bona fide* in paying the required monies to the debt distribution agent and was unaware that this agent had not paid the correct amounts over to the creditor).

[378] (9162/2010) [2011] ZAGPJHC 14 (15 March 2011).

[379] Para 9 per Mokhari AJ.

[380] Para 9. The credit agreement in this case was not a mortgage agreement but rather a lease agreement whereby the creditor sold a motor vehicle to the debtor subject to a reservation of title until the debt is fully settled. However, the principles with reference to the termination of a debt review apply the same to all credit agreements, including mortgage agreements.

[381] *SA Taxi Securitisation (Pty) Ltd v Ndobela* (9162/2010) [2011] ZAGPJHC 14 (15 March 2011) para 9.

[382] Para 15.

[383] Para 15.

[384] Para 21.

[385] Para 21.

> "there is a duty on the credit provider to engage in a debt review process meaningfully and with the intention to find a solution to the consumer's financial distress".[386]

Nevertheless, the creditor is under no obligation to accept a debt rearrangement proposal that defies "commercial rationale"[387] but may not simply disregard such a proposal without making a counter proposal.[388] Therefore, it is not acceptable to just ignore the proposal because that would defeat the purposes of the Act. The court furthermore held that the duty to act in good faith extends to the debtor as well, since both parties must engage meaningfully in the debt review.[389] The debtor may also not sit back during the 60 business days when he or she does not receive a counter proposal from the creditor, and then argue in court that the creditor acted in bad faith.[390] The debtor must act diligently and proactively when he or she perceives that the creditor provider is not acting in good faith or is not responding to the debtor's proposals.[391] The court held that debt counsellors should play a part in this process.[392] Often it is the delays created by debt counsellors that place the debtor in the predicament of facing a terminated debt review.[393]

Therefore, the court found that a debtor may raise the argument that the creditor acted in bad faith, and the magistrate may take this factor into account when hearing the section 86(11) application, if the following two requirements are met:

(1) The debtor or debt counsellor acted proactively when it became clear that the credit provider was not acting in good faith.

(2) The debtor or debt counsellor referred the matter to a magistrate within the 60 business days time period.[394]

On the facts of this case the court was not convinced that the creditor was acting in bad faith. Accordingly, the termination was held to be valid.[395]

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386 Para 22 per Mokhari AJ.
387 Para 22.
388 Para 22.
389 Para 22. See also *Standard Bank of South Africa Ltd v Kroonhoek Boerdery CC and Others* [2011] ZAGPPHC 132; 23054/2011 (1 August 2011) para 49: It seems that if the termination of the debt review is due to the debtor's own conduct and if "[n]o blame can legitimately be attributable" to the creditor's conduct, the scales will tip strongly in favour of the creditor.
390 *SA Taxi Securitisation (Pty) Ltd v Ndobela* (9162/2010) [2011] ZAGPJHC 14 (15 March 2011) para 22.
391 Para 22.
392 Para 22.
393 Para 23.
394 Para 23.
395 Para 24.

The SCA in *Collett v FirstRand Bank Ltd*[396] confirmed the creditor's duty to participate in the debt review negotiations in good faith.[397] The creditor's right to terminate the debt review, even though it extends until after the matter has been referred to a magistrate, is balanced by section 86(11). According to this section the magistrate can, after the review has been terminated and the creditor has proceeded to enforce the agreement, order that the debt review should resume on conditions that the court considers just. The SCA held that it is at this point that the creditor's participation in the debt review process – whether in good or bad faith – becomes relevant.[398] If the creditor fails or refuses to participate in the debt review, the court may order that debt review should continue.[399] However, if the creditor terminated the review because it concluded, on good grounds, that the proposed debt rearrangement will not lead to the satisfaction of all the debtor's financial obligations, the court may refuse to order a resumption of the debt review under section 86(11).[400]

The SCA further held that during an application for summary judgment, the debtor may raise as a defence that the creditor did not participate in the debt review process, or did so in bad faith.[401] This is not a defence to the claim, but a request to the court based on its over-riding discretion to not grant summary judgment.[402] However, the debtor would also have to provide sufficient information to justify a resumption of the debt review.[403] The SCA also concluded that if the proposed debt rearrangement would amount to the creditor being deprived of what it is entitled to under the credit agreement, a termination of the debt review would be understandable, since such a state of affairs is contrary to the NCA.[404]

In conclusion, to ensure that the debt review process is not abused, it is necessary to provide creditors with the right to terminate debt reviews that seem not to have the capability of resulting in a realistic restructuring order. To accomplish this check-and-balance it is also required that termination must be possible after the matter have been referred to a magistrate.

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396 2011 4 SA 508 (SCA) para 15.
397 In terms of section 86(5)(b).
398 *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 15.
399 Para 15. See also *Firstrand Bank v Raheman and Another* (5345/2010) [2012] ZAKZDHC 3 (10 February 2012) paras 10-11: The creditor's failure to participate in good faith can sometimes even be regarded as "reckless".
400 *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 15.
401 Para 18.
402 Para 18.
403 Para 18. See also *First National Bank v Adams and Another* (11945/2011) [2011] ZAWCHC 474 (23 September 2011) 16; *Nedbank Ltd v Van Rooyen* 2011 JDR 1327 (GNP) 11-15.
404 *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 19. The proposed rearrangement in this case would have amounted to the creditor being deprived of almost half of what it was ultimately entitled to under the agreement. The proposed monthly instalments were nearly halved, whereas the time period was not extended. This proposal was therefore contrary to s 86(7)(c)(ii) of the NCA. See 6 4 5 below.

If this were not the case, undeserving debt reviews would be capable of unjustifiably frustrating the rights of creditors. However, termination is not the end of the matter. Debtors can apply to have them reinstated if they can show that the debt review is *bona fide* and will, in fact, potentially result in a viable rearrangement. This approach will also ensure that creditors are not allowed to terminate in bad faith. In my view, these principles create a framework that will ensure proportionate outcomes in residential mortgage cases, since it establishes a nuanced system that takes cognisance of both parties' rights.

4 3 4 6 Court's discretion to relieve alleged over-indebtedness

Debt review can assist a consumer (by preventing or postponing unnecessary mortgage foreclosure) in a couple of ways.[405] Firstly, the consumer can apply for debt review prior to any enforcement action being taken against him or her. However, the window of opportunity to voluntarily apply for debt review comes to an end as soon as the credit provider takes steps to enforce its rights in court.[406] Therefore, if the consumer does not apply for debt review prior to enforcement, he or she can make use of a second avenue. The debtor can allege his or her over-indebtedness during any court proceedings in which a credit agreement is being considered and have the court make a decision in this respect.[407] It is this second option, regulated by section 85 of the NCA, that the following paragraphs deal with.

If a credit agreement is under consideration in any court proceedings (including those to enforce mortgage debt)[408] and if it is alleged that the consumer is over-indebted, the court[409] may do one of two things. The court has this discretion despite any provision of law or agreement to the contrary. Firstly, the court may refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make either of the three recommendation in terms of section 86(7).[410] Secondly, the court itself may

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[405] See C van Heerden & DJ Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D)" (2010) 73 *THRHR* 502-517 510.

[406] S 86(2). See 4 3 4 2 above.

[407] Although there is lack of clarity about the correct interpretation, the consumer may also, subsequent to receiving the s 129(1)(a) notice, approach a debt counsellor. However, this probably does not amount to a full debt review: See 4 3 4 2 above.

[408] *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) para 12.

[409] Although s 85 refers to "any court," if read with ss 86(7) and 87 (referred to therein), it appears that it was the legislature's intention that even though "any court" can refer the matter to a debt counsellor, it is only the magistrates' court that can undertake the actual debt-rearrangement: See C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 11-37. For more on the jurisdictional issues, see further *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) paras 15-23.

[410] S 85(a). See 4 3 4 3 above.

declare the consumer to be over-indebted and make an order relieving the consumer's over-indebtedness as contemplated in section 87.[411]

Section 85(a) requires the presence of two factors before the court can refer the matter to a debt counsellor.[412] Firstly, the proceeding has to be one in which a credit agreement is under consideration and, secondly, an allegation has to be made that the consumer is over-indebted. Section 85 does not require that a separate application must be lodged but the allegation can be made in a pleading, an affidavit or even vocally.[413] The fact that over-indebtedness is admitted is not decisive, but only a factor.[414] The word "may" implies that the court has a discretion, triggered by the above-mentioned two factors, to refer the matter to a debt counsellor.[415] A court will not as a matter of course act upon the mere allegation of over-indebtedness.[416] As a whole, the courts have not been lenient towards debtors who simply make "bland" or "bold" allegations that they are over-indebted.[417] Regarding its discretion, the court in *Firstrand Bank Ltd v Olivier*[418] per Erasmus J made the following comment:

> "The court will exercise this discretion judicially with due regard to the objectives of the NCA which, in the present regard, is to assist the over-burdened consumer to rehabilitate his affairs. In doing so, the Act makes significant inroads into the credit provider's common-law rights, as well as its constitutional right of access to the courts ([section] 34 of the Constitution of the Republic of South Africa Act 108 of 1996). The court will restrict the statutory limitation of the credit provider's rights to the extent that it is reasonable and justifiable to do so in our democratic order while promoting the objects of the NCA."[419]

In *Standard Bank of South Africa Ltd v Hales and Another*[420] the court held that the allegation of over-indebtedness is not a defence to the credit provider's claim, but only a request to refer the matter to debt counselling. Therefore, it is a request to exercise the court's discretion in favour of the consumer. There is no onus to discharge and no facts to prove; all the consumer has to do is to persuade the court to exercise its discretion in his or her favour. The legislature did not provide a list of factors to be taken into account and, consequently, the court found

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[411] S 85(b). Therefore, the court may declare over-indebtedness without first referring the matter to a debt counsellor, but it must conduct a hearing in terms of s 87: See *National Credit Regulator v Nedbank Ltd and Others* 2009 6 SA 295 (GNP) 304-305.
[412] *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 (D) para 6.
[413] *Standard Bank of South Africa Ltd v Kallides* (1061/2012) [2012] ZAWCHC 38 (2 May 2012) para 6.
[414] *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 (D) para 13.
[415] Para 7.
[416] *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) para 14.
[417] See *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 1 SA 310 (GSJ) para 26.
[418] 2009 3 SA 353 (SE).
[419] Para 14. For a discussion of the court's discretion, see also *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) para 25.
[420] 2009 3 SA 315 (D) para 10. For a discussion of this case, see C van Heerden & DJ Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D)" (2010) 73 *THRHR* 502-517.

that the purposes of the NCA[421] are a backdrop against which the discretion must be exercised.[422] The protection of consumers is also not the sole or chief purpose of the NCA and even though consumer protection is an important factor, there must be a balancing of rights.[423]

Section 85 has the implication that over-indebtedness might be an obstacle in the way of any action instituted by the credit provider. This power of the courts is also significant for purposes of this dissertation. As I have emphasised a number of times already, execution orders would be constitutionally justifiable only if there are no alternatives ways left to remedy the default. Rearranging the debt might be such an alternative. Accordingly, a court would have to be certain that the homeowner's debt is incapable of being restructured in a realistic manner before it can be certain that sale in execution is the last resort. Section 85 provides courts with the power to, therefore, refer a case for debt review when the debtor convinces it that debt rearrangement would achieve a more proportionate result. Exercising this discretion might often be the obvious solution to cases where the total outstanding debt or the amounts in arrears seem small enough to render the situation salvageable by way of a restructuring order. In other words, as I argue with regard to the other mechanisms in the NCA, section 85 contributes to remedying the possible disproportionality that a strict application of the traditional common law principles might have caused. I explain and illustrate these arguments in more detail in 4 4 below. For current purposes I provide an explanation of the principles that the courts have developed for applying section 85 of the NCA.

There have been a number of decisions where, during an application for summary judgment or during an application to set aside a default judgment, the consumer alleged his or her over-indebtedness as a *bona fide* defence. The consumers relied on section 85, hoping that the court would refer the matter to debt counselling or declare them over-indebted, instead of enforcing the creditor's rights. The consumers in these matters opposed summary judgment applications, not by raising a *bona fide* defence to the allegations of indebtedness (therefore, on the merits of the case), but rather by admitting their indebtedness and arguing that they were in fact over-indebted and that this status qualified them to apply for debt

[421] S 3.
[422] *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 (D) paras 11-12.
[423] Para 13.

review. Van Heerden[424] and Flemming[425] argue that over-indebtedness in itself does not constitute a defence on the merits of a claim and that the consumer should not be granted leave to defend the matter. Rather, over-indebtedness appears to be a defence created by the NCA, which only gives the court the discretionary power to relieve over-indebtedness. Therefore, the summary judgment application should only be postponed.[426] The SCA agreed that over-indebtedness is not a defence on the merits but held that in terms of its over-riding discretion, it can still refuse an application for summary judgment based on the allegation of over-indebtedness.[427] In the case law dealing with the exercise of the discretion under section 85, some factors have been developed.[428] In the following paragraphs I discuss the factors that have crystallised thus far. These considerations follow on each other and overlap.

An important factor in the exercise of the courts discretion is the reason for the consumer's failure to approach a debt counsellor before he or she received the section 129(1)(a) notice. Section 86(2) precludes the consumer from applying for full debt review after he or she receives the section 129(1)(a) notice.[429] Therefore, the debtor would have to explain why he or she did not voluntarily apply for debt review prior to receiving the notice, when the troubles of over-indebtedness were already being experienced.[430] Hence, a consumer is

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[424] C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 12-59 - 12-61.

[425] HCJ Flemming *Flemming's National Credit Act* (2nd ed 2010) 136.

[426] However, an allegation of reckless credit may constitute a defence on the merits if no credit assessment was done or if credit was extended regardless of the consumer not understanding the risks, costs and obligations: See C van Heerden & DJ Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D)" (2010) 73 *THRHR* 502-517 517.

[427] *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 18.

[428] For a discussion of some of the cases, see JM Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399-408 402ff; JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 59-61.

[429] In two early cases – *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) and *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) – there seems to be a contradiction. In summary, the courts decided that if the consumer argues (as a defence against summary judgment) that he or she is over-indebted and asks the court to use its discretion in terms of s 85 to grant relief, and where a s 129(1)(a) notice was given but the consumer did not make use of the opportunity to apply for debt review, the consumer would have to explain such a failure. Therefore, whether the consumer applied for debt review subsequent to the s 129(1)(a) notice is a factor the court apparently takes into account when exercising its s 85 discretion. If this line of argument is correct, it would not make sense to, at the same time, hold that, after receiving the s 129(1)(a) notice, the consumer may not apply for debt review anymore. This may imply that the court can hold it against the consumer that he or she failed to do something that he or she was not allowed to do anymore. C van Heerden & DJ Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D)" (2010) 73 *THRHR* 502-517 512 submit that if one were to conclude that debt review is precluded once the notice is received, the fact that the consumer did not apply for debt review after receiving such notice, cannot be a factor that the court takes into account. Therefore, the court can only take into account whether the consumer had an opportunity to apply for debt review prior to receiving the notice, and whether he or she failed to do so, and why.

[430] *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) para 28. Waiting until after summons have been served before an allegation of over-indebtedness is made may amount to abuse of the court procedure. However, the courts seem hesitant to acknowledge this possibility: See *Firstrand Bank Ltd v Olivier*

expected to approach a debt counsellor on his or her own initiative to have his or her situation evaluated by a debt counsellor. Not doing so may count against the consumer. Furthermore, after receiving the default notice, if the debtor did not timeously respond to that notice, this failure would also have to be explained.[431] Not deliberately ignoring the notice is a ground upon which the court may possibly condone the debtor's failure to respond.[432] Therefore, as Otto comments, courts would not easily accept failure to respond to the section 129(1)(a) notice, unless the consumer applies for condonation and gives reasons for that failure.[433] Kelly-Louw argues that the consumer should be expected to fully explain why he or she did not respond to the section 129(1)(a) notice.[434]

Another aspect that is relevant to the exercise of the court's discretion is whether the consumer supplies enough information to show his or her over-indebtedness.[435] A consumer who raises over-indebtedness as a defence must prove it in terms of section 79.[436] Such proof must include information regarding his or her financial means, prospects and obligations, amongst others.[437] The prospect of selling the property to reduce the consumer's indebtedness must also be indicated.[438] Also, the mere allegation of over-indebtedness is not sufficient and the test should be whether over-indebtedness can be shown on a balance of probabilities.[439] The consumer must set out sufficient facts to show that he or she is over-indebted and entitled to the relief set out in section 85.[440] Hence, it is important that a consumer wanting to take

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2009 3 SA 353 (SE) paras 15 and 16. The court in *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 (D) paras 14 and 20 rejected a similar argument, namely that waiting until court proceedings are underway instead of taking the voluntary steps to apply for debt review, amounts to an abuse of the court procedure. The court held that this was not an abuse of the court, since after receipt of the s 129(1)(a) notice, it was impossible, according to s 86(2), for the consumer to still apply for debt review in terms of s 86.

[431] *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) paras 17-19 (it is one of the purposes of s 129 to encourage consumers to approach a debt counsellor before the credit provider approaches the court. Also, it is the court's duty to discourage consumers from only raising over-indebtedness after court proceedings have commenced); *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 (D) para 17; *Standard Bank of South African Ltd v Kelly and Another* (23427/2010) [2011] ZAWCHC 1 (25 January 2011) para 16 (an allegation of reckless credit was refused as a *bona fide* defence against summary judgment and one of the factors taken into account was that the consumer did not respond to the s 129(1)(a) notice and could not explain such failure). See also JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 60.

[432] For example, see *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) para 37.

[433] JM Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399-408 407.

[434] M Kelly-Louw "The default notice as required by the National Credit Act 34 of 2005" (2010) 22 *SA Merc LJ* 568-594 570.

[435] *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) para 20. See also *First Rand Bank Ltd v Bernardo and Another* (608/09) [2009] ZAECPEHC 19 (28 April 2009) paras 18-21, where the court refused to exercise its discretion in favour of the consumer due to the lack of relevant information placed before it.

[436] *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) para 8.

[437] Para 9.

[438] Para 10.

[439] Para 24.

[440] Para 42.

advantage of the protections provided for in the NCA disclose proper information enabling the court to exercise its discretion.[441]

In addition to providing information as to the extent of his or her over-indebtedness, the consumer would have to propose a scheme of repayment. The consumer must provide sufficient information to persuade the court that the proposal is reasonable and that he or she has the ability to comply with the proposed rearrangement.[442] The projected rearrangement must moreover be capable of serving the purpose of the NCA in terms of section 3(g), namely to resolve the matter "based on the principle of satisfaction by the consumer of all responsible financial obligations".[443] If not, it would fall short of good faith.[444]

Van Heerden and Lötz argue that if the consumer's situation cannot be cured by rearrangement, the court is obliged to refuse debt review, since the review would serve no purpose and may amount to an abuse of the process.[445] If there is little potential for the consumer to successfully reschedule his or her indebtedness under the home loan, a suspension of instalments would only further increase his or her indebtedness.[446] Therefore, the financial viability of a proposed rearrangement must be argued before the court and the

[441] Para 52. See also *FirstRand Bank Ltd formerly known as First National Bank of South Africa Ltd v Meiring* (22041/10) [2011] ZAWCHC 92 (19 April 2011) paras 12-14 (the debtor did not inform either the debt counsellor or the court of all the properties he owned – an omission that he could not explain. Moreover, it seemed that the debtor was not truthful when he alleged that the property sought to be sold in execution was his primary residence. In fact, it seemed that he lived in another of his various properties and that the property in question was a vacant lot that he owned for investment purposes); *Standard Bank of South Africa v Hales and Another* 2009 3 SA 315 (D) para 22 (the information should include details on why the consumer defaulted, how his or her financial circumstances changed, what he or she did to minimise the default, why he or she did not apply for debt review and how the over-indebtedness arose); *Firstrand Bank Limited v Swarts and Another* (25699/2009) [2010] ZAWCHC 35 [2010] ZAWCHC 230 (1 March 2010) para 7 (the information that the consumer provided was the "bare minimum" and he provided no information regarding any assets and liabilities he and his wife had).

[442] *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) para 60 and 69. See also *Firstrand Bank Limited v Swarts and Another* (25699/2009) [2010] ZAWCHC 35 [2010] ZAWCHC 230 (1 March 2010) para 8: Because the situation did not display any possibility of debt rearrangement, it would not have been suitable to refer the matter for debt counselling.

[443] *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) para 60.

[444] See also *Standard Bank of South Africa Ltd v Allard and Another* (I 1766/2010) [2011] ZAWCHC 47 (3 March 2011) paras 35-43.

[445] C van Heerden & DJ Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D)" (2010) 73 *THRHR* 502-517 514.

[446] For example, see *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 (D) para 23. C van Heerden & DJ Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D)" (2010) 73 *THRHR* 502-517 514 argue that this factor is decisive. See also JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 60-61.

information presented by the debtor must disclose a realistic way of restructuring the debtor's obligations.[447]

The NCA requires that any consumer who applies for debt counselling must "participate in good faith in the review and in any negotiations designed to result in responsible debt rearrangement".[448] Therefore, it is important that a consumer's request in terms of section 85 should be *bona fide* and not merely a delaying tactic.[449] Not only must the defence against the summary judgment application be *bona fide*, but the consumer must also show that the debt review itself would be *bona fide*.[450] The lack of providing important details can cast doubt on the *bona fides* of the consumer.[451] Allegations of over-indebtedness may not be "inherently and seriously unconvincing" and information provided may not be so "vague and bald that they [do] not amount to a *bona fide* defence".[452] Accordingly, a "blatant stratagem" to delay the credit provider's claim will not be tolerated.[453] If the debtor is acting in bad faith, it would not "be justifiable to limit" the creditor's "rights to payment of the debt owed to it" by the debtor.[454]

A factor that corresponds to good faith is one mentioned by Otto in the conclusions he draws from the case law.[455] He argues that a consumer who is struggling to keep up with his or her obligations should not simply leave it at that. Rather, he or she should attempt to negotiate with the credit provider to find a solution. Not doing so would be taken into account by the court. It should not seem to the court that the consumer is attempting to abuse the protection measures provided by the NCA.[456] It would count against a debtor if he or she

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[447] *FirstRand Bank Ltd t/a Wesbank v Rees* (2906/2010) [2011] ZAECPEHC 27 (23 June 2011) para 19; *First National Bank v Adams and Another* (11945/2011) [2011] ZAWCHC 474 (23 September 2011) 16-17; *FirstRand Bank Ltd t/a Wesbank v Rees* (2906/2010) [2011] ZAECPEHC 27 (23 June 2011) para 19.

[448] S 86(5)(b). The same obligation rests on the credit provider.

[449] *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) para 20. The court continued that it is inappropriate to superimpose the requirements of HCR 32, relating to summary judgment, on an application in terms of s 85 of the NCA. However, in *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) paras 54-55 the court disagreed with the decision in *Olivier* and found that HCR 32 cannot be ignored even though the s 85-relief is *sui generis*. Ignoring r 32 would be unfair towards the credit provider because it is during a summary judgment application that the defence of over-indebtedness was raised. An application in terms of s 85 raised in the context of summary judgment proceedings must still be *bona fide*.

[450] *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) para 60.

[451] Paras 60 and 69; *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) para 76. See also *Standard Bank of South Africa Ltd v Allard and Another* (I 1766/2010) [2011] ZAWCHC 47 (3 March 2011) paras 35-43.

[452] *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) para 56 (my italics).

[453] Para 83. See also *FirstRand Bank Ltd t/a Wesbank v Rees* (2906/2010) [2011] ZAECPEHC 27 (23 June 2011) paras 19 and 20.

[454] *FirstRand Bank Ltd t/a Wesbank v Rees* (2906/2010) [2011] ZAECPEHC 27 (23 June 2011) para 20.

[455] JM Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399-408 407.

[456] 408.

simply stops paying and makes no attempt to pay at least part of the monthly instalments.[457] Moreover, Otto argues that the consumer him- or herself should sell some of his or her assets in order to alleviate his or her indebtedness.[458] This initiative may indicate to the court that the consumer is willing to cooperate and not simply expecting the credit provider to make all the compromises.

For many over-indebted mortgagors their biggest liability and the reason for their over-indebtedness is their mortgage debt. In addition, their loan repayments are mostly their largest monthly expenses.[459] Consequently, relieving them of this great monthly burden by allowing the sale of the property might relieve them of their over-indebtedness, which is the purpose of debt review.[460] Even though debt rearrangement would be the first option, since it would render the home safe, this might not be enough to ensure the debtor's financial survival. Hence, courts will take into account – as part of their goal to relieve debtors' over-indebtedness – whether the best (and perhaps only viable) option would be to allow the sale of the home.

Various courts have expressed that it is not the NCA's purpose to allow the consumer to claim over-indebtedness while at the same time remaining in possession of the relevant property.[461] It is also not the purpose of debt review to unjustly deprive creditors of their security.[462] Accordingly, the property should be sold to reduce the consumer's indebtedness.

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[457] For example, in *Standard Bank of South Africa Ltd v Kroonhoek Boerdery CC and Others* [2011] ZAGPPHC 132; 23054/2011 (1 August 2011) paras 39 and 49 the debtor was in default for 13 months. However, regardless of the fact that she was receiving rental income from the property, she had made no attempt to pay any part of the instalments for 13 months. To the court this indicated an intention to benefit illegitimately from debt review. Although this case was decided in the context of the termination of debt review and not s 85, this clearly qualifies as an example of the kind of bad faith that would lead a court to exercise its discretion against the debtor.

[458] JM Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399-408 407.

[459] *FirstRand Bank Ltd t/a First National Bank v Seyffert and Another and Three Similar Cases* 2010 6 SA 429 (GSJ) para 3.

[460] For example, see *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) paras 22 and 23; *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 (D) para 24.

[461] The leading case in this respect is *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) para 77. Others include *First Rand Bank Ltd v Ann Field* (20495/10) [2011] ZAWCHC 145 (16 February 2011) paras 8 and 12; *First Rand Bank Ltd t/a FNB Home Loans v Makhoba* (55443/10) [2011] ZAGPPHC 199 (14 October 2011) para 33; *Pelzer v Nedbank Ltd* 2011 4 SA 388 (GNP) para 6.4.3; *Firstrand Bank Ltd v Grobler* (A249/10) [2011] ZAFSHC 45 (17 March 2011) para 12.

[462] *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 1 SA 310 (GSJ) paras 33-35. This point was made in the context of motor vehicle financing. If the over-indebted consumer were to be allowed to retain the motor vehicle, which is depreciating in value, while at the same the debtor was allowed to not make payments, it makes it even more unlikely that the debtor would discharge his or her over-indebtedness. The sooner the vehicle can be returned to the creditor, the more efficient the reduction in the debtor's indebtedness would be, since the vehicle will have a higher value. On the other hand, where the debtor keeps the vehicle, it has the opposite effect. See also *SA Taxi Securitisation (Pty) Ltd v Campher* (5081/2009) [2012] ZAECGHC 9 (24 February 2012) paras 14-15; *Pelzer v Nedbank Ltd* 2011 4 SA 388 (GNP) paras 6.3-6.6, especially para 6.3:

As Flemming explains, this point of departure may be correct in specific instances but is probably too wide for general application.[463] If the property is not the consumer's residence, selling the property would be justified easier because the consumer would not be prejudiced by losing his or her home.[464] Therefore, if a consumer cannot repay his or her debt without liquidating his or her assets it would be appropriate to grant an order declaring the property executable.[465] However, this principle should be qualified by stating that the sale of residential property should not be resorted to lightly.[466]

In summary, it seems that in order for a consumer to convince the court to exercise its discretion in terms of section 85, the consumer would have to explain his or her failure to react to the section 129(1)(a) notice or why he or she did not apply for debt review in terms of section 86. Secondly, even if the court condones either or both of these failures, the consumer would have to supply enough information to convince the court of his or her over-indebtedness. Moreover, the consumer's request must be made in good faith. Thirdly, it is a decisive factor whether the consumer's debt can be successfully rearranged. Consequently,

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"[A] consumer who is over-indebted is granted a 'moratorium' and is assisted to get his 'house in order'. But his liability to repay does not disappear, neither is he entitled to hang on to the goods which are the subject matter of the agreement, whilst not paying. On the contrary, the goods must be sold to reduce his debt." For a discussion of *Pelzer*, see M Roestoff & A Smit "Non-compliance with time periods – should the debt review procedure lapse once a reasonable time has expired? *Pelzer v Nedbank Limited* unreported case no 14160/09 (GNP)" (2011) 74 *THRHR* 501-509.

Of course, motor vehicle finance cases are different from home loan mortgage cases, since housing factors do not play a role if the relevant property is a motor vehicle. Therefore, the value of comparing the two situations is limited. Firstly, housing interests play a big role in home loan circumstances, but obviously not with motor vehicles. Secondly, in the case of motor vehicle finance, ownership of the property is retained by the creditor as security, whereas home loan mortgages only vest creditors with real security rights. Thirdly, motor vehicles as objects of security depreciate in value over time, whereas immovable properties generally appreciate. Therefore, for the fair enforcement of motor vehicle security it makes sense to require the realisation of the security as soon as possible, since this will be to the advantage of the debtor, the lender and the motor vehicle finance industry as a whole (see *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 1 SA 310 (GSJ) para 36). The same cannot generally be said when it comes to immovable property, unless the property is, for example, falling into disrepair and, hence, decreasing in value.

[463] HCJ Flemming *Flemming's National Credit Act* (2nd ed 2010) 136. See also JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 60-61 n 64. The author specifically refers to the outcome in *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W).

[464] *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) para 78. The court (at para 78) also commented that it cannot be expected of a credit provider to sit back and allow its interest to be diminished and that, based on these facts, the longer the property remained in possession of the consumer, the more likely it would be that the credit provider suffer prejudice. The long-term plans of the consumer to improve the property and thereby make a profit cannot be allowed to deprive the credit provider of that which it is legally entitled to, namely judgment in its favour if the consumer has disclosed no defence: See para 80.

[465] *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) para 61. In this case it would have been impossible to repay the mortgage loan on the repayment scheme proposed by the consumer and to liquidate his property was, therefore, the best option to reduce his over-indebtedness: See para 71. It would also count against the consumer if the outstanding balance has risen above the amount of the initial loan.

[466] Para 60. The court based this qualification on the constitutional protection against eviction. See also *FirstRand Bank Ltd t/a First National Bank v Seyffert and Another and Three Similar Cases* 2010 6 SA 429 (GSJ) para 16.

creditors' rights are protected against the effect of alleged over-indebtedness (in terms of section 85) by the high level of good faith expected from consumers.

Although summary judgment should generally be granted (unless the consumer can convince the court to exercise its discretion in his or her favour), obtaining an order declaring the property executable may become more difficult as courts are increasingly becoming cautious of allowing someone's home to be lost.[467]

On the interaction between section 86 of the NCA and section 26 of the Constitution, Van Heerden and Lötz[468] argue that housing considerations should not play a role when the court exercises its discretion under section 86, although some of the factors mentioned in *Jaftha*[469] may be taken into account. However, section 26 will only become directly relevant once the court exercises its discretion against the consumer and therefore grants the summary judgment. The authors seem to suggest that, subsequent to the judgment order being granted, the consumer would have a second opportunity to prevent the loss of his or her home. This could be done by proving to the court that an execution order would result in the consumer being left homeless and with no alternative accommodation – in other words, an unjustifiable infringement of section 26(1) of the Constitution.

However, I am in favour of already taking the housing issue into consideration while deciding whether to grant the request for referral to debt review.[470] I argue that it should probably count in the consumer's favour if he or she can indicate that not referring the matter to debt review would result in the loss of his or her home. Due to the general concern that courts have when it comes to homes being in jeopardy, one can assume that a court would want certainty regarding whether debt review might have presented a solution that would exclude the sale of the home.[471] I submit that the proportionality test requires this approach.

Any uncertainty regarding the possible effectiveness of debt review may just sway the court in favour of the consumer, especially if a home is implicated. I find it unlikely that a court will ignore the housing issue while exercising its discretion, especially if proper information regarding the infringement of section 26(1) is provided to the court. Referring a

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[467] See *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) para 61; *FirstRand Bank Ltd t/a First National Bank v Seyffert and Another and Three Similar Cases* 2010 6 SA 429 (GSJ) para 16.

[468] C van Heerden & DJ Lötz "Over-indebtedness and discretion of court to refer to debt counsellor: *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D)" (2010) 73 *THRHR* 502-517 515.

[469] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC). See 3 2 2 above.

[470] See my interpretation of the scope of s 26 of the Constitution in 3 3 above.

[471] This is similar to the approach followed in *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ), where the court would not allow foreclosure, since it was not convinced that all the protection provided by the NCA was utilised.

matter to debt review is an alternative to the immediate sale of the property in execution. Therefore, an execution order should not be granted if there is the possibility that debt review might lead to a realistic solution that would preclude the loss of home. It might also be appropriate for courts to be more lenient in exercising their discretion under section 86. As long as the homeowner is acting in good faith, courts should not make it too hard for debtors to find relief in section 85, especially if there is a reasonable suspicion that immediate sale in execution would be disproportionate.

4 3 4 7 Need for a discretion to act mero motu*: The* Maleke *case*

In the paragraph above I explain how the court's discretion to refer a matter for debt counselling or to declare and relieve over-indebtedness itself should be a key component of the court's endeavour to ensure that debtors' access to housing is not limited unjustifiably. As I argue, this discretion under section 85 of the NCA (and the other mechanisms of the NCA as a whole) should be the primary point of departure for seeking alternatives to sale in execution of the home. However, one problem with the discretion under section 85 – one which may put its constitutional compliance in doubt – is the fact that the court does not have the power to exercise this discretion *mero motu*.[472] In other words, if the debtor does not allege over-indebtedness and request the court to exercise its discretion accordingly, the court cannot assist the debtor. During applications for default judgments (when debtors do not defend themselves) this might be problematic, since courts might be faced with cases where the facts display that debt rearrangement would render execution (and the ensuing violation of section 26) unnecessary and, therefore, unjustified. Nonetheless, without a power to *mero motu* relieve the over-indebtedness, the court would be left with no choice but to grant the execution order. In the following paragraphs, with reference to an example from case law, I explain how problematic this state of affairs is. I then present a solution to remedy the potential unconstitutionality caused by this *lacuna* in the Act.

In *Firstrand Bank Ltd v Maleke and Three Similar Cases*[473] ("*Maleke*") the four cases involved were applications for default judgments, since the debtors did not enter appearance to defend the execution proceedings. The amounts in arrears were relatively small.[474] The

[472] JM Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399-408 406-407 was the first to point this *lacuna* out.
[473] 2010 1 SA 143 (GSJ).
[474] Paras 2.10 and 5.4. The amounts in arrears varied between R2 000 and R5 000, except for the one case in which the amount was higher but inconclusive. It is important to consider that these amounts are those in arrears

mortgagors had been paying their loan instalments for periods ranging between thirteen and seventeen years before defaulting for the first time.[475] This implied that the mortgagors had acquired valuable equity in their properties due to the increased market value of the properties, which equity would be lost by sale in execution.[476] Moreover, the court assumed that the value of the properties must have been significantly higher than the outstanding balances on the loans, due to the capital growth accumulated over the years.[477]

After summarising the purposes of the NCA, the court emphasised that the Act is also aimed at protecting and providing assistance to previously disadvantaged households who wish to enter the property and credit market.[478] It was evident to the court that the NCA provides particular protection for historically disadvantaged persons who struggled under the disadvantages of the apartheid dispensation.[479] Furthermore, the court held that, taking the small size of the arrears into account, an agreement between the parties or reliance on the

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and not the total outstanding balances. On the significance of distinguishing between these two amounts, see 3 4 3 3 above and 4 4 3 below.

[475] *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) para 5.2.

[476] Para 5.2.

[477] Para 5.3.

[478] Para 3. It is significant that strong emphasis was placed on the fact that the mortgagors were historically disadvantaged: See also paras 2.2 and 5.1.

[479] *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) para 5.1. S 2(6) of the NCA defines historically disadvantaged persons as "a category of natural persons who, before the Constitution ... came into operation, were disadvantaged by unfair discrimination on the basis of race". S 3(a) of the NCA, regarding its purposes, states as follows:

> "The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by -
> (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions".

Interestingly, the court also referred to s 13(a) of the NCA, regarding the National Credit Regulator's responsibility to

> "promote and support the development, where the need exists, of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry to serve the needs of -
> (i) historically disadvantaged persons ;
> (ii) low income persons and communities ; and
> (iii) remote, isolated or low density populations and communities".

Even though this section places an obligation on the National Credit Regulator, the court held (at para 5.5) that the courts should reflect the pursuit of the same ideals in their judgments. It is also clear from these sections that the NCA has socio-economic aspirations and is not simply aimed at the regulation of credit relationships on a purely private law basis: See JW Scholtz "Objects and interpretation of the National Credit Act" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 2-6 - 2-8. In summary, the court stated that the NCA aims to level the playing field between a relatively impoverished and unsophisticated debtor and a rich and well-advised creditor. It also attempts to restrict the financial harm debtors may suffer if they become unable to pay their debts: See *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) para 3.

debt review process could have resulted in a satisfactory outcome.[480] This would have resulted in the mortgagee ultimately receiving full payment of the loan and the mortgagors not losing their homes.[481]

The court attributed the debtors' failure to make use of the suggested debt review to a possible lack of understanding.[482] Historically disadvantaged persons in particular may generally not be aware of the protection afforded them by the NCA. Moreover, it is often due to this ignorance that they do not respond to the suggestions made in the section 129(1)(a) notice.[483] The court argued that, had they been aware of the consequences of not responding to the notice of default, they might have made use of the opportunity to apply for debt review and saved their homes in this way.[484] Furthermore, the court mentioned that as a result of financial constraints, historically disadvantaged persons by and large do not seek legal advice. They usually are not aware of the free legal advice that is available, which will in any event probably be withheld from them due to their status as homeowners.[485] According to the court

> "it would place too high a standard of sophistication on the historically disadvantaged to expect them to 'know the law' and appreciate all these legal niceties".[486]

Because of the size of the arrears (of trifling significance to the creditor, according to the court), the prejudice that would result from the debtors losing their homes would have been disproportionately large in comparison to the minor prejudice the mortgagee would suffer if the properties were not sold in execution. The only prejudice the mortgagee would suffer – in the event of execution being refused – is a delay in the payment of the full outstanding balance, and such a delay would not have harmed it. On the other hand, sale in execution would lead to permanent setbacks for the relatively poor and historically disadvantaged mortgagors.[487]

Because the mortgagors had fallen in arrears only recently, the court assumed that they had paid their monthly instalments dutifully for years. Due to economic developments, the

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480 *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) para 5.4.
481 Para 5.4.
482 Para 5.6.
483 Para 6.1. For details regarding the s 129(1)(a) notice, see 4 3 1 2 above.
484 *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) para 6.2.
485 Paras 6.3-6.4.
486 Para 6.6.
487 Para 5.4.

value of the homes must have increased substantially since the mortgages were registered.[488] Consequently, the court held that it would be unfair and unjust for the mortgagee to receive the benefit of the capital growth in the homes under circumstances where the arrears were relatively minor.[489] As a consequence of sale in execution the mortgagee would gain an obvious advantage. The reason for this is because the value of the homes would be in excess of the outstanding loans and, therefore, would ensure that the outstanding amounts are recovered.[490]

The court found that it should take into consideration that the mortgagors had made an investment in the properties, with the expectation of capital growth and the benefits that accompany it.[491] In the facts of this case, if the debtors were to lose their homes due to minor arrears, they would also suffer a loss of capital growth.[492] Therefore, sales in execution would prejudice the mortgagors substantially.[493] The court held that if the loan instalments had been paid over a long period and the arrears are relatively small, the advantage to the mortgagee compared to the prejudice to the mortgagor would be disproportionate.[494]

The court confirmed that it has a duty to apply a standard of fairness without being prompted to do so by the parties.[495] The court found that execution orders under these circumstances would terminate the mortgagors' access to credit, a right provided to all persons by section 3(a) of the NCA.[496] Also, in future they would be denied access to adequate housing. The court held that under these circumstances it is necessary for the court to intervene to protect the interests of historically disadvantaged mortgagors. When applying the NCA, the court should be careful to protect the rights of these categories of persons.[497]

Concerning section 26 of the Constitution, the court held that the protection this section affords should be considered when applying the NCA.[498] Applying the principles in *Jaftha*, the court held that sales in execution would deprive the mortgagors of adequate housing if they were to be evicted subsequent to the sales in execution.[499] Even if an amount was raised

[488] Para 8.
[489] Para 8.
[490] Para 8.
[491] Para 8.
[492] Para 8.
[493] Para 8.
[494] Para 8.
[495] Para 6.7.
[496] Para 6.7.
[497] Para 9.
[498] Para 10.
[499] Para 12.

in excess of the debt, it would not assist the mortgagors to buy homes of an equal size and value.[500] Furthermore, relying on *Jaftha*, the court stated that a sale in execution usually would be undesirable if there are other reasonable ways to achieve debt recovery. Also, an execution order would be unattractive if there is gross disproportionality between the interests of the parties, if there is the likelihood of complete homelessness and if the debt is trifling.[501] Therefore, the court gave an order absolving the mortgagors from the instance and exercised its discretion against the mortgagees, dismissing the application for an execution order.[502]

Moreover, the court held that it would have been ideal in this case to refer the mortgagors to debt counselling in terms of section 85(a) of the NCA. Accordingly, debt counselling would be a reasonable alternative.[503] The problem was that the mortgagors placed no allegations of over-indebtedness before the court, since they were not present in court.[504] A debt review and rearrangement (should the mortgagees participate) may ensure that the mortgagors will satisfy all their financial obligations – a purpose contemplated by sections 3(g) and (i) of the NCA.[505] This may lead to a situation where the mortgagee will receive eventual payment of all outstanding balances, while the mortgagors will retain their homes.[506] Dismissing the applications meant that the mortgagee would have to start all over with the process of complying with the NCA, but this time in the magistrates' court.[507]

The court mentioned the problem that even referring the matter to the magistrates' court would not ensure the debtors' participation.[508] The NCA will not benefit them without their participation and the court could not compel them to do so. Yet, the court decided to encourage them in this regard by making a special order to have copies of its judgment served on them personally (along with the section 129(1)(a) notices) as a prerequisite for the mortgagee resuming debt recovery proceedings.[509]

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[500] Para 12.
[501] Para 13.
[502] Para 16.
[503] Para 17.
[504] Para 18.
[505] Para 21.
[506] Para 21.
[507] Para 21.
[508] Para 24.
[509] Paras 24 and 25.3. HCR 4(10) empowers the court to order further steps, where it is not satisfied with the effectiveness of the service.

According to Otto, the result in *Maleke* illustrates one of the shortcomings in the NCA.[510] In terms of section 85 of the NCA a court has the discretion to refer any matter relating to a credit agreement for debt counselling. However, the court can only exercise this discretion if the debtor makes an allegation of over-indebtedness.[511] Therefore, the court cannot assist the debtor *mero motu*. This problem is evident in a case like *Maleke*, where the debtors did not make an appearance to defend the matter. Even though the facts of *Maleke* seemed ripe for debt review, the court did not have the power to order debt review, since there was no one present who could make the allegation of over-indebtedness. Nevertheless, after its proportionality-type analysis of the facts (for which I applaud it), the court could not allow the home to be sold either. Accordingly, the court opted for the uncertain solution of simply dismissing the creditor's application, with the hope that the debtors will make use of debt review next time. Otto suggests that the unsatisfactory result in *Maleke* should inspire the legislature to amend section 85 of the NCA to allow courts to assist over-indebted mortgagors by *mero motu* referring their cases to debt counsellors.[512] The NCA already provides for such an approach concerning reckless credit.[513]

The decision in *Maleke* also illustrates the need for courts to be attentive in situations where the debtors are indigent and have a lack of knowledge regarding the protection offered by the NCA. As the court convincingly sets out, in the absence of debt review a sale in execution would have been a disproportionate and, hence, unconstitutional option. However, currently it seems that the only thing the courts can do is to dismiss the case, since – as Otto explains[514] – the court does not have the power *mero motu* to refer the case for debt review. One can only hope that the legislature will address this shortcoming in the NCA. However, to my knowledge there is no such plan in the pipeline. Moreover, I do not believe that the route adopted by the court in *Maleke* is suitable either. There was in actual fact no legal ground for the court to have denied the creditor the relief it prayed for, since it had complied with all the requirements. I suspect that creditors may now be inspired to ensure that their debtors first make use of debt review, before the creditors approach a court (which is arguably a good thing). However, this is not an adequate solution. One can certainly expect that courts

[510] JM Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399-408 406-407.
[511] On s 85 of the NCA, see 4 3 4 6 above.
[512] JM Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399-408 407.
[513] S 83 of the NCA. On reckless credit, see 4 3 3 above.
[514] JM Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399-408 406-407.

regularly are faced with cases where a debtor is not defending, but where the facts indicate that debt rearrangement might be a viable option.

The way section 85 of the Act is structured implies that it is the debtor's responsibility to allege his or her over-indebtedness and provide sufficient information in that regard before a court can exercise its discretion under that section. Therefore, if the debtor chooses not to make use of this opportunity, the court would be entitled (and probably left with no choice but) to ignore the possibility of viable debt rearrangement and would have to grant the execution order. However, even though the debtor did not approach a debt counsellor or does not allege his or her over-indebtedness, it might seem to the court that debt counselling should take place before allowing the home to be sold in execution. At the moment there is nothing the court can do in such a case and the only option left is to grant an execution order or to take the unsatisfactory (and uncertain) route followed in *Maleke*.

I propose that when such a situation again appears before a high court, the court should make use of its powers under the Constitution and read a *mero motu* power for itself into section 85 of the NCA.[515] If the section is applied strictly according to the way it presently stands, the effect may be an unjustifiable limitation of section 26(1) rights. The reason for this is that a court would have to grant the execution order despite the fact that there may be a viable alternative available, namely debt review and rearrangement. This deficiency can be remedied in a simple manner, which will not be inconsistent with the purposes of the NCA. The court should interpret section 85 in such a way that the section promotes the purposes of section 26 of the Constitution. In other words, section 85 should be read as giving a court the power to refer a worthy case to debt review, despite the fact that the debtor does not request it.

This power should, however, only be exercised in those cases where the debtors did not have knowledge about the advantages of debt review and where granting the execution order without prior debt counselling will lead to a clear and unjustifiable limitation of the debtors' housing rights. Practically, it probably does not make sense for the court *mero motu* to grant a debt rearrangement order, since it would hardly have enough information before it to be able to do so. Rather, courts should be able, at least, to refer these cases for debt counselling so that a debt counsellor can evaluate the debtor's financial situation and report back to the

[515] S 39(2) of the Constitution. On the reading-in and reading-down remedies available to the court, see also I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 64-67 and 204-206.

court. Of course, this would be subject to the debtor's cooperation, a lack of which will leave the court with no choice but to grant the execution order.

4 3 5 Conclusion

This chapter has thus far discussed various aspects of the NCA that directly impact the enforcement of mortgage bonds. The purpose was to illustrate how these mechanisms function and to show how the correct application of the Act has the (possibly unintended) result of giving effect to the proportionality requirement of sections 26(1) and 36(1) of the Constitution. In line with the subsidiarity principles that I endorse and as I often emphasise in this dissertation, the point of departure for resolving debt enforcement disputes (including mortgage foreclosures) is the NCA. Even where the facts of individual cases indicate that granting an execution order would violate the housing clause (for example, where the debt seems insignificant), the court should seek for a solution in the NCA before direct resort is made to constitutional housing principles. The court should ask whether the application of the NCA mechanisms will remedy the disproportionality displayed by a specific factual scenario.

In the next part of the chapter I provide a more detailed explanation, with reference to examples and case law, to further justify the arguments I put forward in this dissertation. I particularly explain how specific factual instances and factors that might render sale in execution unconstitutional are resolved by the application of the NCA.

4 4 Applying the Act where access to housing is compromised

4 4 1 Introduction

In chapter 3 above I discuss the application of section 26 of the Constitution to mortgage foreclosures. In that discussion I conclude that there are certain instances in which it seems that the normal application of common law principles may lead to unjustified limitation of the debtor's "right to have access to housing".[516] The trite principle of mortgage law that a mortgage creditor may execute its claim directly against the hypothecated immovable property without first seeking execution against other assets may constitute an unconstitutional violation of section 26(1). The reason for this is that it would not satisfy the section 36(1) proportionality requirement if access to housing is deprived under

[516] S 26(1) of the Constitution. See 3 4 3 3 above.

circumstances where there might be alternative and less invasive ways available to serve the creditor's purpose.

From the exposition in 3 4 3 3 above, it is clear that there are two issues that further complicate this constitutional controversy. Firstly, if the judgment debt is "trifling" in size and significance, it would be disproportionate to have the debtor's home sold in execution to satisfy such a judgment debt. Secondly, if one disregards the size of the accelerated outstanding debt (which usually constitutes the value of the judgment debt) and takes a step back to evaluate the size of the actual amount in arrears, the proportionality standard may often also be violated. Even though the size of the judgment debt would *prima facie* be big enough to justify the sale of the debtor's home, the actual amount in arrears – which triggered the creditor's right to foreclose – might be too small to justify the sale of the home. Currently the common law surrounding acceleration clauses allows creditors to claim the full outstanding debt even though the amount of the actual default is very small or subsequently purged. The *Ntsane* case[517] in particular illustrates this issue, where the bond was foreclosed despite the fact that the amount in arrears was only R18,46. This disproportionality forced the court to deviate from the common law, which departure from the principles of acceleration was criticised by the court in *Fraser*.[518]

Therefore, the *prima facie* question is whether the common law should be developed so as to bring it in line with section 26(1) of the Constitution. In the following part of this chapter I illustrate how that the introduction of the NCA has rendered any development of the common law unnecessary and, in fact, unjustified. The reason for this is that that the consumer protection mechanisms in the NCA provide a sufficient balance between the rights of debtors and creditors. In other words, my thesis is that any disproportionality that the common law might result in is remedied by the proper application of the NCA, as interpreted through a constitutional lens. I argue that debt review and rearrangement as well as the debtor's right of reinstatement balance out the constitutional disequilibrium caused by the traditional and strict application of the common law. In my argumentation I rely heavily on the subsidiarity principles.[519]

[517] See 4 4 3 2 below.
[518] See 4 4 3 4 below.
[519] See 3 5 above.

4 4 2 Is sale in execution justified by the size of the judgment debt?

Section 36(1) of the Constitution requires one to scrutinise the proportional relationship between the effect of the infringement on section 26(1) and its purpose. The effect of a sale in execution would be the loss of the debtor's home and, therefore, potentially an infringement of section 26(1). The general purpose of sale in execution would be to enforce the creditor's claim to repayment of the accelerated debt and, therefore, to give effect to its real security right. The economic policy behind this is to protect the creditor's investment and to ensure that creditors continue to provide credit for the housing market.

It is not enough merely to argue that there is a rational reason for the infringement, which in the case of mortgage foreclosure there clearly is.[520] Instead, one needs to go a step further and ask whether the effect of the infringement on the individual debtor is just and reasonable with reference to the factors provided in section 36(1) of the Constitution. The issue that raises possible disproportionality concerns is the link that has been drawn between abuse of process and the size of the judgment debt. Especially if the judgment debt is quite small, one may question whether an infringement of section 26(1) would be justifiable, even if there is a valid purpose for sale in execution. One of the central factors in the section 36(1) proportionality test is whether the infringement of section 26(1) is the least invasive way to achieve its purpose. The smaller the size of the judgment debt, the higher the chances that there may be another, less invasive way to settle the debt instead of having the debtor's home sold. Accordingly, the "trifling" nature of the judgment debt will cause courts to be on the lookout for such less invasive ways.

Therefore, after considering whether there is a mortgage bond, the size of the judgment debt as compared to the value of the residential property will always be a relevant factor when applying HCR 46.[521] In the case of a trifling judgment debt, in the words of Peter AJ,

> "[a] person is dispossessed of the security of residential tenure and a drastic price is paid by the judgment debtor for no corresponding benefit to the judgment creditor. The claim to satisfaction of the judgment debt might easily have been satisfied other than by resort to the drastic procedure of execution against the residential home. In such a case the social value of ensuring a debt is paid could easily be met without the dispossession of the judgment debtor of the residential property."[522]

[520] See 3 4 2 above.
[521] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 28; *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) paras 57 and 60.
[522] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 22.

In the situation described above, execution against the home is not justifiable.[523] Certain factors, like the fact that the judgment debt and the value of the property are disproportionate to each other, might indicate this type of abuse.[524] Moreover, when the debt is small, there will be little or no motivation on the part of the creditor to obtain the highest possible price for the property at the auction. It is after all common knowledge that properties seldom (if ever) achieve a fair market-based selling price at public auctions.[525]

Allowing a sale in execution under these circumstances will lead to unacceptable disproportionality. The creditor almost certainly will achieve the settlement of its claim, whereas the debtor will lose his or her home, which might be more valuable than the claim. In addition, the excess amount that the debtor receives from the sale will probably be too low (as a result of the low realisation value of the property at the public auction) for him or her to purchase a house similar to the one lost. The difference in value between the original and new home will presumably be larger than the value of the judgment debt. Therefore, the difference between decrease in the debtor's wealth and the advantage obtained by the creditor will be unfair. This disproportionate result can be avoided by allowing the judgment debt to be settled in an alternative way. Of course, there might be instances where no alternatives exist, even in extraordinary examples.

In *Jaftha*, the CC decided that courts must be careful when allowing the sale in execution of homes when the judgment debt is "trifling", since this might indicate that the creditor is abusing the process. The CC held that the collection of a trifling debt did not constitute a compelling enough reason to allow existing access to adequate housing to be eradicated.[526] However, the court emphasised that not every sale in execution to satisfy a trifling debt will be unreasonable and unjustifiable, since the concept of a "trifling debt" cannot easily be defined.[527] The CC in *Jaftha* held, as a general principle, that it would be unjustifiable for someone to be left homeless if the debt is small and when there are other ways to recover the debt.[528] However, this is a general assumption and will not be the case in every sale in execution of this nature. The court emphasised that the interests of creditors must not be overlooked.[529] In some cases the advantage that attaches to the creditor will outweigh the

[523] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 22, relying on *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 55.
[524] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 22.
[525] *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) para 8.
[526] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 40.
[527] Para 40.
[528] Para 41.
[529] Para 42.

prejudice and hardship caused to the debtor.[530] Hence, other factors may necessitate a finding that the execution is justifiable, despite the trifling nature of the debt.[531]

Of course, *Jaftha* was decided before the NCA provided mechanisms to avoid these situations. Accordingly, this decision must be understood in light of what the NCA now provides, especially (but not exclusively) if the debt is payable in instalments, such as mortgage loans. If these debts can be rearranged in a way that will avoid the granting of "trifling" judgment debts, they should be so rearranged. If rearrangement is not a viable option and if the debtor does not have the means to reinstate the credit agreement by getting the arrears up to date, the debt cannot truly be regarded as "trifling". The reason for this is that a debt will only be "trifling" when it is insignificant relative to the debtor's ability to repay the debt.

Furthermore, one must consider that judgment debts under mortgage circumstances are seldom (if ever) as small as, for example, the unsecured judgement debts in *Jaftha* were. In the unlikely event that a mortgage judgment debt (the full outstanding balance) is as small as it was, for instance, in *Jaftha* (R250 and R190 respectively),[532] it is hard to imagine that some alternative repayment scheme cannot be utilised or developed that will allow the debtor to keep his or her home, while at the same time guaranteeing that the creditor's right to payment of the principal debt is satisfied. In fact, if the outstanding debt is so small, the first option would be for the court to grant an order in terms of the MCA that requires the judgment debt to be paid in instalments.[533]

The extraordinary situations described above (minor judgment debts) will occur most probably in the magistrates' courts, due to the size of the judgments in those cases. Moreover, judgments in this range will be prayed for mostly in cases where the values of the properties are also relatively low. For example, it is difficult to imagine a situation in practice where a

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[530] Para 43.
[531] Para 41.
[532] See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2003 10 BCLR 1149 (C) paras 2-10; *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) paras 2-5.
[533] See s 73 of the MCA. See also *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 58:

> "At present, s 73 of the Act provides for a judgment debtor to approach a court with an offer to pay off a debt in instalments. As pointed out above, this section does not constitute sufficient protection for indigent debtors because they are generally unaware of its potential to protect them and their inability to invoke it. However, the concept of paying off the debt in instalments is important and the practicability of making such an order must be ever present in the mind of the judicial officer when determining whether there is good cause to order the execution."

mortgage creditor will claim execution to enforce a judgment debt of, say, R1 000 where the value of the property is, say, R5 000 000. In a case like this, the creditor will tend to negotiate with its (relatively wealthy) client instead. In addition, it is hard to imagine that someone who owns a home of this value would not be able to settle an outstanding debt of this nature. In theory, an extreme situation like this is possible, but could – to my mind – be resolved relatively easily.

Examples of judgment debts this small are more likely to occur at the lower end of the market. To claim an outstanding balance of R1 000 if the property is worth R20 000 is a different matter and it cannot be viewed in the same light as the above-mentioned example. In the upper-market example, the R1 000 may be considered "trifling" in comparison to the value of the property. However, in the lower-market example the R1 000 might *not* be regarded as "trifling" in comparison to the value of the property and in light of all the circumstances. Therefore, whether the amount can be considered as "trifling" will depend on the debtor's ability to satisfy it, his or her ability to negotiate with the creditor as well as other variable factors.

Furthermore, the lower-market examples are those that are more sensitive to injustice and exploitative practices, since these debtors often will be those with the lowest level of knowledge. Moreover, often it will be these debtors who face the most extreme consequences if they were to lose their homes, with homelessness being a likely possibility. The line between upper- and lower-market scenarios is not easy to draw and one should, therefore, not attach too much weight to such a distinction. One cannot assume either that all lower-market debtors necessarily suffer from a lack of knowledge or that upper-market debtors never need court intervention. However, the likelihood of abusive practices probably becomes higher as the debtor's level of wealth and knowledge decreases. The point is that courts should be more attentive to cases where they perceive a lack of knowledge or a low level of financial and legal sophistication.[534]

In the event that a mortgage creditor claims an accelerated outstanding balance of an amount as small as, for example, R1 000, the court may grant the judgment order. However, this would be an example of a case where the court might not grant an order that will allow the judgment debt to be executed directly against the immovable property. After all, the likelihood is strong that such an amount can be satisfied against assets other than the debtor's

[534] In this regard, see my discussion in 4 3 4 7 above, where I argue in favour of a *mero motu* power for courts to refer cases for debt review particularly if the debtor suffered from a lack of legal and financial knowledge.

home. In scenarios like this it might perhaps make sense for a court to require a *nulla bona* return before granting a warrant of execution against the immovable property. This approach would, consequently, amount to a deviation from (and development of) the common law. It would overturn the creditor's right to execute immediately against the hypothecated immovable property and oblige it to first seek execution against other assets that are not subject to the bond.

However, a more sound approach – one in line with the subsidiarity principles I endorse – would be to first seek for a solution within the scope of the NCA. Debt review and rearrangement will usually be apposite remedies in cases where the outstanding debt is small enough so as to be capable of a restructuring. The right of reinstatement will also provide debtors with the opportunity to sell other assets and use the proceeds to pay the outstanding judgment debt or amounts in arrears. This factor makes it unnecessary and unjustified for the court to expect, as a principled requirement, a *nulla bona* return before granting the execution order against the home. The reason for this is that, for the court to expect a *nulla bona* return, would circumvent the NCA, which in terms of the subsidiarity principles is not justified. The NCA provides debtors in default with an extensive right to reinstate the credit agreement by simply getting the arrears up to date. Along with this right, in my view, comes the obligation to make use of such a right when desiring to save one's home. As one court has held, the right of reinstatement is "the beacon ... that keeps the hope alive" for debtors who wish to "weather the hard times and keep their homes, and dignity".[535]

Consequently, courts should make decisions in line with the NCA and thereby require debtors to employ their right of reinstatement. Requiring creditors to seek execution against assets other than the hypothecated property would ignore the legislature's intention, namely that debtors should take the initiative and sell their own assets so as to use the process to reinstate the credit agreement. The NCA also expects debtors to apply for debt review or allege their over-indebtedness when they desire debt relief. When they do not make use of these opportunities, debt enforcement should go ahead as usual.

One exception, as I argue, is that the court might *mero motu* refer a matter for debt review under exceptional circumstances – for example, when the debtors suffer from a lack of knowledge.[536] Especially under default circumstances (when debtors do not make

[535] *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) para 35 n 36 per Hartle J.
[536] See 4 3 4 7 above.

appearances to defend) the courts should be attentive to the possible reasons for the debtor not lodging a defence. Is it because the debtor willingly accepts the situation or is it because he or she does not know of the available solutions? Courts may face situations where the debtor does not appear to defend, but where the facts before the court indicate that debt review and rearrangement might be a viable solution and that execution may, hence, not be necessary. In a case like this, it can hardly be said that the court is convinced that sale in execution is the last resort. As I explain in 4 3 4 7 above, the NCA can accommodate this eventuality as well and there is, therefore, no need or justification for simply denying an execution order under this seemingly disproportionate conditions.

My conclusion is that the possible disproportionality that might befall homeowners who in total only owe a relatively minor amount, is sufficiently prevented by the debtor's rights under the NCA to reinstate the credit agreement, apply for debt review and/or obtain a debt rearrangement order.

4 4 3 Does the size of the amount in arrears justify the creditor's decision to foreclose?

4 4 3 1 Introduction

Another extraordinary situation occurred before the NCA came into full operation. This relates to the question of what courts should do if the amount in arrears (not the judgment debt) seems insignificant in comparison to, for example, the value of the property. In 4 4 2 above I focussed on the size of the judgment debt – in other words, the size of the total outstanding debt, payment of which becomes accelerated due to foreclosure. I discuss there the possibility of this amount being disproportionate (and, therefore, not sufficient to justify sale in execution of the home) and how the NCA solves this problem. However, another question has been raised that takes the enquiry one step backwards, namely the relevance of the size of the amount in arrears that triggered the creditor's right to accelerate payment of the full outstanding debt.

This question has brought to light the importance of distinguishing between two stages of foreclosure.[537] The first stage is when the debtor defaults and, based on this default, the creditor enforces its rights under the mortgage agreement to accelerate payment of the full outstanding debt. In terms of this right, the creditor is entitled to a judgment order for the

[537] This distinction was highlighted by the court in *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 32, discussed in 4 4 3 4 below.

entire outstanding debt. During the second stage of the process, the creditor can insist on enforcing this judgment debt by having the hypothecated property sold in execution. These two stages (or aspects) of the foreclosure process are often not distinguished due to the fact that the courts usually deal with them cumulatively in mortgage cases. The judgment order and the order declaring the property executable are often requested and obtained together. For instance, it is interesting to consider that HCR 46(1)(a)(ii) does not require judicial oversight or the taking into consideration of all relevant circumstances when granting the judgment order, but only when granting the execution order.

The case I discuss below illustrates how the size of the amount in arrears can cause courts to raise doubts as to whether sale in execution is justified. I also explain that the solution to this problem is found in the NCA.

4 4 3 2 The Ntsane *case*

In *ABSA Bank Ltd v Ntsane and Another*[538] ("*Ntsane*") the mortgage creditor applied for default judgment against the debtors for the total amount outstanding on the loan after they had failed to comply with their monthly repayment obligation, and after they had failed to enter an appearance to defend.[539] At the date of application the debtors' bond payments were in arrears with R18,46.[540] The amount claimed was the accelerated outstanding debt of R62 042,43.[541] In terms of the contractual principle, the default (regardless of size) was a legal fact that activated the mortgage creditor's rights under the acceleration clause, namely to claim the full balance of the debt, which entitles it to judgment for that amount.

The court considered that the creditor was attempting to deprive the debtors of their home while the amount in arrears at the time of application was "piffling", especially in comparison to the creditor's status as a "multi-billion rand international financial conglomerate".[542] Hence, the facts displayed a proportionality problem. Although the mortgage bond made provision for the creditor to foreclose the bond when the debtors defaulted, the court expected the creditor to explain why it insisted on enforcing that right.[543]

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[538] 2007 3 SA 554 (T).
[539] Paras 5-8.
[540] Para 12.
[541] Para 10.
[542] Para 18. The court (at para 19) gave the creditor the benefit of the doubt by presuming that, at the time it decided to foreclose, the arrears surely would not have been only R18,46.
[543] *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) para 21.

The court commented that the creditor's decision to enforce the mortgage seemed "morally and ethically questionable" in the sense of proverbially "insisting upon every single ounce of [its] pound of flesh".[544] The court was disquieted by the irreversible setback the mortgagors would suffer because of the mortgagee's reliance on a minute amount in arrears to enforce its right to have the property sold.[545] The court also considered that its first impression from the creditor's application was that it would be unfair and an injustice to deprive poor persons of their only home. Accordingly, the court found the "apparent hard-heartedness" of the creditor's application difficult to accept.[546]

The court stated that neither in *Jaftha* nor in *Saunderson* did the question arise whether the mortgagee's decision to accelerate repayment of the full outstanding loan upon default can be set aside or reviewed by a court.[547] The court in *Ntsane* decided to take the matter a step back. It did not investigate whether the sale in execution itself would limit section 26 rights. Rather, the court focussed on whether the decision to foreclose, in other words, to accelerate payment of the full outstanding balance – which happens prior to applying for the execution order[548] – is reviewable. The court commented that

> "it would be difficult to imagine a ground upon which such a decision by the creditor [to accelerate the debt upon default and to foreclose the bond] could be held to be unlawful."[549]

Based on this consideration, the court held that the best it could do was to postpone enforcement while alternative ways of debt repayment are arranged.[550] However, the court agreed that if it was a small amount in arrears that triggered the foreclosure, the possibility of section 26 rights being infringed increased and that such cases require careful scrutiny.[551] The court decided that the mortgagee's right to commercial activity and its right to enforce lawful agreements must be weighed against the mortgagors' right of access to adequate housing.[552] During this balancing act the proportionality of the harm that the mortgagor may suffer (if judgment is granted) should be weighed against the harm the mortgagee will suffer (if the

[544] Para 22.
[545] Para 22.
[546] Paras 24-25.
[547] Para 67. See L Steyn "'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) 11 *LDD* 101-119 110.
[548] *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) para 67.
[549] Para 68.
[550] Para 69.
[551] Para 69.
[552] Para 71.

mortgage agreement is rendered commercially ineffective).[553] The court mentioned that the harm the mortgagee may suffer included it being denied its right to enforce a contract lawfully entered into.[554] What should also be kept in mind is that this may create uncertainty and distrust in commercial activities. Moreover, investment in the economy may be affected negatively if courts were seen to interfere "willy-nilly" with established practices such as mortgage foreclosure.[555]

The court held that it should take all relevant information into account when balancing the interests of the parties. These include the value of the property, the past history of payments made, the amount outstanding, other assets the mortgagor may possess (especially movables capable of attachment), other debts of the mortgagor, the mortgagor's employment status, *et cetera*.[556] However, the court commented on the difficulty of obtaining this information, since most defaulting mortgagors in similar circumstances will seldom enter appearance to defend.[557] It would be up to the court to enquire into the mortgagors' ability to rectify default and, therefore, to evade execution.[558] It is after all the courts' constitutional responsibility to ensure that fundamental human rights are not violated and it has to act *mero motu*, if necessary.[559]

Although it may seem difficult to intervene comprehensively, the court held that it should enquire from the mortgagee why the small amount in arrears could not be satisfied by execution against the mortgagor's movables[560] (or, for that matter, simply be paid up). The court further held that even if the bond has an acceleration clause, it is entitled to refuse sale in execution of the home when it is so seemingly iniquitous or unfair to the debtor that enforcing the full rights of execution will amount to an abuse of the system.[561] In this regard, the court developed the following principle:

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[553] Para 72.
[554] Para 72.
[555] Para 72. The court did not clearly state whether it was referring to "willy-nilly" interference with the creditor's decision to accelerate payment of the full outstanding debt or to "willy-nilly" interference with the creditor's entitlement to enforce its judgment debt through sale in execution. I suspect that the court was referring to the former aspect, since this was the issue that the court was dealing with. Yet, it is clear that interferences with creditors' rights – whether the former or latter aspect – should not be "willy-nilly". In other words, there should be sound and balanced reasons for these interferences. In 6 4 below I shed more light on interferences with creditors' vested rights.
[556] *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) para 73.
[557] Paras 74-75.
[558] Para 76.
[559] Para 77.
[560] Para 79.
[561] Paras 79-80.

> "The insistence upon the right to enforce the execution against the immovable property, the only home the defendants have, under the circumstances where there are easier ways to obtain payment of the arrears without any prejudice to plaintiff's rights, therefore also constitutes an abuse of the system and the processes of this [c]ourt."[562]

Furthermore, the court held that a principle needs to be defined for every set of circumstances in which a fundamental right could be limited.[563] Though this is difficult where many variables are involved, the principle at least includes the following:

> "[W]henever 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."[564]

The court found that this principle was applicable to the facts in *Ntsane*. A court faced with such facts should refuse execution against the immovable property unless it is convinced that there are no reasonable alternatives to enforce the mortgagee's rights.[565] Therefore, based on the fact that there were alternatives available, the court found that a section 26(1) right was infringed in an unjustifiable manner. Even if this was not the case, default judgment could still not be granted, since the mortgagee's claim constituted a *prima facie* abuse of its right.[566] In the absence of any information to the contrary, the court furthermore assumed that the mortgagee had to that date not suffered any loss on the security transaction.[567]

Hence, the court did not grant an order declaring the mortgagors' home executable. The court also refused to give default judgment for the entire accelerated debt and only gave judgment for the amount of R18,46 – in effect reversing the mortgagee's decision to accelerate payment of the loan.[568] Acknowledging the difficulty that courts would face when investigating these kinds of situations, the court held that mortgagees should set out the

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[562] *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) para 85.
[563] See L Steyn "'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) 11 *LDD* 101-119 114, where the author points to a difference between the decisions in *Ntsane* and *Jaftha*. In *Jaftha* the CC held that it is inappropriate to attempt to delineate all the circumstances under which a sale in execution would be unjustifiable. Conversely, in *Ntsane* the high court emphasised its preference for narrowly defined principles. This preference resulted from the court in *Ntsane*'s concern regarding the uncertainty that may be created for the effective enforcement of mortgages.
[564] *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) para 86. See also L Steyn "'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) 11 *LDD* 101-119 111 and 113.
[565] *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) paras 87-88.
[566] Para 91.
[567] Paras 44 and 92.
[568] Paras 93-94.

amount of arrears as well as sufficient facts that would persuade the court to grant the execution order.[569]

Ntsane illustrates an example of an extraordinary set of circumstances under which a court might deny the enforcement of a substantive right under the mortgage, namely the right to accelerate payment and foreclose the bond. Arguably, section 26(1) rights would be limited unjustifiably if a sale in execution of a debtor's home is allowed under circumstances where the amount in arrears appears to be "piffling".[570] In other words, it amounts to an abuse of the creditor's rights (under the acceleration and foreclosure clauses) to elect to enforce such rights if the amount in arrears is too insignificant to justify such an election. The court in *Ntsane* went further with the abuse-of-process principle than the courts in *Jaftha* and *Saunderson* did, probably because those courts did not deal with or anticipate facts such as *Ntsane*'s.[571] In fact, the SCA in *Saunderson* deemed it unlikely that a mortgage creditor would ever be denied its rights.[572]

It seems that in light of *Ntsane*, it now may be required that the enforcement of acceleration clauses should be justified separately from the execution.[573] Whether this is dogmatically correct, is still uncertain. I argue that the facts of *Ntsane* were so extraordinary that one cannot regard it as a general requirement that creditors must always justify their election to accelerate payment of the outstanding debt. As it was conceded in *Ntsane*, the creditor's decision to accelerate repayment of the debt cannot be regarded as unlawful.[574] It seems that the decision to foreclose would only have to be justified where it would lead to disproportionate results. An example would be if the amount in arrears is extraordinarily small in comparison to the hardship that the debtors would face if their home were to be sold.

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[569] Para 97.
[570] *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) para 18.
[571] See L Steyn "'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) 11 *LDD* 101-119 112, where the author states as follows:

> "If [*Ntsane*] is to be followed, then instances where a defaulting mortgagor's section 26 rights are unjustifiably infringed, by an order declaring his or her home executable, may well turn out to occur more frequently than what the [SCA] [in *Saunderson* at paragraph 19] apparently anticipated. Its effect will be not only to broaden the parameters, already set by the [CC] in the *Jaftha* case, for circumstances in which the sale in execution of a debtor's home will constitute a limitation of his or her section 26 rights, but also to refine the definition of factors which are relevant to a court's consideration, as required by section 36 of the Constitution, to determine whether such limitation is justifiable or not".

[572] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 19.
[573] AJ van der Walt "Property" (2010) 1 *JQR* para 2.4.1.
[574] *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) para 68.

Therefore, the possibility that a creditor would separately have to justify its election to accelerate becomes more probable when the amount in arrears is insignificant. Since creditors' investment and security is not truly under threat if the arrears is very small, courts might become hesitant to give effect to creditors' security rights at the expense of the debtors' housing rights. Foreclosure must be aimed at fulfilling the purpose of mortgage financing, namely to protect creditors' investments. Generally speaking, creditors' decision to accelerate and foreclose should reflect this purpose, something which a minute amount in arrears might negate.

4 4 3 3 Solution: The National Credit Act

Ntsane was decided before the NCA came into operation and for that reason the court's exceptional decision (which represents a constitutionally inspired development of the common law) is understandable. However, *Ntsane* must be read together with the NCA, since these mechanisms now provide a solution to the problem faced in that case. The decision in *Fraser*, discussed in 4 4 3 4 below, illustrates this point. The court in *Ntsane* also suggested that a speedy and inexpensive remedy should be created for such matters and that the banking sector should create a compulsory arbitration process.[575] This process now exists in the form of debt review.[576] Hence, the court in *Ntsane* acknowledged that an alternative dispute resolution mechanism would avoid cases like this from appearing in the high courts. Even if such an extreme case would end up before a judge, in light of the NCA, it would not be necessary to follow the same route that Bertelsmann J followed in *Ntsane*. Instead, the NCA should now be applied.

In the first place, if a debtor in a case like this alleges his or her over-indebtedness, a court should refer the matter to a debt counsellor or immediately grant a rearrangement order.[577] If the amount in arrears is extremely small, it is unlikely that debt rearrangement will *not* be feasible. In the second instance, if a debtor does not appear to defend the matter, and if the amount in arrears is that small, a court should still refer the matter to a debt counsellor.[578] Thirdly, the court can grant the direct execution order against the property, but inform the

[575] Paras 97-98.
[576] See M Kelly-Louw "Protection of homeowners against various interest rate hikes" (2010) 22 *SA Merc LJ* 27-49 45; L Steyn "'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) 11 *LDD* 101-119 114.
[577] See 4 3 4 6 above.
[578] See 4 3 4 7 above.

debtor of his or her right to reinstate the agreement by getting the arrears up to date.[579] If the amount in arrears is minute, this reinstatement should not be a problem. Therefore, the right of reinstatement provides debtors with the opportunity to avoid their homes being sold due to "piffling" arrears. They can simply get these outstanding amounts up to date, perhaps along with a rearrangement order so as to prevent future arrears. In the case of minor arrears, debt rearrangement would be an obvious and easy solution. Therefore, to do what the court did in *Ntsane* would not be necessary in light of the NCA, since the Act prevents any potentially disproportionate result with regard to the amount in arrears. Moreover, in terms of the subsidiarity principles, it would not be justifiable to ignore the solutions presented by the NCA and remedy the situation outside the scope of these mechanisms.

4 4 3 4 Ntsane *criticised by the court in* Fraser

As I show in 4 4 3 2 above, in *Ntsane* the outstanding debt was R62 042,43 and the amount in arrears (at the time the case was before the court) was R18,46. In *Ntsane*, one of the questions was whether it would be justifiable to sell someone's home for a trifling debt of only R18,46. The court in *Fraser* agreed that it would not.[580] However, granting an execution order for a R62 042,43 judgment debt is a different matter. Whether execution is justifiable would not be as straightforward.[581] Focussing on the arrears of R18,46 was, according to *Fraser*, a misunderstanding of the issue.[582]

According to the court in *Fraser*, a mortgage bond grants the mortgagee two distinct rights.[583] The first right is to accelerate payment of the outstanding debt and to request a judgment to this amount. The second right is a procedural one, namely to execute the judgment against the hypothecated property.[584] The court argued that it is only the procedural aspect that needs judicial oversight in terms of section 26(3), and not the substantive question as to whether the enforcement of the acceleration clause is justified on proportionality grounds.[585] However, *Ntsane* dealt with this second aspect, namely judicial interference with

[579] This option was suggested – correctly in my view – in *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ), discussed in 4 4 3 4 below. On reinstatement, see also 4 3 2 above.
[580] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 31.
[581] Para 31.
[582] Para 32.
[583] Para 32.
[584] Para 32.
[585] I argue that this point is not correct, as will become clear in due course. See also 3 3 2 and 3 4 3 above.

the mortgagee's right to accelerate payment of the debt.[586] The court in *Fraser* agreed that courts have the discretion to refuse to grant an execution order against a home if enforcement of the mortgagee's rights will amount to an abuse of the process.[587] In *Ntsane*, judgment was granted only for the amount in arrears (R18,46) together with interest.[588] The judgment only recognised the mortgagee's claim to payment of the arrears and not to payment of the full debt. Consequently, because the judgment was only for R18,46, it would have been inappropriate to grant an execution order against the home for such a trifling judgment debt.[589]

However, the court in *Fraser* disagreed with the decision in *Ntsane* to the extent that it attributed to itself the power to redefine the mortgagee's contractual entitlement to a judgment order.[590] Judicial oversight (and its purpose to prevent abuses) does not allow the court to decide a case in this manner. An execution order should not be granted against a home if the judgment debt is trifling. Nonetheless, according to the court, the size of the arrears should not determine the size of the judgment. The premise in *Ntsane* was that the arrears were relatively insignificant and that this did not justify execution. Yet, when the mortgagee exercises its right to accelerate, the outstanding balance is of a much larger amount, which will justify execution against a home and it would, therefore, not constitute an abuse. The court in *Ntsane* ignored the mortgagee's lawful right to accelerate payment and applied section 26(3) with reference to the amount in arrears and not to the true amount that the mortgagee was entitled to. This result is "adverse to the creditor [and] in favour of the debtor".[591] Hence, the court in *Fraser* held that this approach by the court in *Ntsane* was incorrect. The correct approach is that one must first establish the amount to which the mortgagee is entitled for judgment purposes.[592] In the words of Peter AJ,

> "[t]his enquiry into contractual rights is independent of the question whether or not execution against a person's home should be permitted in satisfaction of that judgment debt."[593]

The court held that in the event of an acceleration clause, the common law allows the debt to be accelerated even if the amount of the actual default is small or subsequently purged.[594]

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[586] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 33.
[587] Para 33.
[588] Para 34.
[589] Para 34.
[590] Para 35.
[591] Para 35.
[592] Para 36.
[593] Para 36.
[594] Para 36.

Moreover, the court held that there is no scope to introduce a rule (as was done in *Ntsane*) to the effect that the right of acceleration cannot be exercised when the amount in arrears is relatively small and when the judgment sough is for a more substantial accelerated debt, which amount will justify execution against the home.[595] Therefore, the court held that – in light of the purpose and function of judicial oversight – it is unjustifiable to interfere with the mortgagee's contractual right of acceleration.[596]

Although the court held that any restriction in this regard is a function of the legislature, it stated that such legislation might be necessary.[597] The court mentioned that section 129(3) and (4) of the NCA might provide the answer to the difficult situation in *Ntsane*.[598] Section 129(3) grants a defaulting debtor the right to reinstate a credit agreement by paying all the outstanding amounts, together with permitted charges and costs.[599] It appeared to the court that section 129(3) grants the debtor a right to reinstate the agreement even after judgment had been granted.[600] This reinstatement is brought about by paying the amount in arrears, along with charges and costs.[601] Consequently, a judgment can be "overtaken" by such a reinstatement.[602] Section 129(4) prohibits reinstatement after the execution of an order that enforced the agreement.[603] The court held that this prohibition refers to both the sale and registration of transfer of ownership to the purchaser.[604]

The court compared this right of reinstatement to the common law right to redeem property that has been attached and that is in the process of execution.[605] In terms of this principle, a debtor can redeem the attached property as long as the debtor remains owner. The right of redemption is extinguished only when the property is registered in the name of the purchaser after the sale.[606] Accordingly, a purchaser concludes a sale agreement at the sale in execution subject to the debtor's right of redemption.[607] The public sale by way of auction

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[595] Para 36. In 4 4 3 3 above and 4 4 3 5 below I argue that the common law principle does not escape constitutional scrutiny but that development is unnecessary, since the right to reinstate a credit agreement in terms of the NCA already amended the common law so as to render the result sufficiently proportionate.
[596] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 37.
[597] Para 38.
[598] Para 39. Based on the subsidiarity principles, this dissertation argues that the NCA *does*, in fact, provide the answer.
[599] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 39.
[600] Para 39.
[601] The court cited C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 12-10.
[602] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 39.
[603] Para 40.
[604] Para 40.
[605] Para 40. On the right of redemption, see 2 4 5 above, and on the right of reinstatement, 4 3 2 above.
[606] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 40.
[607] Para 40.

should be allowed to fail if the purpose of execution (namely to give effect to judgment debts) can be achieved by, for example, the exercise of a right of redemption.[608]

The court held that section 129(3) of the NCA applies similarly to the right of redemption.[609] The debtor can redeem the home from the execution process by paying the outstanding amounts in arrears along with charges and costs.[610] Consequently, to redeem the property in terms of section 129(3), the debtor is not required to repay the full outstanding debt (as the common law right of redemption requires), but merely the amount in arrears.[611] This is a statutory right of reinstatement to which the sale in execution is subject.[612]

Therefore, if the total amount that has been accelerated is significant enough to justify the execution order, but where the possibility exists that the amount in arrears might reasonably be paid to reinstate the credit agreement, section 129(3) and (4) should be brought to the attention of the debtor.[613] The court suggested that this notification can be included in the order declaring the property executable.[614]

4 4 3 5 Remarks

The court in *Fraser*'s rejection of the approach adopted in *Ntsane* was *obiter*, since – on the facts – it was not necessary to decide this issue. Yet, it is important to briefly explain why *Fraser*'s criticism of *Ntsane* is not valid in its totality. It was incorrect of the court to assume that there is no scope to develop the common law. It seems like the court adopted the attitude that the common law is not subject to constitutional scrutiny, which is not the case. I agree that it was in this case not necessary to develop the common law so as to provide courts with the ability to reverse the creditor's valid decision to accelerate the debt. However, I do not agree with the court's reason for not developing the common law. As I explain in 4 4 3 4

[608] Para 40.
[609] Para 41.
[610] Para 41. Reinstatement by the debtor can occur unilaterally and, therefore, without prior notice to or consultation with the creditor: See *Nedbank Ltd v Barnard* (1142/08) [2009] ZAECPEHC 45 (1 September 2009) para 15. The s 129(1)(a) notice of default is also no longer valid after the debtor had brought the arrears up to date and thereby reinstated the credit agreement: See *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) paras 33-34. Therefore, if the debtor were to default again, the creditor would have to start the notification process afresh.
[611] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 41. However, see *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011) para 35 n 36, where the court in an *obiter* statement questions whether the court in *Fraser* was correct in holding that through reinstatement a foreclosure case can be prevented by only bringing the arrears up to date and not the full outstanding balance. I reject this argument in 4 3 2 above.
[612] *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 41.
[613] Para 42.
[614] Para 42.

above, the court held that there was simply no scope to develop the common law, since the common law provides that creditors may accelerate the outstanding debt even if the amounts in arrears are minute. The court refused to change this principle purely because it would interfere with the creditor's contractually agreed-upon rights. This is not the correct approach, since courts have the duty to develop the common law when it does not promote the spirit, purport and objects of the Constitution.[615] The court's common law approach could lead to limitation of section 26 rights without justification, since the common law does not provide for alternative ways to solve the problem created by the possibility to foreclose a bond on the basis of a small amount in arrears. Therefore, the common law would have the debtor lose his or her home despite the fact that the arrears are so small that it would be unconscionable to allow sale in execution to go through.

Even though the court in *Fraser* did not take the approach I explain immediately above, it did refer to the correct reason for not developing the common law, albeit without expressly drawing the link. The reason that changing the common law principle was unnecessary and, therefore, uncalled for is the fact that the NCA already provides a mechanism that will ensure that the Constitution is not violated by the sale in execution, namely the right of reinstatement. The right of reinstatement will ensure that if debtors can purge the small amounts in arrears, they will be able to do so and prevent their homes from being sold. As the court in *Dwenga v First Rand Bank Ltd and Others*[616] commented,

> "[i]t is the beacon of re-instatement, and the legitimate entitlement thereto, that keeps the hope alive in consumers that they will weather the hard times and keep their homes, and dignity in the process."[617]

Therefore, avoiding the loss of home is "exactly the aim of the NCA".[618] It is clear that the right of reinstatement is immensely valuable for consumers who wish to protect their homes against foreclosure. Furthermore, this right of reinstatement negates any constitutional non-compliance that the common law principles of acceleration would otherwise have caused. What is more, the possibility of debt review and rearrangement can also serve to resolve the debtor's default problems. Consequently, in view of the subsidiarity principles, in situations where the NCA applies (which include all consumer mortgages), further amendments of the common law are unwarranted.

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[615] S 39(2) of the Constitution.
[616] (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 (29 November 2011).
[617] Para 35 n 36.
[618] Para 38.

The NCA makes it unnecessary – for practical purposes at least – to decide whether the enforcement of the acceleration clause is justifiable in a particular case. Accordingly, the question of whether the court can measure the creditor's decision to enforce the acceleration clause against the standard of good faith or public policy can be avoided by applying the NCA in cases where the creditor approaches the court to enforce a mortgage agreement due to insignificant amounts in arrears. If *Fraser* is to be followed, this approach implies that the creditor's lawful decision to accelerate payment should in principle be honoured by the court. Nonetheless, the court can interfere with and reverse the effects of acceleration to the degree that the NCA allows. However, this intervention (debt review and rearrangement) does not imply that the court rejects the creditor's lawful decision to accelerate. The court only reverses foreclosure due to the policy reasons that underlie the consumer credit protection in the NCA as well as the disproportionate impact that foreclosure would have.

In situations where the NCA does not allow courts to interfere with the creditor's decision to foreclose, one might ask whether the common law should in fact be developed to provide for constitutional non-compliance in such circumstances. I argue that development of the common law to provide for protection in such situations is not necessary or permissible either. In the first place, in circumstances where debt review and debt rearrangement are not options, there are always good reasons; for example, the debtor did not make use of the available options or these options would not be viable solutions to the dispute. If homes are owned through corporate entities and the occupant is a member of the entity (situations which may not fall under the scope of the NCA), the assumption should be that these occupants willingly chose to arrange their affairs in the relevant manner and with the full knowledge that they may not enjoy the NCA's protection.

I am sceptical of a general discretion to dismiss mortgage foreclosure cases based on the size of the arrears, which arguably implies "abuse of process" (*Ntsane*) or even bad faith. Which arrears would be "trifling" or "piffling" enough to signify bad faith in this regard? The trifling nature of the arrears is a relative concept and each case must depend on its own circumstances. It would cause too much uncertainty if courts were to start dismissing foreclosure cases based on what each judge deems to be in line with good faith in that particular case. Therefore, if "trifling" is defined in the abstract I would avoid principles based on this concept. However, if the concept of a "trifling" debt can in some way be defined relatively, it may be more valuable. For instance, it may be useful to define "trifling" debt as a factor of the value of the property and the size of the accelerated debt. However,

such a factor would have to be determined by the legislature and until such time (if ever) the courts would be limited to the abstract concept of "trifling" debt. An abstract standard like this will, to my mind, be too uncertain and lead to inconsistencies in court decisions.

For example, in *Maleke* the court deemed the amounts in arrears to be trifling, even though they were not as obviously trifling as the arrears in *Ntsane*. As I argue in 4 3 4 7 above, the problem in *Maleke* was that the NCA did not (and still does not) provide that a court can refer a worthy matter for debt counselling *mero motu*. In my opinion, it was unnecessary to classify those arrears as trifling, since it added nothing to the case (except that it illustrated the disproportionate result that a pure application of the common law would have had). Admittedly, the size of the arrears indicated that debt review might have been a viable alternative and, for this reason, that execution against the home was probably unjustified. In *Maleke* the creditor was not abusing the process or acting contrary to good faith. It did everything the law required of it. The facts merely indicated that the effect of enforcing the creditor's lawful rights would have had unjust and disproportionate consequences for the debtors.

If only the NCA had provided for a power to refer the matter for debt counselling (where debtors do not defend, due to a lack of knowledge), the case would have been straightforward. Assuming that this *lacuna* in the NCA will be filled by the legislature or by a court's reading-in remedy (as I argue in 4 3 4 7 above), a court should not dismiss a case similar to *Maleke* because of abuse of process or a lack of good faith, even if the amount in arrears is small. The same goes for facts similar to *Ntsane*. In such cases, a just result can be reached by applying the NCA and, therefore, there is no justification to introduce a general discretion (outside the scope of the NCA) based on good faith and whether the debt is "trifling".

In terms of the subsidiarity principles, for a court to make a decision outside the scope of the NCA would be incorrect, since this piece of legislation is aimed at comprehensively regulating the consumer credit market. Subsidiarity prohibits any approach that would lead to a fragmented system where parties can rely either on the NCA or other norms. To the extent that there are interpretational and practical difficulties or *lacunae* in the NCA, courts should interpret and apply it in line with constitutional values (for example, housing rights) instead of applying section 26 directly or using a vague standard of good faith. The standard of good

faith can of course still be applied within the framework of the NCA, since the Act requires good faith participation in the debt review process.[619]

Therefore, I suggest that the only role the size of the amount in arrears should play is to help indicate to the court (during exercise of its discretion under section 85 of the NCA)[620] whether debt review and rearrangement would be a viable alternative to debt enforcement. If not, a court should not be able to dismiss the case based on what the judge deems to be contrary to good faith (unless, of course, there are actual ulterior motives present). Furthermore, the right of reinstatement provides the necessary solution in cases where the amount in arrears is small enough to be brought up to date without a sale in execution. In conclusion, any disproportionality that might befall debtors due to the relatively minor nature of the amount in arrears is sufficiently remedied by the options that the NCA makes available. Therefore, any unjustifiable infringements of section 26 rights are prevented by the NCA, which provides enough compromises between the rights of the debtor and creditor. In the following part of the chapter I provide some examples from case law where the courts, to my mind, did not take the correct approach in terms of the subsidiarity principles.

4 4 4 Illustrations from case law

A court technically has the discretion to grant a judgment order without declaring the property specially executable, even though it is burdened with a mortgage bond. Therefore, the court can refuse to give effect to the procedural exception – the one where mortgaged immovable property is sold directly and without first executing against movables.[621] In such a case, the creditor first would have to attempt to execute the judgment debt against the debtor's movables. If these assets are insufficient, the sheriff will issue a *nulla bona* return, after which the creditor can approach a court for an execution order against the immovable property.[622] Consequently, the process would be the same as in the case of unsecured debts, except that other creditors will not be entitled to the proceeds of the hypothecated property before the mortgage creditor's claim had been settled. In effect, this approach will uphold the procedural rule (first movables; them immovables) and create an exception to the substantive rule (direct execution against immovable property). Moreover, this approach deviates from

[619] S 86(5)(b) of the NCA.
[620] See 4 3 4 6 above.
[621] See 3 2 5 above, where I explain the relationship between the procedural rules of sale in execution and substantive principles of mortgage foreclosure.
[622] HCR 46(1)(a).

the common law entitlements of a mortgage creditor. Therefore, it seems that the case law discussed below (which took this approach) developed the common law in this regard. It appears that direct execution against the debtor's hypothecated home would be subject to first seeking to execute against other assets.

In the following paragraphs I critically discuss some cases that have been decided with regard to how courts might deal with the possibility that alternatives to sale in execution might be available. For example, the possibility that other means of settling the debt are available (like movables) may sometimes cause courts to not grant direct execution orders against mortgage debtors' homes. Rather, courts may come, as a general rule, to first expect *nulla bona* returns – even in mortgage cases. I discuss my scepticism of this approach with reference to the solutions that the NCA provides. Although it is correct for courts to be attentive to the possibility of alternatives to sale in execution, I propose what I regard as a more nuanced and doctrinally sound approach. Specifically, I endorse the subsidiarity principles in terms of which the point of departure in debt enforcement cases (including mortgage foreclosures) should be the NCA.[623] The mechanisms and remedies of the NCA must then be interpreted and applied in line with section 26 of the Constitution, rather than applying housing principles in isolation of the NCA. Hence, I explain why the development of the common law with regard to direct executability against the hypothecated home is not called-for in view of the NCA.

In *FirstRand Bank Ltd t/a First National Bank v Seyffert and Another and Three Similar Cases*[624] ("*Seyffert*") Willis J granted the judgment order, but refused to grant the execution order against the immovable property (the debtor's home). The court first wanted to afford the debtor the opportunity to explore other methods of settling the judgment debt. Based on section 26(1), the PIE Act and the decisions in *Jaftha* and *Saunderson*, Willis J held that

> "although it would be right to grant the applicants summary judgment for the debts due to them, it would be an appropriate exercise of a discretion not to make orders that the immovable property in question be declared to be specially executable. After all, among the clear purposes of the NCA is to afford a debtor a reasonable opportunity to discharge a debt on terms that may be less onerous than may otherwise be the case. For the applicants, the recovery of the debt may take a little longer without the order declaring the immovable properties specially executable but at least the respondents will have the opportunity first to explore ways of settling their debt

[623] See 3 5 above.
[624] 2010 6 SA 429 (GSJ).

> without losing their homes. The *Jaftha* and *Saunderson* cases are not, of course, directly in point but they do indicate a wariness about persons losing their homes."[625]

This quote illustrates the willingness of courts to ensure that the sale of the home is the last resort. Therefore, I applaud the spirit of Willis J's approach, especially his general "wariness about persons losing their homes".[626] However, I am hesitant with regard to the way the court incorporated this statement into the practical order it granted. The court was correct to say that it is one of the purposes of the NCA "to afford a debtor a reasonable opportunity to discharge a debt on terms that may be less onerous than may otherwise be the case".[627] However, the court's judgment does not make it possible for the judgment debtor to employ the central mechanisms of the NCA. Judgment debts cannot be reviewed or rearranged.[628] Accordingly, it is not clear what alternative routes the court had in mind. The only mechanism in the NCA that can assist debtors after the judgment order had been made is section 129(3) and (4) – the right of reinstatement – which the court in *Seyffert* did not refer to.

It seems that either the court expected the creditor to first execute against the debtor's movables, or the court wanted to grant the debtor time to liquidate some of his or her other assets to settle the judgment debt. The former option entails a longer and probably more expensive route for the creditor, in accordance with the process usually employed for the execution of unsecured debts. The latter option does not involve the mortgage foreclosure being treated as the enforcement of an unsecured debt, but postpones the direct execution against the home to see whether the debtor can come up with another plan. If the debtor cannot do so (presumably within a reasonable time), execution against the home should continue.

However, the way *Seyffert* was decided means that the creditor in any event would have to approach the court again to obtain an execution order. In the mortgage context and in view of the NCA, this approach is not correct. Either the court should not grant the judgment order at all (in favour of debt relief options) or it should grant both the judgment and execution orders. Only granting the judgment order and expecting the mortgagee to first seek to satisfy

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[625] Para 18.
[626] Para 18.
[627] Para 18.
[628] This fact is not expressly stated in the NCA, but is implied by the fact that the Act deals with the review and rearrangement of contractual debts, in other words debts that have not yet been enforced or is only in the process of being enforced. The NCA makes no reference to reviewing debts that have already been successfully enforced, ie judgment debts. Debt review and rearrangement is in fact aimed at avoiding the full legal enforcement of debts. Therefore, debt review would have to come before the judgment is granted.

such order in another way would be a deviation from the common law principles of mortgage. This stance is unjustified in light of the NCA and the subsidiarity principles. It is not the mortgage creditor's responsibility to seek out alternative ways of settling the debt,[629] since in terms of the common law the mortgage grants the creditor the entitlement to seek execution only and directly against the hypothecated home. This result is sufficiently balanced by the opportunities that the NCA liberally offers debtors to avoid foreclosure.

Therefore, a court should not expect the mortgage creditor to search for other assets before executing against the hypothecated home. If the debt was unsecured, then this could have been (and is) expected from creditors, but not if the home is hypothecated with the aim of securing the debt. The debt review process should, instead, fulfil the purpose of seeking alternatives. If the debtor is of the opinion that the sale of the home can be avoided, he or she must – with the help of the debt counsellor – provide information and make proposals in this respect, especially since it was his or her choice to subject his or her home to this real security right. The entitlement of the creditor – in terms of the mortgage agreement and bond – to direct execution must not be interfered with easily, particularly when debtors make no effort to proactively propose alternative solutions.

It might have made more sense to grant the execution order at the outset, but to suspend it for a reasonable period to afford the debtor time to find the money to reinstate the credit agreement. I would, in principle, also not have a problem with the proposition that a court might grant some time to allow the debtor the opportunity to first try and sell his or her home privately.[630] However, the NCA currently does not provide for this option. It seems to rather be the NCA's policy to seek for an appropriate solution prior to the granting of the judgment order and not afterwards.

Nonetheless, if courts were to favour the prospect of suspending the execution of judgment orders, they should do so only for one of the above-mentioned reasons if the debtor provides enough information to indicate that there is at least a good possibility that he or she will be able to accumulate the necessary money to settle the debt (or at least get the arrears up to date) within that period. I would support the idea that courts could accommodate debtors who have alternative means to settle the debt, but who merely require time – for example – to

[629] Except in as far as the NCA places certain obligations on the creditor, for example, the s 129(1)(a) default notice with its proposals to try and solve the dispute.

[630] In *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) para 84 the court commented on the gross unfairness that may befall some debtors if an auction sale of their homes were to obtain a price less than the market value, whereas a controlled private sale may obtain a higher price, possibly leaving these debtors with some money after settling the debt.

liquidate movable assets or other investments. However, a debtor must be proactive in this regard and there must be no indication that the debtor is stalling the process in bad faith. It is, nevertheless, important to emphasise that this compromise must happen within the scope of the NCA. Therefore, if appropriate, the court should not grant the judgment order but, for example, rearrange the debt or refer the matter for debt counselling. Or, if reinstatement of the credit agreement seems possible, the court should grant the judgment order and inform the debtor of his or her right to reinstate the agreement by getting the arrears up to date. There should generally be sufficient time between the granting of judgment and the sale in execution (and transfer) of the property to accumulate enough money to reinstate the agreement – should this be a viable option, of course.

Further, courts should consider that if a creditor is required to execute against the movables first, this might be more prejudicial to the debtor than to sell his or her home to start with.[631] In addition, the size of mortgage judgment debts often will be too big to allow satisfaction against the debtor's movable assets. If it was possible to settle the debt from other assets, the debtor would have (or should have) liquidated these assets him- or herself and could have avoided the threat against his or her home. Even after the execution order is granted and the property attached, the possibility that the debtor could use his or her other assets to settle the debt is still available. The common law right of redemption[632] as well as the statutory right of reinstatement[633] are available to relieve a debtor who has alternative assets on hand.

In *Seyffert* the debtor did apply for debt review, but the creditor had terminated the review in terms of section 86(10). The debtor could, however, not convince the court to have the debt review continued in terms of section 86(11). This factor confirms that it would have been appropriate for the court to grant the creditor's application for an execution order, since the NCA mechanism of debt review was already employed but could not reasonably avail the

[631] For example, in *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 45 the court held that, under mortgage circumstances, a court should not be inflexible in its insistence on first executing against the movables. Such a sale of the movables may often leave the mortgagor worse off, since the amount generated might not be enough to settle the judgment. In such a case, the home would be sold in any event, leaving the mortgagor with no movable assets as well. Therefore, depending on the circumstances, it might be better to execute against the home from the beginning. The court also held that a too heavy burden should not be placed on creditors to provide further information, since this might lead to additional and unreasonable expenses. This will increase the cost of collecting debt, which will eventually have to be borne by the debtor and other borrowers, since these expenses will be factored into the cost of lending. This factor would also dissuade banks from granting credit to certain people, which would frustrate the social value of housing as emphasises by s 26 of the Constitution.

[632] See 2 4 5 above.

[633] S 129(3) and (4) of the NCA. See 4 3 2 above.

debtor. For the court to acknowledge the valid termination of the debt review process while at the same time refusing to grant an execution order, is contradictory and should be avoided.

In *Changing Tides 17 (Pty) Ltd NO v McDonald and Another*[634] ("*McDonald*") the court similarly granted the summary judgment for the outstanding balance claimed but refused to declare the immovable property executable. The reason for this stance was that the creditor disclosed neither the value of the property nor information regarding the availability of other (movable) assets. With regard to the proposition of directly executing a judgment against immovable property (in other words, before looking to the movables), the court held that such an execution was "not there for a take".[635] The court acknowledged the possibility that execution against movables might "substantially reduce the capital amount claimed".[636] If this decision is correct (which I doubt), courts will become increasingly "disinclined"[637] to declare immovable property directly executable (even under mortgage circumstances) if they are not presented with information concerning the possibility of execution against movables that could reduce the debt.[638]

My prediction with regard to the outcome of a situation like *McDonald* is that the creditor would have to obtain a *nulla bona* return from the sheriff, after which it can attain an execution order against the immovable property. To my mind, this is – similar to *Seyffert* – not correct. Rather, the court should make use of debt review and rearrangement, as well as consider the right of reinstatement. Furthermore, the availability of alternatives might convince the court to rearrange the debt in such a way that payment is postponed for a certain period, perhaps the period necessary to accumulate finances in order to reinstate the credit agreement.

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634 (22859/09) [2011] ZAGPPHC 106 (5 May 2011) para 10.
635 Para 10.
636 Para 10.
637 Para 10.
638 In *Standard Bank of South Africa Ltd v Bekker and Another* [2011] ZAWCHC 330; 6628/2011, 6635/2011, 6644/2011, 7032/2011, 7047/2011 (25 August 2011) paras 29-30 the full bench strongly advised mortgagees to provide information as to the amount of the mortgage instalments as well as the size of the amount in arrears. Moreover, the court advised creditors, in cases where the arrears are relatively low, to provide allegations in support of their insistence on direct execution. Although the court stated that this is not mandatory, it emphasised that such information would help it to quickly establish whether there was any abuse of the process present. Therefore, for practical expediency it would be beneficial for mortgagees to provide as much information as possible. A lack of information might cause delays in cases where the debtors make allegations of abuses.

Another example of the approach taken in *McDonald* and *Seyffert* was the decision in *Standard Bank of South Africa v Molwantwa and Another*[639] ("*Molwantwa*"). The value of the property was alleged to be R4 000 000, whereas the amount owed was R130 540,86. The debtors also showed that they potentially had available to them an amount of R2 453 492,03 with which they could repay the capital debt.[640] The court acknowledged that the creditor "is entitled to be paid what is due to it".[641] However, if the court were to declare the immovable property executable, the debtors and their minor children would "run the risk of [losing] a roof over their heads".[642] On the other hand, the court held that if it were to refuse such an order, the creditor would "not suffer much prejudice", since it might settle the amounts owed by having the debtors' movable property sold.[643] In the words of the Mavundla J:

> "[W]here it is sought, an order that has the potential of encroaching drastically upon the fundamental rights of a person, the applicant who seeks such an order, must first exhaust other less invasive remedies before resorting to a cause that is much more invasive."[644]

Therefore, it seems that the court expects creditors (even those who have direct execution clauses in their favour) to first seek execution against movables, in other words in a way that would be "less invasive" of the debtor's housing rights.[645] As already indicated, I do not support this approach in mortgage circumstances. It develops the common law without taking account of the solutions provided by the NCA, which approach is irreconcilable with the subsidiarity principles.

Furthermore, the court's reliance on the fact that the creditor would "not suffer much prejudice"[646] is overemphasised. The fact remains that the mortgage creditor has a right to direct execution, which is embodied in the registered limited real right of mortgage. To my mind, a court cannot deny the enforcement of such a right simply because this would *not* "prejudice" the creditor. If truth be told, the fact that the creditor is denied direct execution (which it bargained for) is prejudicial in itself.[647] Moreover, the court also exaggerated the

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[639] (15043/2009) [2011] ZAGPPHC 108 (5 May 2011). This case was decided on the same day and by the same judge as *McDonald*.
[640] *Standard Bank of South Africa v Molwantwa and Another* (15043/2009) [2011] ZAGPPHC 108 (5 May 2011) para 10.
[641] Para 11.
[642] Para 11.
[643] Para 11.
[644] Para 12.
[645] Para 12.
[646] Para 11.
[647] In 6 4 2 below I explain why the creditor's contractual claims and proprietary rights under the mortgage bond are protected by s 25(1) of the Constitution. The creditor may not be deprived of his rights (where they qualify as "property") in an arbitrary fashion.

debtor's potential prejudice. In light of the value of the property, it is clear that the limitation of section 26(1) rights would probably be close to insignificant. It cannot be argued that the debtor would not have had the means to acquire adequate alternative accommodation, especially in light of the difference between the capital debt and the value of the property. Therefore, the facts do not display the kind of disproportionality that section 26(1) is aimed at avoiding. It is clear that the limitation of section 26(1) rights was so small (and, therefore, justifiable) that the execution order should have been granted. This over-protection of the debtor arguably amounted to an unjustifiable limitation of the creditor's rights under the mortgage bond.

Nevertheless, the facts of this case made it clear that execution would ultimately be unnecessary, since the debtors apparently had finances at their disposal that would cover the debt. These financial considerations should, however, not have played a part in deciding whether to grant the execution order. Instead, they should have been considered during debt review, which in this case probably would have lead to a viable restructuring order. Such an approach would have ensured that the debtor's allegation of alternative funding was true and not a mere ploy to postpone the inevitable. Perhaps the court accepted the debtor's allegation in this regard too easily, especially since such a factor should not play a role in determining whether the mortgage creditor is entitled to have the hypothecated property sold in execution. The mortgage creditor does not have the obligation to *not* enforce its right of direct execution simply because the debtor has alternative assets or funds available. If such assets or funds are present, it is the debtor's responsibility to liquidate them and repay the debt or make use of the debt review process.

Therefore, the court in both *McDonald* and *Molwantwa* operated outside the scope of the NCA, which I deem unjustified and reminiscent of what Bertelsmann J called a "willy-nilly" interference with established practices.[648] This approach also violates the subsidiarity principles. In terms of section 85, the debtors should have requested the court to refer them to debt counselling or grant a debt rearrangement order. However, they did not do so and since they did not make use of the NCA (which mechanisms were freely available to them), the court should have granted the creditors what they asked for. In addition, the rights of redemption and reinstatement would still have been available to them. In other words, all that was necessary to redeem the property from the execution process was to purge the outstanding arrears. If debtors – as in these cases – did not make use of the opportunity to

[648] *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) para 72.

apply for debt review or did not even make a request in terms of section 85, they cannot then rely on other defences based solely on section 26. In terms of the subsidiarity principles, debtors must make use of the NCA and when they do not, courts cannot accommodate them more than what the Act allows. In my view, this stance is a constitutionally balanced approach.

4 4 5 Personal circumstances? The unfortunate but unavoidable result in *Meyer*

The proportionality test required by sections 26(1) and 36(1) of the Constitution necessitates that the impact of the sale in execution on the individual occupiers must be taken into account. This state of affairs entails that their personal circumstances must necessarily play a role. In chapter 5 below I analyse how the issue of personal circumstances and the proportionality test in general has been dealt with in English law. As the English case law illustrates, this question is not without difficulties, especially when one aims to balance the interests of the opposing parties. The complexity lies therein that creditors' interests are easily quantifiable, whereas debtors' personal circumstances (which are in essence non-right or extra-legal interests) apparently are not – at least not in a legal conceptual sense. In what follows I discuss a case that highlights how tricky it may be to take account of debtors' personal circumstances, especially where it seems that there are no financially viable option left other than to sell the home.

FirstRand Bank Ltd v Meyer and Another[649] ("*Meyer*") was one of the earliest cases in which a high court had to apply the amended HCR 46(1)(a)(ii) in granting an execution order. Prior to the enforcement of the mortgage bond, the mortgagors (an elderly couple) had applied for debt review under section 86 of the NCA. This application was successful and the mortgagors' debt was rearranged in terms of section 87 of the NCA, which restructuring provided for a new repayment plan. However, the mortgagors failed to comply with this plan and again fell into arrears.[650]

The mortgagors requested the court to exercise its discretion under HCR 46 to refuse to grant the execution order against their home.[651] Although no information was presented to the court regarding the value of the property, the court assumed that the size of the mortgage

[649] (3483/10) [2011] ZAECPEHC 8 (17 March 2011).
[650] Para 3. On debt rearrangement in terms of the NCA, see 4 3 4 3 below.
[651] *FirstRand Bank Ltd v Meyer and Another* (3483/10) [2011] ZAECPEHC 8 (17 March 2011) paras 5 and 19ff. Two other defences, both of which were rejected, are not relevant for my research: See paras 6-18.

bonds provided some indication.[652] Therefore, the court supposed a value in excess of R158 500. Concerning proportionality, the mortgagors argued that the mortgagee faced no risk of suffering any loss, since "there is sufficient equity in the property to cover the debt".[653] The mortgagors presented the following circumstances (mostly of a personal nature) for the court's consideration:[654]

- The husband was 65 years old, a pensioner and with ailing health. He was hearing impaired and had suffered a stroke five years before. He suffered from chronic high blood pressure and cholesterol, as well as diabetes. For this he received monthly medication. His yearly medical aid provision was enough to pay for only four months' worth of his chronic medication. He had to pay the remaining medical bills himself.
- The wife was 60 years old and suffered from Alzheimer's. She had a small income of R3 040,00 per month, which she used for household expenses.
- The property in question was their primary and only residence, which they have occupied since 1983.
- Having the property sold in execution would cause them to suffer immense hardship, since they had nowhere else to go.
- As a result of the husband's small pension income of R4 290,00 per month and his high medical expenses, they could not afford alternative accommodation.
- The alleged prejudice that the mortgagee would suffer (in the event of refusing the execution order) could not be compared to the hardship and prejudice that the mortgagors would suffer (if the execution order was granted).

With reference to *Jaftha* and *Saunderson*, the court accepted that when a debtor willingly put his or her house up as security, a sale in execution should be permitted unless there was an abuse of the court process.[655] However, in this case no allegation was made as regards abuse of the process. The mortgagors relied on two cases in support of the court exercising its

[652] *FirstRand Bank Ltd v Meyer and Another* (3483/10) [2011] ZAECPEHC 8 (17 March 2011) para 26.
[653] Para 26.
[654] Para 27.
[655] Paras 30-31.

discretion in their favour, namely *Seyffert* and *Ntsane*.[656] Yet, the court found that these cases were distinguishable from the facts in *Meyer*.[657]

Furthermore, the court relied on the fact that the mortgagors had already obtained a debt rearrangement order under section 87 of the NCA.[658] In effect, this restructuring order allowed the mortgagors to repay the debt in smaller instalments and over a longer period of time. However, they could not keep up with the reduced instalments and, therefore, fell into arrears again. The total outstanding debt – the amount claimed – was R154 337,41 plus interest.[659] The total amount of the credit that was extended under the four credit agreements (which were later consolidated) was R158 500.[660] The court commented that the arrears, in its context (the total being R2 922,36),[661] was not trifling.[662] The mortgagors already had the opportunity to exhaust the debt review and debt rearrangement process. Even though this relieved their position, it was not enough to help them, since they defaulted on three months' instalments within a period of fourteen months. After taking all the circumstances into consideration, the court held that the mortgagee was entitled to the order it sought, namely a judgment order for the outstanding debt as well as an execution order.[663]

The result in *Meyer* seems unfortunate. It is difficult to accept the situation where an elderly couple's home is sold in execution and where they are probably left homeless. Yet, it is just as hard to comprehend an alternative route, at least if the court's assessment of the case's proportionality was correct. A court cannot deny a mortgage creditor's rights merely because the debtors will be left homeless. In fact, the creditor's claim should be honoured unless there is disproportionality, which seemed not be the case here (although, the superficial way in which the court assessed the matter may raise doubts as to whether the result was truly proportionate, but be that as it may).

This case also illustrates the position that I take, namely that if the alternative mechanisms in the NCA had been employed, an execution order should be allowed, since there are no alternatives left. If one assumes the correctness of the court's finding, it was fairly clear that there were no alternatives available and, furthermore, it is unlikely that the debtors would have had movable assets available to satisfy the debt. In any event, even though debt review

656 Paras 33-34. These cases are discussed in 4 4 4 and 4 4 3 2 above.
657 *FirstRand Bank Ltd v Meyer and Another* (3483/10) [2011] ZAECPEHC 8 (17 March 2011) para 35.
658 Para 35.
659 Para 1.
660 Para 2.
661 Para 35.
662 Para 36.
663 Para 37.

and rearrangement was no longer a viable option, the debtors could still liquidate their movable assets and use the proceeds to get the arrears up to date. This would have the effect of reinstating the credit agreement and preventing the sale in execution.[664]

In comparison to the results in *Seyffert*, *McDonald* and *Molwantwa*,[665] it is also ironic that the debtors in those cases received some leeway in the sense that direct execution against their immovable properties was not immediately allowed. The reason for this was mainly based on the likelihood of these debtors having alternative assets that they could use to satisfy the judgement debts or to get the arrears up to date. However, the situation of the debtors in *Meyer* was so dire and the likelihood of alternatives so slim that the court found it to be justifiable to declare the property executable. The irony of the fact that poorer debtors have fewer options available to save their homes, seems unavoidable – mainly due to the debtors' economic status and inability to settle the debt.

To enable a more equitable solution in cases like *Meyer* (that is, if the result *does* raise doubts), I suggest that courts should make sure that the debt restructuring order is not only realistic but that it accommodates the debtors sufficiently. The fact that the debtors in *Meyer* defaulted so soon after the debt had been rearranged, shows that the original restructuring might not have been enough to truly relieve their over-indebtedness. Courts should accordingly make serious attempts to be creative when deciding on the appropriate rearranged payment scheme – of course staying within the bounds of the Act. The importance of debt rearrangement is emphasised throughout this dissertation. I argue that it can develop into a reasonable and creative way to assist struggling homeowners.

The purpose of my discussion of the *Meyer* case was to illustrate how important it may be to consider debtors' personal circumstances in foreclosure matters. However, even though one instinctively desires to include such considerations (based on, for instance, their right to dignity), my analysis also shows how tricky this would be on a conceptual level. It seems that the best one could suggest is that personal circumstances should play a part in the debt review and debt rearrangement process. A more extensive and creative restructuring might be called for in cases of extreme personal hardship. In as far as such a more far-reaching restructuring might prejudice creditors, I argue in 6 4 5 below that it might be justifiable in light of the importance of debtors' housing rights. Therefore, both parties' interests would have to be

[664] See 4 3 2 below.
[665] See 4 4 4 above.

taken into account and compromises on either side would have to be justifiable, as I conclude in 7 2 3 below.

4 5 Conclusion

On the face of it, it seems like the NCA weighs in favour of the credit consumer, possibly to the detriment of the credit provider. It is clear that, for a mortgagee to claim foreclosure of its mortgage, new requirements and hurdles have been added. However, the majority of courts seem to recognise that the interests of credit providers should not be forgotten. Also, the Act provides mechanisms to uphold a balance between the conflicting interests. For example, credit providers can terminate pending debt reviews and there are certain time frames within which consumers must react in terms of sections 129 and 130 in order to take advantage of the protection afforded them. The Act also provides the courts with a discretion in most instances so as to allow for considerations of fairness and to maintain a balance. A pertinent element of the NCA is that it provides creditors and debtors alike with a relatively predictable and non-fragmented framework – operating alongside the common law – for enforcing mortgage bonds. The possibility of delays to debt enforcement as a result of the debt review process, the prospect of a rearranged repayment plan and a potential reinstatement of the agreement can, therefore, be foreseen by creditors. For mortgagees, this state of affairs is preferable to an uncertain case-by-case proportionality test conducted outside the scope of the NCA. In fact, the Act's mechanisms (if correctly applied and constitutionally interpreted) already incorporate a proportionate outcome in foreclosure cases. Courts should henceforth adjudicate debt enforcement cases accordingly, since the NCA gives effect to debtors' housing rights, but without having an unbalanced and uncertain effect on creditors' rights.

The NCA exemplifies a shift experienced in South African law since the Constitution came into operation, namely that of greater focus on the protection of individual rights. It is no longer possible to automatically give effect to registered real rights of credit providers as an automatic consequence of the debtor's default. This is particularly true when homes are implicated. The courts would have to embark on a process of balancing the rights of parties, not only procedurally, but also substantively. Sections 26(1) and 36(1) of the Constitution require this proportionality test whereas the NCA serves as a mechanism for establishing this balance.

In light of the obligation to protect home interests during mortgage foreclosure, the NCA should result in a strong degree of protection for over-indebted homeowners. Of course, the Act would have to be applied properly and all parties would have to make appropriate use of the measures available. Courts would also have to instil certainty with the way they adjudicate these matters. The Act mostly provides protection for those consumers whose circumstances are suitable for debt rearrangement. However, depending on the circumstances of each case, many consumers would be in financial conditions that are unsalvageable and where debt rearrangement would be unrealistic. Consequently, these consumers' homes might not be protected by applying the NCA, particularly if everything possible was done to make use of the protection measures available and the credit provider did everything it was obliged to do in terms of the Act.[666] However, as I argue in this dissertation, based on the subsidiarity principles, the NCA is the framework that was created by the legislature to regulate debt enforcement and courts should, therefore, limit their interference with mortgage foreclosure procedures to the mechanisms that the Act provides. As a whole, the Act results in justifiable regulation of the mortgage creditor's right to foreclose. Any interference beyond what the NCA provides for would – to my mind – amount to an unjustifiable infringement of the creditor's rights.[667]

In conclusion, the NCA has the potential to seriously assist many defaulting mortgagors and, hence, contribute to the aim of preventing the loss of as many homes as possible. Yet, there are those remaining homeowners who simply cannot be assisted by the NCA. To my mind, the NCA serves as a good instrument to balance the rights of the parties. If the parties complied in full with the NCA, the law would, on the one hand, extend sympathy and help to the defaulting consumer and, on the other hand, limit the credit provider's rights. However, this limitation should be within reason and should go only as far as the NCA allows. Nevertheless, one wonders what help remains for those over-indebted homeowners who, after the NCA has been applied, can still not be protected against the loss of their properties. In these cases it may be justifiable for the consumer to lose his or her home, since everything possible was presumably done to avoid the sale; the proportionality test would be satisfied. It would then also no longer be justifiable to prevent the credit provider from enforcing its rights. Although the NCA should in theory provide assistance for all deserving over-indebted

[666] See *Changing Tides 17 (Pty) Ltd NO v Erasmus and Another; Changing Tides 17 (Pty) Ltd NO v Cleophas and Another; Changing Tides 17 (Pty) Ltd NO v Frederick and Another* (18153/09, 14229/09, 11973/09) [2009] ZAWCHC 175 (12 November 2009) para 10.
[667] See 6 4 and 7 2 below.

homeowners, much depends on the practical effectiveness and correct interpretation of the NCA, as well as the cooperation of all parties involved.

CHAPTER 5
MORTGAGE POSSESSION IN ENGLISH LAW

5 1 Introduction

In chapter 3 above I explain that the residential nature of the debtor's hypothecated property places an obligation on courts to take all relevant circumstances into consideration before granting an execution order.[1] To summarise, it is reasonably clear that the point of departure in exercising this discretion is the content of the mortgage agreement. The effects of enforcing the mortgage bond are softened by obliging courts to prevent abuses of the foreclosure process and to ensure that all viable alternatives are pursued before the home is sold. I also argue in chapter 4 above that the protective framework should focus on the consumer protection mechanisms made available by the National Credit Act 34 of 2005. These developments were inspired by the need to give effect to section 26 of the Constitution of the Republic of South Africa 1996 ("the SA Constitution"). This section (the housing clause) requires that "[e]veryone has the right to have access to adequate housing" and prohibits arbitrary evictions, that is, situations where all the relevant circumstances were not considered by a court before someone is evicted from his or her home.[2]

Therefore, the residential nature of the property has compelled the courts to take serious account of factors such as preventing abuses of the foreclosure process, seeking alternatives and enforcing consumer protection relief measures. As I expound in chapter 3 above, the execution order will be granted if the sale in execution of the debtor's home is the last option and if it is justified. The fact that the property is a home will in itself not assist the debtor in preventing foreclosure from taking place. This result is even reflected in section 26 of the Constitution itself, which does not render housing rights absolute. Instead, a person may be deprived of her right to "access to adequate housing" if such a limitation is justifiable under section 36(1) of the Constitution. Eviction from a home is not prohibited either; the Constitution merely ensures that there is judicial oversight over the procedure and that the eviction is justified on all the relevant circumstances of each case.

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1 HCR 46(1)(a)(ii).
2 S 26(1) and (3) of the SA Constitution.

Especially the section 36(1) element implies that a proportionality-type test is necessary when South African courts assess whether an infringement of section 26 rights is justified. It is no longer enough to state that the purpose of the limitation (for example, the efficient enforcement of debt) is valid and important and, therefore, sufficient to justify the infringement. Instead, the impact of the infringement on individual occupiers must not only be rationally linked but also proportionate to the goal that the violation of section 26 seeks to achieve. As this chapter illustrates, English courts have also struggled to come to grips with the possibility of having such a proportionality test in loss-of-home contexts. For this reason I have chosen English law as an interesting example to compare with South African developments.

Therefore, this chapter investigates how the fact that the mortgaged property is the debtor's home[3] has impacted the law of mortgage in England and Wales (collectively referred to as English law). It is worth emphasising that the term "foreclosure" has a different technical meaning in English law.[4] For this reason, this chapter uses "mortgage possession" or "repossession" instead. As I explain in 5 2 2 below, English mortgagees generally enforce their security by first taking possession of the mortgaged property and then selling it, hence the "possession" terminology.

Despite practical distinctions, South African and English law share the same inevitable assumption when faced with mortgage repossession, namely "in disputes between creditors and occupiers, the creditor almost invariably wins".[5] To ensure the availability of credit and the acceptability of residential property as security, courts and policy makers generally refrain from interfering with creditors' legitimate expectations as far as enforcement is concerned.[6] The same hesitance is experienced in South African law. Consequently, policy considerations are similar in both systems when balancing the outcome of mortgage cases. English law also acknowledges that the law of mortgage should maintain the

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3 See L Fox "Creditors and the concept of 'family home': A functional analysis" (2005) 25 *Legal Studies* 201-227, who argues that it is better to refer to the concept one wishes to protect as "home" *per se*, rather than "family home".

4 See 5 2 4 below.

5 L Fox *Conceptualising home: Theories, laws and policies* (2007) 14.

6 See K Gray & SF Gray *Land law* (6th ed 2009) 272, where, with reference to *Barclays Bank plc v O'Brien* [1994] 1 AC 180 HL, the authors comment as follows:

> "Thus, for Lord Browne-Wilkinson, it was essential that a 'law designed to protect the vulnerable' should not choke the availability of loan finance, as in the circumstances of the *O'Brian* case, by rendering the matrimonial home 'unacceptable as security to financial institutions'."

For a summary of why creditors' interests are generally respected in English law, see L Fox *Conceptualising home: Theories, laws and policies* (2007) 14-16.

> "difficult balance between the need to protect vulnerable borrowers and the equally compelling need to ensure that land remains an efficient and commercially productive form of security."[7]

This statement not only accurately reflects the overall pursuit of this dissertation, but illustrates the value of comparing South African with English law. Even though the same tension is present in, no doubt, most (if not all) modern economies, I have chosen to focus solely on English law for a number of reasons. Firstly, the English courts also have had to deal (significantly, also from a human rights standpoint) with the impact of home interests on the traditional outcome of possessory actions and the concomitant evictions. Secondly, English academics have already done significant work concerning the weight that the home concept should play when courts decide on mortgage and tenancy repossession cases.[8] Thirdly, the relationship between the House of Lords (now Supreme Court) and the ECtHR is comparable to the relationship between South Africa's Supreme Court of Appeal (as well as high courts) and the Constitutional Court. The idea of a higher court overruling a lower court's decision based on a human rights instrument can, therefore, be perceived in both contexts. Accordingly, the shared issue of developing "normal" law with reference to human rights makes for valuable comparison.

This chapter does not include an exhaustive exposition of the law of mortgage in England. Rather, I focus on the repossession aspect of mortgage law – what is referred to as foreclosure or sale in execution in South African law. In other words, I accentuate the aspect that corresponds more closely to the topic of my dissertation. It is unnecessary for current purposes to analyse the exact technical differences and similarities between South African and English mortgage law, since these are not important for the purposes of the comparison.[9] My aim is to establish how the constitutional notion of protecting the "home" has impacted

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7 K Gray & SF Gray *Land law* (6th ed 2009) 255.

8 Although I do not expand on her arguments in detail, I was especially inspired by L Fox *Conceptualising home: Theories, laws and policies* (2007) as well as some of the author's other work, including L Fox O'Mahony "Eviction and the public interest: The right to respect for home in English law" in RP Malloy & M Diamond (eds) *The public nature of private property* (2011); L Fox "The idea of home in law" (2005) 2 *Home Cultures* 25-50; L Fox "The meaning of home: A chimerical concept or a legal challenge?" (2002) 29 *Journal of Law and Society* 580-610; L Fox O'Mahony *Home equity and ageing owners: Between risk and regulation* (2012). See also S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011); S Nield "Clash of the titans: Article 8, occupiers and their home" in S Bright (ed) *Modern studies in property law* Vol 6 (2011) 101-129; A Goymour "Possession proceedings and human rights – the final word?" (2011) 70 *Cambridge LJ* 9-12; A Goymour "Proprietary claims and human rights – a 'reservoir of entitlement'?" (2006) 65 *Cambridge LJ* 696-720.

9 For the foundational principles of English mortgage law, see NP Gravells *Land law: Text and materials* (4th ed 2010) 821-968; K Gray & SF Gray *Elements of land law* (5th ed 2009) 694-806; K Gray & SF Gray *Land law* (6th ed 2009) 255-306; RJ Smith *Property law* (6th ed 2009) 544-589. The foundational principles of South African mortgage law are expounded in ch 2 above.

English mortgage enforcement law and to compare the approaches and arguments relied upon to those encountered in South African law.

The chapter consists of two parts. The first part examines how domestic English law has already made provision for the fact that the mortgaged property is the debtor's home. That is, I look at how the law already tries to protect occupiers from the loss of their home as a result of repossession actions. In the second part of the chapter I discuss the impact of article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("the ECHR" or "the Convention") in this respect. For all practical purposes, one can describe article 8 as England's housing clause.[10] Therefore, it is valuable to compare how English courts have dealt with cases where domestic legal outcomes have been challenged on the basis of human rights (especially respect for the home) considerations. Of particular interest is how the courts approached the question of whether a proportionality-type test was called for in English loss-of-home cases and whether the personal circumstances of the debtor can play a role. However, it is first necessary to look at the domestic English law framework for mortgage repossessions as it exists irrespective of human rights influences.

5 2 Mortgage enforcement remedies

5 2 1 Introduction

When a mortgagor defaults, there are at least three remedies in English law available to the mortgagee that impacts the mortgagor's housing interests.[11] These are the assertion of the mortgagee's right to possession, the exercise of the mortgagee's power of sale, and foreclosure. They operate concurrently and cumulatively, which means that the mortgagee can choose between them. The mortgagee may even employ more than one and, when one fails, make use of the others.[12] In the following paragraphs I explain how these remedies function, focusing on the first two, since they usually operate together and because the third one has generally fallen into disuse. The purpose of this analysis is to establish how these

[10] For the relationship between English domestic law and the ECHR, see 5 3 1 below.

[11] K Gray & SF Gray *Elements of land law* (5th ed 2009) 763-806. There are two other remedies as well, namely the action on the mortgagor's personal covenant to repay and the appointment of a receiver. However, for current purposes I focus on the three listed in the main text, since they are comparable to the South African remedy of sale in execution. On the enforcement of mortgages in general, see further R Calnan *Taking security: Law and practice* (2nd ed 2011) 279-339.

[12] See *Alliance and Leicester plc v Slayford* [2001] 1 All ER (Comm) 1 paras 20-28 and the other sources cited by K Gray & SF Gray *Elements of land law* (5th ed 2009) 763 n 3; NP Gravells *Land law: Text and materials* (4th ed 2010) 900.

remedies take account of the fact that the property is the mortgagor's home and, therefore, whether and how English law provides protection against the loss of home.[13] In 5 3 below I enquire whether "home" in its human rights dimension makes any difference in domestic English law.

5 2 2 Assertion of the mortgagee's right to possession

5 2 2 1 Introduction

In English law, the mortgagee's right to have the property sold to enforce the debt is premised on its right to immediate possession of the property. The reason for this is that in order to enforce its security, the mortgagee must first take possession of the property, after which it can sell the land with vacant possession.[14] Therefore, the mortgagee almost always seeks possession as a precursor to selling the property.[15] This principle is one of the fundamental differences between South African and English law, albeit one that does not make a difference with respect to the question of protecting home interests. In South African law the property is usually first sold and transferred to the auction purchaser, who then evicts the mortgagor if he or she does not leave voluntarily. In South African law the mortgagee's remedy is not based on a right to possession (in fact, the mortgagee does not have such a right)[16] but on its entitlement to insist on sale in execution in terms of its limited real right of mortgage. In contrast, as I explain in 5 2 2 2 below, the English mortgagee's security pivots on its right to take immediate possession of the land. In terms of enforcing its security, the English mortgagee's right to take possession is, therefore, comparable to the South African mortgagee's right to have the property attached prior to the sale. The similarity between these steps is that, in both systems, they serve as the method for perfecting the creditor's security, although they differ in detail.

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[13] S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 14-40 asks a similar question, namely whether the "personal home story" plays any role in possession cases.

[14] K Gray & SF Gray *Land law* (6th ed 2009) 291-292.

[15] RJ Smith *Property law* (6th ed 2009) 571.

[16] In South African law, s 4(1) of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 only provides standing to bring eviction proceedings to the "owner" or "person in charge" of the land. A mortgagee/bank who has not taken transfer of ownership of the property cannot bring an eviction application: See *Standard Bank of SA Ltd v Mabunda* 2011 JDR 1329 (GNP). Other than the right to have the property sold pursuant to an order of court, the South African mortgagee is incapable of dealing with the property in any way, since it does not have any of the ordinary entitlements of ownership: See *Roodepoort United Main Reef GM Co Ltd (In Liquidation) & Another v Du Toit* 1928 AD 66 70-71. See also S Scott & E Dirix "Calling up a mortgage bond of immovable property" (2009) 72 *THRHR* 575-598 580.

As was mentioned earlier, the value of comparison does not lie in the technical similarities and differences between the two systems' mortgage law. Rather, the comparative value is in the fact that, in both systems, the exercise of the mortgagee's rights (regardless of its basis or form) usually leads to the loss of the mortgagor's home. It is on this effect that my comparison focuses. Consequently, for practical and comparative purposes, the English law right to take possession and to thereafter sell the property is similar to the South African mortgagee's right to foreclose (or call up) the bond and to have the property attached and sold in execution.

5 2 2 2 Mortgagee's right to immediate possession[17]

In English law, the mortgagee has the right to immediate possession from the moment that the mortgage contract is concluded.[18] In fact, the right to immediate possession is an inherent incident of the estate in land[19] that the mortgagee holds by way of mortgage.[20] This right is usually restricted by the express terms of the mortgage agreement to cases where the mortgagor defaults on a term of the agreement.[21] However, save for contractual or statutory exceptions, the mortgagee is entitled to remove the mortgagor from possession even when there is no default and even without a court order.[22] The purpose of the right to immediate possession is to serve as "a threat, held *in terrorem* over the head of the debtor, to encourage punctual repayment of the mortgage debt and interest".[23]

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[17] K Gray & SF Gray *Elements of land law* (5th ed 2009) 768-772 and 755-761. See also M Wonnacott *Possession of land* (2006) 74-90.

[18] *Ropaigealach v Barclays Bank plc* [2000] QB 263 284; *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317 ChD 320. See also R Calnan *Taking security: Law and practice* (2nd ed 2011) 286-287; K Gray & SF Gray *Land law* (6th ed 2009) 291; K Gray & SF Gray *Elements of land law* (5th ed 2009) 756; RJ Smith *Property law* (6th ed 2009) 570; S Gardner *An introduction to land law* (2nd ed 2009) 246; M Wonnacott *Possession of land* (2006) 78-79 and other cases cited by the respective authors.

[19] A mortgage confers on the lender a legal estate in the mortgaged land: See ss 85(1) and 86(1) of the Law of Property Act 1925. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 756.

[20] K Gray & SF Gray *Land law* (6th ed 2009) 291; RJ Smith *Property law* (6th ed 2009) 570. A mortgagee is deemed to have "the same protection, powers and remedies (including the right to take proceedings to obtain possession)" as if a leasehold term of 3 000 years had been created in its favour: See s 87(1) of the Law of Property Act 1925. See also K Gray & SF Gray *Land law* (6th ed 2009) 259 and 458; M Wonnacott *Possession of land* (2006) 77.

[21] K Gray & SF Gray *Land law* (6th ed 2009) 291.

[22] *McPhail v Persons, Names Unknown* [1973] Ch 447 456-457; *Ropaigealach v Barclays Bank plc* [2000] QB 263. See also K Gray & SF Gray *Land law* (6th ed 2009) 291; K Gray & SF Gray *Elements of land law* (5th ed 2009) 756.

[23] M Wonnacott *Possession of land* (2006) 79.

Although it is unattractive for mortgagees to make use of this right (that is, taking possession without a court order, even if there is no default),[24] it has survived in English law in its unqualified form. Gray and Gray argue that "[i]t is doubtful whether a right of such draconian rigour can be sustained much longer as a cornerstone of the modern law of mortgage".[25] The authors refer to the possibility that the exercise of this right may contravene the mortgagor's right to respect for his or her private and family life and his or her home under article 8 of the Convention.[26] I address this human rights element in 5 3 below.

It is pertinent to consider that, despite the drive for the protection of debtors, "the mortgagee's paramount right to possession as inherent from the date of mortgage" is upheld as "[o]ne of the venerable dogmas of mortgage law".[27] It is this entitlement that provides the mortgagee with its security. Nevertheless, in practice it is very rare for a mortgagee to make use of the right to possession while the mortgagor is not in default. There is usually an explicit (or even tacit) agreement between the parties that the mortgagor will remain in possession except if he or she falls in arrears.[28] Therefore, the right to possession is typically only asserted as a precursor to realisation of the security right by means of a sale with vacant possession.[29]

Even though it is still possible for a mortgagee to obtain possession of the property without a court order,[30] the right to possession is usually asserted by first approaching a court. When the mortgagee applies to a court for a possession order, which is usually the case, there are certain protection measures available to mortgagors. In the following two paragraphs I explain two ways in which homes can enjoy protection against possession proceedings.

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[24] Making use of the right under circumstances where there is no default is unattractive for a number of reasons. Firstly, mortgagees' primary concern is that the mortgagors remain in possession and faithfully discharge their financial obligations. Secondly, the mortgagee in possession is burdened with certain obligations, such as letting and maintaining the property. Thirdly, a mortgagee who takes physical control of the property runs the risk of criminal liability under s 6(1) of the Criminal Law Act 1977, since it is an offence to use or threaten to use violence when trying to enter any premises: See K Gray & SF Gray *Land law* (6th ed 2009) 292; K Gray & SF Gray *Elements of land law* (5th ed 2009) 759-761.

[25] K Gray & SF Gray *Land law* (6th ed 2009) 291.

[26] 291.

[27] 295.

[28] 292.

[29] 295 and 298-299.

[30] *Ropaigealach v Barclays Bank plc* [2000] QB 263.

5 2 2 3 Court's inherent jurisdiction to stay possession[31]

The court has an inherent discretion to stay possession proceedings for a short period, probably no longer than a couple of weeks.[32] This equitable jurisdiction is not limited to residential property but can be exercised with regard to commercial property as well.[33] The purpose of the postponement is to grant the mortgagor some time to find ways to fully repay the mortgagee.[34] This discretion only provides temporary relief for the debtor and is only aimed at resolving financial difficulties or enabling the mortgagor to sell the property privately. For example, the court may stay possession proceedings if a private sale of the property is imminent and likely to discharge the full debt.[35] The court may not grant a suspension to allow the debtor to seek a private sale, but only if there is clear evidence that such a sale is going to happen.[36]

With reference to *Quennell v Maltby*,[37] Dixon refers to the possibility of widening the scope of the court's inherent jurisdiction.[38] In this case the court asserted for itself a wider inherent discretion to prevent mortgage repossessions that go "contrary to the justice of the case" unless "it is sought *bona fide* and reasonably for the purpose of enforcing the security and then only subject to such conditions as the court thinks fit".[39] However, this *dictum* did not find wide support in subsequent cases.[40] Even though there is nothing that prevents the House of Lords (now the Supreme Court) from giving a wider interpretation to the inherent jurisdiction, there is no indication that it will do so.[41]

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[31] K Gray & SF Gray *Land law* (6th ed 2009) 296; K Gray & SF Gray *Elements of land law* (5th ed 2009) 772-773; RJ Smith *Property law* (6th ed 2009) 572-573.

[32] Probably no longer than 28 days: See *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883 ChD 908.

[33] K Gray & SF Gray *Elements of land law* (5th ed 2009) 772.

[34] *Redditch Benefit Building Society v Roberts* [1940] Ch 415 420; *Birmingham Citizens Permanent Building Society v Caunt* [1962] Ch 883 ChD 891. See also K Gray & SF Gray *Land law* (6th ed 2009) 296; K Gray & SF Gray *Elements of land law* (5th ed 2009) 772-773; M Dixon "Combating the mortgagee's right to possession: New hope for the mortgagor in chains?" (1998) 18 *Legal Studies* 279-293 286.

[35] *Cheltenham and Gloucester Building Society v Booker* (1997) 73 P&CR 412 415-416; *Royal Trust Co of Canada v Markham* [1975] 1 WLR 1416 1420. See also K Gray & SF Gray *Land law* (6th ed 2009) 296; RJ Smith *Property law* (6th ed 2009) 572.

[36] M Dixon "Combating the mortgagee's right to possession: New hope for the mortgagor in chains?" (1998) 18 *Legal Studies* 279-293 286.

[37] [1979] 1 WLR 318.

[38] M Dixon "Combating the mortgagee's right to possession: New hope for the mortgagor in chains?" (1998) 18 *Legal Studies* 279-293 288.

[39] *Quennell v Maltby* [1979] 1 WLR 318 322 (own emphasis). See also M Dixon "Combating the mortgagee's right to possession: New hope for the mortgagor in chains?" (1998) 18 *Legal Studies* 279-293 288.

[40] In particular, *Palk v Mortgage Services Funding plc* [1993] Ch 330. See also M Dixon "Combating the mortgagee's right to possession: New hope for the mortgagor in chains?" (1998) 18 *Legal Studies* 279-293 288.

[41] M Dixon "Combating the mortgagee's right to possession: New hope for the mortgagor in chains?" (1998) 18 *Legal Studies* 279-293 288.

5 2 2 4 Statutory discretion to stay possession[42]

Section 36 of the Administration of Justice Act 1970 ("AJA") confers on courts the discretion "to stop the mortgagee from taking possession".[43] The purpose of this statutory power is

> "to give a measure of relief to those people who find themselves in temporary financial difficulties, unable to meet their commitments under their mortgage and in danger of losing their homes".[44]

Therefore, the purpose of section 36 is to grant relief to residential mortgagors and, significantly, it recognises the importance of the mortgagor's home (or, according to the section, "dwelling-house").[45] The discretion of the court under this section is more far-reaching than its inherent jurisdiction discussed in 5 2 2 3 above. The section provides as follows:

> "(1) Where the mortgagee under a mortgage of land which consists of or includes a dwelling-house brings an action in which he claims possession of the mortgaged property, not being an action for foreclosure in which a claim for possession of the mortgaged property is also made, the court may exercise any of the powers conferred on it by subsection (2) below if it appears to the court that in the event of its exercising the power the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage.
> (2) The court –
> (a) may adjourn the proceedings, or
> (b) on giving judgment, or making an order, for delivery of possession of the mortgaged property, or at any time before the execution of such judgment or order, may -
> (i) stay or suspend execution of the judgment or order, or
> (ii) postpone the date for delivery of possession,
> for such period or periods as the court thinks reasonable."

Accordingly, if the case concerns a home, the court has the authority to adjourn possession proceedings or to postpone the granting of possession for a period that is reasonable in the court's view. The court may do this if the mortgagor is likely to be able to pay any sums due or remedy the default within a reasonable period.

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[42] K Gray & SF Gray *Land law* (6th ed 2009) 296-298; K Gray & SF Gray *Elements of land law* (5th ed 2009) 773-780; RJ Smith *Property law* (6th ed 2009) 573-579; B McFarlane *The structure of property law* (2008) 830-832; M Wonnacott *Possession of land* (2006) 81.

[43] *Ropaigealach v Barclays Bank plc* [2000] QB 263 283. See also K Gray & SF Gray *Land law* (6th ed 2009) 296; K Gray & SF Gray *Elements of land law* (5th ed 2009) 774.

[44] *Bank of Scotland v Grimes* [1985] QB 1179 1190, as quoted by R Calnan *Taking security: Law and practice* (2nd ed 2011) 301.

[45] B McFarlane *The structure of property law* (2008) 828.

Section 36 provides valuable support for many residential mortgagors who run into temporary financial problems.[46] The loss of home can be avoided as long as the financial problems remain temporary. In recent years this mechanism has begun to assume, as Gray and Gray comment, "a pivotal importance in relieving the financial crisis otherwise engulfing thousands of mortgagors".[47] In fact, the authors argue that the effect of the economic recession of the early 1990s on innocent homeowners initiated a more liberal interpretation of section 36.[48] The same can arguably be said for the more recent credit crunch. Also, in the context of the importance of protecting homes Fox O'Mahony and Sweeney state that

> "the significance of the home as dwelling place has been highlighted in the rise in repossession and foreclosure statistics following the recent crunch in the credit and housing markets."[49]

The court's statutory discretion is premised on whether the mortgagor is able to get the arrears up to date, since the AJA assumes that possession will not be sought if there is no arrears.[50] The court can exercise its discretion under section 36 even if the mortgagor has no realistic prospect of repaying the entire debt immediately.[51] This is the case even if there is a clause in the agreement that accelerates full payment of the debt upon default. The reason for this is that section 36 (read with section 8) only requires a reasonable prospect of rectifying the amount in arrears and not the full outstanding debt,[52] unlike the inherent discretion discussed in 5 2 2 3 above.

Consequently, it seems that section 36 can have a similar effect as the ability of South African debtors to rectify default in terms of their right to reinstate the credit agreement.[53] In English law there is also the possibility of applying section 129 of the Consumer Credit Act 1974, in terms of which a court may reschedule a loan so that smaller instalments are paid over a longer period.[54] However, this option does not seem favourable for long-term

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46 K Gray & SF Gray *Elements of land law* (5th ed 2009) 775.
47 K Gray & SF Gray *Land law* (6th ed 2009) 297. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 775.
48 K Gray & SF Gray *Land law* (6th ed 2009) 297; K Gray & SF Gray *Elements of land law* (5th ed 2009) 775, with reference to *Target Home Loans Ltd v Clothier* (1992) 25 HLR 48 54.
49 L Fox O'Mahony & JA Sweeney "The idea of home in law: Displacement and dispossession" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 1.
50 RJ Smith *Property law* (6th ed 2009) 575.
51 S 36(1) of the AJA 1970. See also K Gray & SF Gray *Land law* (6th ed 2009) 297.
52 See s 8(1) and (2) of the AJA; *Peckham Mutual Building Society v Registe* (1981) 42 P&CR 186 189. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 774-775; RJ Smith *Property law* (6th ed 2009) 573-574; B McFarlane *The structure of property law* (2008) 830.
53 See 4 3 2 above.
54 RJ Smith *Property law* (6th ed 2009) 577.

mortgages.[55] This power of English courts to reschedule loans shares similarities with the South African courts' power to rearrange credit agreements.[56] Under appropriate circumstances this option can be a proper solution for a mortgagor's temporary inability to pay the instalments, rendering the loss of one's home unnecessary as long as the mortgagor is able to bring the payments up to date.

The court may not adjourn possession proceedings indefinitely, but only for as long as is reasonable.[57] It may be reasonable to adjourn proceedings to determine at a later date whether there has come to light any chance that the mortgagor will be able to pay the arrears within a reasonable time. For example, one court decided to "wait and see" whether the mortgagor could obtain employment, even though he was at that point a student studying for a higher qualification.[58]

If a mortgagor has already negotiated (or is in process of negotiating) a private sale of the property, it may be reasonable to suspend a warrant for possession.[59] The purpose of this suspension would be to enable him or her to apply to the high court for an order of sale under section 91 of the Law of Property Act 1925.[60] However, the court will only suspend the warrant for possession if the proposed private sale is likely to produce enough proceeds (perhaps in conjunction with independent financing) to discharge the entire debt.[61] Moreover, the private sale must take place within the foreseeable future[62] and a mere expressed intention to place the property on the market is not enough.[63]

It is not sufficient under section 36 if the mortgagor simply requests a postponement. Instead, there must be realistic evidence of a real possibility that he or she will have some

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55 For example, see *First National Bank plc v Syed* [1991] 2 All ER 250. See also RJ Smith *Property law* (6th ed 2009) 577.

56 See 4 3 4 3 above.

57 *Royal Trust Co of Canada v Markham* [1975] 1 WLR 1416 1423-1424. See also K Gray & SF Gray *Land law* (6th ed 2009) 297; K Gray & SF Gray *Elements of land law* (5th ed 2009) 775.

58 *Skandia Financial Services Ltd v Greenfield* [1997] CLY 4248. See also K Gray & SF Gray *Land law* (6th ed 2009) 297; K Gray & SF Gray *Elements of land law* (5th ed 2009) 775-776.

59 *Target Home Loans Ltd v Clothier* (1992) 25 HLR 48 54. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 776.

60 K Gray & SF Gray *Land law* (6th ed 2009) 297 and 304. On the possibility of suspending possession so as to sell the home privately, see M Dixon "Combating the mortgagee's right to possession: New hope for the mortgagor in chains?" (1998) 18 *Legal Studies* 279-293.

61 *Cheltenham and Gloucester Building Society v Krausz* [1997] 1 WLR 1558 1565-1566. See also K Gray & SF Gray *Land law* (6th ed 2009) 297.

62 *Mortgage Service Funding plc v Steele* (1996) 72 P&CR D40. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 776.

63 *National and Provincial Building Society v Lloyd* [1996] 1 All ER 630 639-640. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 776; RJ Smith *Property law* (6th ed 2009) 578.

ability to purge all the current arrears.[64] In addition, a key requirement is being able to rectify the default within a reasonable time. Before *Cheltenham and Gloucester Building Society v Norgan*[65] ("*Norgan*"), courts generally regarded a period of two to four years as constituting the reasonable period in which arrears should likely be purged.[66] Conversely, the court in *Norgan* decided that the whole remaining term of the mortgage should be used as the starting point for establishing a reasonable period.[67] Therefore, the courts now seem willing, at least in principle, to reschedule the repayment of the amount in arrears by using the full remaining term of the mortgage as a starting point to calculate the reasonable period for such repayment.[68] This more accommodating approach benefits debtors because the arrears can be spread over a longer period and, therefore, rectifying the arrears is more manageable and feasible. This approach would require mortgagors to furnish the court with more budgetary information.[69] Also, the court indicated that repeated requests for postponements (in other words, after defaulting again) would not be tolerated after the initial postponement was granted.[70] Powell provides an example:

> "The mortgage borrower has a 25-year mortgage which she took out five years ago, there now being 20 years left to the end of the mortgage term. She has £6,000 of mortgage arrears. Therefore, the minimum *Norgan* offer is: £6,000 ÷ 20 ÷ 12 = £25 per month. This is the sum which, if paid regularly by the mortgage borrower in addition to the [current monthly instalment], would clear the mortgage arrears by the end of the remaining 20-year term of the mortgage."[71]

According to Powell, what he calls "the minimum *Norgan* offer" (the monthly minimum necessary to eventually purge the arrears) is "crucial".[72] More specifically, if the debtor has the ability to pay more than the minimum *Norgan* offer, this is a determining factor when the

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64 *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 509. See also K Gray & SF Gray *Land law* (6th ed 2009) 297-298; K Gray & SF Gray *Elements of land law* (5th ed 2009) 777.

65 [1996] 1 WLR 343.

66 L Fox *Conceptualising home: Theories, laws and policies* (2007) 44.

67 *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 WLR 343 267 and 353. See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 44.

68 K Gray & SF Gray *Land law* (6th ed 2009) 298; K Gray & SF Gray *Elements of land law* (5th ed 2009) 777; B McFarlane *The structure of property law* (2008) 831; L Fox *Conceptualising home: Theories, laws and policies* (2007) 44.

69 *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 WLR 343 267.

70 268. See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 45.

71 T Powell *Mortgage possession proceedings* (2012) 5.

72 5.

judge is deciding whether to grant a possession order or not.[73] It might also be possible to postpone repayment of the entire arrears to the end of the mortgage term.[74]

Consequently, English courts seem to have become prepared to rewrite the repayment terms of mortgages on condition that it can reasonably be expected of the mortgagee to only retrieve the amount in arrears over the whole remaining term of the mortgage. Furthermore, the mortgagor must appear reasonably able to cope with the new repayment schedule.[75] The section 36 discretion is not available to mortgagors who cannot discharge the arrears through periodic payments. Therefore, section 36 cannot assist the mortgagor if his or her only way of settling the debt is to sell the property.[76]

Fox refers to section 36 as "a relatively rare example of a legal context in which (what are in substance) home considerations" underlie the protection of occupiers against mortgage creditors.[77] However, the conditions for exercising this discretion are exclusively focused on the occupier's ability to rectify arrears within a reasonable period and to continue meeting instalments.[78] Even though the home interest and personal circumstances are present, the court's discretion is largely dominated by the creditor's commercial interests.[79]

Bright describes mortgage cases as ones where the "personal *financial* story" of the mortgagor is legally relevant.[80] However, the author emphasises that the "wider home story" is not legally relevant and that "home meanings" seem to be immaterial.[81] Accordingly, courts are only allowed to take financial factors into consideration when exercising their discretion under section 36.[82] For instance, the court in *Bristol and West Building Society v Ellis*[83] emphasised how important it is that the exercise of the court's discretion is justified by the debtor's financial credibility. If it is unlikely that the debtor would in the near future be

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73 5.
74 For example, *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 WLR 343. See also RJ Smith *Property law* (6th ed 2009) 576.
75 *Household Mortgage Corpn plc v Pringle* [1998] 30 HLR 250 259-260. See also K Gray & SF Gray *Land law* (6th ed 2009) 298; K Gray & SF Gray *Elements of land law* (5th ed 2009) 777.
76 *Bristol and West Building Society v Ellis* (1996) 73 P&CR 158 161. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 777.
77 L Fox *Conceptualising home: Theories, laws and policies* (2007) 43.
78 44.
79 45.
80 S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 14-40 17 (original emphasis).
81 17 and 24.
82 17.
83 (1996) 73 P&CR 158. See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 45.

able to meaningfully contribute to reducing the arrears, possession should only be postponed for a relatively short period of time.[84]

As a result, whereas section 36 seems to value the home of mortgagors, such interest is still consistently outweighed by the creditor's financial interest. At least section 36 provides temporary relief in cases where the default is a result of short-term financial difficulties. Yet, this momentary relief is only available if debtors can show the necessary financial credibility.[85] Though one can argue that section 36 does not sufficiently take account of mortgagors' home interests, it certainly contributes to the protection of homes. It ensures that if it is possible to avoid the sale of the home by postponing the creditor's rights for a reasonable period, this option is considered.

5 2 3 Exercise of the power of sale[86]

5 2 3 1 Out-of-court sale

The mortgagee usually exercises its power to sell the property after it has asserted its right to possession.[87] The reason for this is that vacant possession is normally essential to obtain a good selling price. According to Smith, the assumption in English law is that "[i]t is hopeless for the mortgagee to attempt to sell a house with a mortgagor in it who is refusing to move".[88] Therefore, the two remedies – although separate – often function together to realise the mortgagee's security. In fact, the mortgagee almost always seeks possession for the sole purpose of selling the property with vacant possession.[89] It is this sale aspect of the process that resembles the South African version of the remedy, except that in South Africa sale precedes the eviction. As already pointed out, in both systems mortgage remedies – if pursued to the full – eventually lead to the loss of home, regardless of the order in which sale and eviction occurs.

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[84] *Bristol and West Building Society v Ellis* (1996) 73 P&CR 158 161. See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 45.

[85] L Fox *Conceptualising home: Theories, laws and policies* (2007) 45.

[86] K Gray & SF Gray *Elements of land law* (5th ed 2009) 780-803; K Gray & SF Gray *Land law* (6th ed 2009) 298-305; RJ Smith *Property law* (6th ed 2009) 581-589; NP Gravells *Land law: Text and materials* (4th ed 2010) 903-920.

[87] K Gray & SF Gray *Elements of land law* (5th ed 2009) 780; B McFarlane *The structure of property law* (2008) 826 and 828.

[88] RJ Smith *Property law* (6th ed 2009) 571.

[89] *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317 ChD 320. See also S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 14-40 14-15 n 11; NP Gravells *Land law: Text and materials* (4th ed 2010) 899-900.

Even though a mortgagee has no common law power to sell the property, it is frequently granted in terms of the mortgage deed and is in any event provided for by section 101(3) of the Law of Property Act 1925 ("LPA"). The statutory power of sale arises when three conditions are met. Firstly, the mortgage must have been constituted by a deed; secondly, the mortgage debt must have become due; and thirdly, the mortgage deed must not expressly preclude the power of sale.[90] Even after these three requirements have been satisfied and the right of sale therefore arises, the power only becomes exercisable if any one of three further conditions has been met.[91] Accordingly, unless the power of sale was expressly granted by the mortgage deed, the power of sale may only be exercised in terms of the LPA when one of these requirements is satisfied:[92]

(1) The mortgagor has been in default for three months after a notice (that requires repayment) was served on him or her;

(2) some interest under the mortgage has been in arrears for two months after becoming due; or

(3) there has been a breach of some other term in the mortgage deed.

If any of these requirements is met, the LPA authorises the mortgagee to proceed with the sale of the land.[93] In contrast to South African law, the mortgagee does not need the leave of any court to exercise this power of sale, as long as the requirements of the LPA are met.[94] In what Gray and Gray describe as "rather brutal", the power of sale authorises a "compulsory divesting of the mortgagor's title at the direction of the mortgagee".[95] It is only when a mortgagee seeks possession that it normally approaches a court for permission. Therefore, it is during the application for a possession order that the court would have to intervene, if appropriate. In substance, it is already at the court proceedings for possession that the court inquires whether a sale should take place.[96] However, a problem may arise if the mortgagee asserts possession without court oversight, which – although theoretically possible – is rare

[90] S 101(1), 101(1)(i) and 101(4) of the LPA.
[91] S 103 of the LPA. See also RJ Smith *Property law* (6th ed 2009) 581-582; L Fox *Conceptualising home: Theories, laws and policies* (2007) 41.
[92] S 103(i) to (iii) of the LPA.
[93] S 101(1)(i) of the LPA.
[94] NP Gravells *Land law: Text and materials* (4th ed 2010) 905; L Fox *Conceptualising home: Theories, laws and policies* (2007) 41-42.
[95] K Gray & SF Gray *Elements of land law* (5th ed 2009) 781.
[96] RJ Smith *Property law* (6th ed 2009) 571, with reference to *Citibank Trust Ltd v Ayivor* [1987] 3 All ER 241.

and risky.[97] This seems to be an area of English mortgage law that requires attention, especially when compared to the emphasis placed on court oversight in South African law.[98]

5 2 3 2 Sale by virtue of court order

If the requirements for an out-of-court sale are not satisfied, the mortgagee can apply to the court for an order to sell the property in terms of section 91(2) of the LPA.[99] When such an application is made, the court "may direct a sale of the mortgaged property, on such terms as it thinks fit".[100] As Fox points out, the power to order the sale of the property is "unfettered", which means that the court is allowed to take account of not only commercial factors, but also home considerations and other relevant matters.[101] However, as the author further explains, there are no reported cases in which mortgagors – based on home arguments – successfully prevented the sale of their properties under section 91(2).[102] In other words, home considerations have not yet prevented a creditor from realising its security through sale of the property, although the possibility exists in theory.

5 2 4 Foreclosure[103]

Unlike the power of sale, foreclosure requires judicial control and, therefore, application to a court.[104] The effect of a foreclosure order is that it

> "abrogates the mortgagor's equity of redemption and leaves the entire value of the mortgaged property in the hands of the mortgagee (irrespective of the amount of the mortgage debt)."[105]

In civil law terminology, ownership of the property is transferred to the mortgagee by way of court order. This is the "most draconian remedy"[106] available to the mortgagee in English law

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97 The risk of committing a criminal offence usually ensures that mortgagees choose to rather seek possession by way of a court order: S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 14-40 23-24 n 24. See 5 2 2 2 n 24 above.

98 See 3 2 above.

99 L Fox *Conceptualising home: Theories, laws and policies* (2007) 42.

100 S 91(2) of the LPA. See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 42; M Dixon "Combating the mortgagee's right to possession: New hope for the mortgagor in chains?" (1998) 18 *Legal Studies* 279-293 292.

101 L Fox *Conceptualising home: Theories, laws and policies* (2007) 42.

102 42.

103 K Gray & SF Gray *Elements of land law* (5th ed 2009) 803-805; RJ Smith *Property law* (6th ed 2009) 569-570; NP Gravells *Land law: Text and materials* (4th ed 2010) 900-902.

104 *Ness v O'Neil* [1916] 1 KB 706 709.

105 K Gray & SF Gray *Elements of land law* (5th ed 2009) 803. See also NP Gravells *Land law: Text and materials* (4th ed 2010) 900.

and, despite its potential potency, is enforced extremely rarely in English courts.[107] For comparative purposes it is consequently not necessary to consider this remedy, since it has no counterpart in South African law. The South African concept of foreclosure corresponds more closely to the English remedies of immediate possession and power of sale. Even if foreclosure was applied for in English law, section 36 of the AJA provides courts with the same statutory discretion to stay or postpone foreclosure as with possession proceedings.[108]

5 2 5 Remarks concerning the role of "home" in law

The frustration experienced by Fox (who has done extensive research on the role of home in law) is that even though home interests are increasingly present in legal discourse, the creditor's interests almost always automatically win.[109] Although courts recognise the value of "home", they seem incapable of protecting this interest when measuring it against the easily recognisable commercial interests of creditors.[110] One reason for this is that it is not easy "to make persuasive arguments in favour of the occupier",[111] at least on a practical level. Apparently there is a "cycle of reasoning"[112] that prevents home interests from receiving more attention during the balancing process. Fox explains this presumptive way of thinking as follows:

> "[C]reditors ought to prevail, so there is no need to investigate the meaning and value of the home interest; the home interest is not explored in the courts; therefore creditors continue to prevail."[113]

In *Conceptualising home: Theories, laws and policies*, Fox argues that the importance of home (and the effects of losing it) should enjoy more explicit attention when balancing the interests of debtors and creditors.[114] Drawing from research in other disciplines, Fox "seeks to identify some of the values of home which might inform a legal concept of home" – ones

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[106] K Gray & SF Gray *Elements of land law* (5th ed 2009) 803-804.
[107] *Palk v Mortgage Services Funding plc* [1993] Ch 330 336. The remedy is almost never sought and even less often granted: See K Gray & SF Gray *Elements of land law* (5th ed 2009) 805; RJ Smith *Property law* (6th ed 2009) 569; NP Gravells *Land law: Text and materials* (4th ed 2010) 901.
[108] See 5 2 2 4 above.
[109] L Fox *Conceptualising home: Theories, laws and policies* (2007) 79; L Fox "The meaning of home: A chimerical concept or a legal challenge?" (2002) 29 *Journal of Law and Society* 580-610 585.
[110] For instance, see *Le Foe v Le Foe* [2001] EWCA Civ 1870 paras 10-13. See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 79 n 1 and accompanying main text.
[111] L Fox "The meaning of home: A chimerical concept or a legal challenge?" (2002) 29 *Journal of Law and Society* 580-610 586.
[112] L Fox *Conceptualising home: Theories, laws and policies* (2007) 79.
[113] 80.
[114] 80.

that can be weighed on the debtor's side as against the creditor's interests.[115] She insists that the creditors-must-win presumption – as a starting point for deciding possession cases – is flawed.[116] One must *prima facie* accept that there is at least some merit to home claims.[117] Fox states her reasons for the need to develop a legal concept of home as follows:

> "[A] legal concept of the meaning of home would be useful, for instance, when considering the conflict of interests between occupiers of a property 'as a home', and other parties with 'non-home' interests in the property, for example, creditors."[118]

The author argues that "home" entails values that can (or should) be "weighed in the balance" in favour of the occupier.[119] These values include home as a financial investment, as a physical structure, as a territory, as identity, and as a social and cultural unit. For current purposes it is unnecessary to repeat the author's exposition of these values.[120] On a conceptual level the difficulty lies therein that the creditor's interest is of an economic nature and, therefore, easy to quantify and give effect to. On the other hand, home values include financial and non-financial aspects and it is especially the non-financial elements that are difficult to weigh against the creditor's financial interest.

Fox does not question the legitimacy of creditors' commercial claims and she does not suggest that creditors should lose their proprietary rights to the mortgaged home,[121] nor does she argue that home interests should always necessarily prevail against creditors' rights.[122] Instead, she proposes the possibility, based on considering home interests, to strike a different balance between the conflicting rights.[123] In order to do so, the balancing exercise should, in Fox's view, not be conducted without also considering a "clearly articulated conception of

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[115] 80.
[116] 12. See also 122-128, where the author makes a case for reconsidering the pro-creditor presumption in mortgage law.
[117] L Fox *Conceptualising home: Theories, laws and policies* (2007) 12.
[118] L Fox "The meaning of home: A chimerical concept or a legal challenge?" (2002) 29 *Journal of Law and Society* 580-610 580.
[119] 580.
[120] For the author's analysis of these values, see L Fox *Conceptualising home: Theories, laws and policies* (2007) 131-180; L Fox "The meaning of home: A chimerical concept or a legal challenge?" (2002) 29 *Journal of Law and Society* 580-610, especially 588ff. See also 7 2 4 below, where I discuss the value of the mortgaged home from a personhood perspective with reference to MJ Radin "Property and personhood" (1982) 34 *Stanford L Rev* 957-1015.
[121] L Fox *Conceptualising home: Theories, laws and policies* (2007) 28. See also L Fox "The meaning of home: A chimerical concept or a legal challenge?" (2002) 29 *Journal of Law and Society* 580-610 587.
[122] L Fox "The meaning of home: A chimerical concept or a legal challenge?" (2002) 29 *Journal of Law and Society* 580-610 587.
[123] L Fox *Conceptualising home: Theories, laws and policies* (2007) 29.

the occupier's interest in the home".[124] An example of a different balance would be to delay enforcement of the creditor's rights – for example, in terms of the court's discretion under section 36 of the AJA as applied in *Norgan*.[125] Yet, despite the potential benefits of such a delay, home interests still do not enjoy strong enough recognition to ultimately outweigh creditor's claims.[126]

The idea that a home claim might trump a commercial claim is controversial indeed.[127] However, a legitimate balance is not struck, according to the Fox, unless all the interests at stake are fully understood, including those relevant to the home.[128] The author critically analyses the presumption that home interests can be dismissed simply because economic policy requires that creditors must prevail.[129] She does this by analysing the traditional justifications for this pro-creditor attitude. These justifications include (as in South Africa) the enforcement of contracts and safeguarding the availability of credit.[130]

Fox's criticism of the enforcement-of-contracts argument is not as such based on concerns for protecting the home of debtor/occupiers. She admits that one can hardly challenge the proposition that voluntarily and validly concluded contracts should be enforced.[131] Rather, her questions regarding this principle focus on the protection of non-debtor occupiers, in other words persons who are not party to the loan agreement.[132] Since this dissertation centres on the rights of the judgment debtor/owner him- or herself, Fox's analysis of the interests of non-debtors is not as relevant here.[133] Therefore, as to protecting the home of the mortgagor/occupier him- or herself, English law places the same (if not stronger) emphasis

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[124] L Fox "The meaning of home: A chimerical concept or a legal challenge?" (2002) 29 *Journal of Law and Society* 580-610 587.
[125] L Fox *Conceptualising home: Theories, laws and policies* (2007) 29, with reference to *Cheltenham and Gloucester Building Society v Norgan* [1996] 1 WLR 343. See 5 2 2 4 above.
[126] L Fox *Conceptualising home: Theories, laws and policies* (2007) 12.
[127] 36.
[128] 36.
[129] 80-130.
[130] See also L Fox "The meaning of home: A chimerical concept or a legal challenge?" (2002) 29 *Journal of Law and Society* 580-610 585.
[131] L Fox *Conceptualising home: Theories, laws and policies* (2007) 82.
[132] 82-88. These parties include spouses, partners, non-debtor co-owners, children, *et cetera*.
[133] This is not to say that the situation of non-debtor occupiers plays no role in South African decision making. Some courts mention the fact that, for example, minor children will lose their home during the forced sale. Therefore, when considering all the relevant circumstances, courts may be swayed by such factors to extend greater leniency to the debtor/owner him- or herself, especially when considering alternatives to forced sale. For instance, see *Standard Bank of South Africa v Molwantwa and Another* (15043/2009) [2011] ZAGPPHC 108 (5 May 2011) para 11 and the discussion in 4 4 4 above. The impact of enforcing contracts on non-contracting parties is certainly worthy of future research in the South African mortgage context.

on enforcing contracts as South African law.[134] In 7 2 4 below I discuss Fox's use of Margaret Radin's property-for-personhood theory to strengthen her view of the role that "home" should play in creditor-occupier conflicts.

5 2 6 Conclusion

At the moment the basic situation in English law is similar to that in South African law. The fact that the property is a home does play a role in deciding whether to allow the enforcement of mortgagees' rights. However, it seems that the most courts can do is to postpone or stay possession proceedings. Moreover, mortgagors will only receive this help if they can show that the mortgage default can be rectified within a reasonable time. In other words, financial considerations are the determining factor. When there are no ways for the debtor to keep his or her home, while at the same time ensuring the satisfaction (albeit postponed) of the mortgagee's claims to repayment, there is no option left other than to sell the home.

The position discussed thus far does not account for the influence of the human right of respect for the home.[135] Of course, in South African law it was primarily the constitutional imperative to protect "access to adequate housing"[136] that inspired a more serious attempt to protect homes, also in mortgage cases. Therefore, it is interesting to perceive that English law extends some level of protection to the occupiers of mortgaged homes even without the human-rights element. This was substantively not the case in South Africa prior to the Constitution. Nevertheless, in recent years English law has also had to face the fact that there is a human-rights basis for the protection of home interests. In the next part of this chapter I analyse how this European human-rights norm (like its South African counterpart) has influenced English law with regard to the enforcement of a mortgagee's right to claim possession of the mortgaged home.

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[134] *Printing and Numerical Registering Company v Sampson* (1875) LR 19 Eq 462 465. See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 81.
[135] Art 8 of the ECHR.
[136] S 26(1) of the SA Constitution. See ch 3 above.

5 3 Human rights: Respect for the home

5 3 1 General

Even though the United Kingdom does not have a Bill of Rights, English law is subject to human rights by virtue of the Human Rights Act 1998 ("the HRA"),[137] which subjects English domestic law to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 ("ECHR" or "the Convention").[138] The HRA requires that, as far possible, legislation should now be read and given effect to in a way that is compatible with the Convention.[139] Moreover, no public authority may act in a way that is incompatible with the Convention.[140]

It is important to consider that the ECHR applies indirectly through existing causes of action and does not give rise to free-standing causes of action. Since courts are regarded as public authorities, their orders (including possession orders) must be in line with the Convention (specifically, for current purposes, article 8).[141] Accordingly, courts should "strike a balance between the lender's right to possession and the borrower's fundamental Convention rights".[142] Moreover, courts must read and reinterpret existing law to ensure its compliance with the Convention.[143] Therefore, it is reasonably clear that the Convention has indirect horizontal application to private disputes by virtue of the courts' obligation to apply and interpret the common law in line with Convention rights.[144]

Article 8 of the ECHR[145] has some similarities to section 26 of the South African Constitution. In essence, both provisions provide protection for peoples' homes against unjustified interferences, although the exact wording differs. Neither provision entails an absolute right; both are qualified and can, therefore, be infringed under justifiable reasons, generally based on a proportionality test. Like their South African counterparts, the English courts in recent years have had to grapple with the possibility that rental and mortgage

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[137] K Gray & SF Gray *Elements of land law* (5th ed 2009) 115-131.
[138] The purpose of the HRA is to make it easier for people to give effect to the ECHR in domestic English courts: See T Powell *Mortgage possession proceedings* (2012) 156.
[139] S 3(1) of the HRA.
[140] S 6(1) of the HRA.
[141] S 6(3)(a) of the HRA. See also T Powell *Mortgage possession proceedings* (2012) 158.
[142] T Powell *Mortgage possession proceedings* (2012) 162.
[143] S 3(1) of the HRA. See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 454.
[144] L Fox *Conceptualising home: Theories, laws and policies* (2007) 465-467; S Nield "Clash of the titans: Article 8, occupiers and their home" in S Bright (ed) *Modern studies in property law* Vol 6 (2011) 101-129 107-108.
[145] As T Powell *Mortgage possession proceedings* (2012) 156 points out, art 6 (the right to a fair trial) and art 1 of the first protocol (protection of property) are also potentially relevant to mortgage possession proceedings. However, the focus of this chapter remains on art 8 (respect for the home).

repossessions might be scrutinised in light of occupiers' right to respect for their homes. The main implication is that a mortgagee's inherent right to take possession may be judicially reviewed in light of the Convention,[146] since repossession almost always involves the eviction of a family.[147] Hence, article 8 might provide a foundation (or a trump card)[148] from which to advance home arguments in domestic English law.[149] Article 8 of the Convention provides as follows:

> "(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 interests 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 and morals, or for the protection of the rights and freedoms of others."

Article 8(1) sets out the content of the right that may not be interfered with by public authorities, which include courts.[150] People do not have a positive right to be provided with a home,[151] but they are protected against unlawful interferences with their existing homes.[152] Whether a property is a home does not depend on whether the occupier has any proprietary interests in the land[153] or whether his or her occupation is lawful.[154] In essence, whether a building is a home is a factual test and the claimant must show sufficient and continuous links with the place.[155]

Article 8(2) provides the justifiable reasons for when interferences with the right to respect for the home may indeed occur. In other words, there are three pre-conditions before the right

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[146] S Nield "Charges, possession and human rights: A reappraisal of s 87(1) of the Law of Property Act 1925" in E Cooke (ed) *Modern studies in property law* Vol 3 (2005) 155-175 155.
[147] K Gray & SF Gray *Elements of land law* (5th ed 2009) 771.
[148] S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 14-40 18-20.
[149] L Fox *Conceptualising home: Theories, laws and policies* (2007) 453.
[150] The court is a public authority: S 6(3)(a) of the HRA.
[151] *X v Germany* (1956) Yearbook ECtHR 202; *Chapman v United Kingdom* (2001) 33 EHRR 399 427. This is unlike the situation in South Africa, where s 26(2) of the SA Constitution requires the state to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right".
[152] L Fox *Conceptualising home: Theories, laws and policies* (2007) 460.
[153] *London Borough of Harrow v Qazi* [2003] UKHL 43 para 97. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 117.
[154] *Buckley v United Kingdom* (1997) 23 EHRR 101 para 63; *London Borough of Harrow v Qazi* [2003] UKHL 43 para 11. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 117.
[155] *Gillow v United Kingdom* (1986) Series A No 109 para 46; *London Borough of Harrow v Qazi* [2003] UKHL 43 para 68.

may be infringed:[156] The interference must be prescribed by law; it must be directed at one of the aims specified in article 8(2); and the interference must be necessary in a democratic society. One of the valid aims, "the protection of the rights and freedoms of others", will probably include the rights of lenders in terms of the mortgage agreement.[157] However, this fact is not sufficient to justify the interference with the debtor's article 8 rights. The third condition implies that one should also ask "whether there is a pressing social need for [the interference] and whether it is proportionate to the legitimate aim pursued",[158] which is essentially a proportionality test. Therefore, a court has to test whether the granting of a possession order would be necessary,[159] based on the impact that the possession order would have on the individual occupiers.

As to what impact article 8 would have on the outcome of property cases, more specifically repossession cases, one can ask (as one court has) whether the article has created

> "a reservoir of entitlement upon which the occupier of a home can draw in order to resist an order for possession when domestic law leaves him defenceless?"[160]

In other words, do English courts now have another layer of discretion that is based on the social merits of each individual case? Moreover, can courts use this discretion to refuse to enforce rights and obligations that, save for the HRA, are clear under domestic law?[161] This question is significant because the potential impact of article 8 goes further than that of section 36 of the AJA.[162] The courts' section 36 discretion is limited to financial considerations and does not allow a court to take personal circumstances (such as the home interest) into account. Accordingly, article 8 might provide the platform to start weighing personal home interests when having to decide possession cases.

Initially it seemed as if the HRA might have brought about "a new species of property right in a 'home'".[163] The contrary argument was that a proportionality-based discretion to

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[156] *R (Countryside Alliance) v Attorney General* [2007] 3 WLR 922 paras 43-45. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 116.
[157] T Powell *Mortgage possession proceedings* (2012) 159.
[158] *R (Countryside Alliance) v Attorney General* [2007] 3 WLR 922 para 45. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 116.
[159] T Powell *Mortgage possession proceedings* (2012) 159.
[160] *Patel v Pirabakaran* [2006] 1 WLR 3112 para 41. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 124; A Goymour "Proprietary claims and human rights – a 'reservoir of entitlement'?" (2006) 65 *Cambridge LJ* 696-720.
[161] K Gray & SF Gray *Elements of land law* (5th ed 2009) 124.
[162] See 5 2 2 4 above.
[163] *Newham LBC v Kibata* [2003] 3 FCR 724 para 2. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 124-125.

refuse to enforce orthodox property rights would create "novel rights to security of tenure in derogation of the existing proprietary rights of others".[164] The fear was expressed that such an approach would fundamentally transform the legal principles that regulate the enforcement of property rights.[165] Therefore, despite some earlier willingness to embrace what was seen as the wide scope of the HRA,[166] courts have since 2003 tried to curb the argument that article 8 of the Convention creates parallel property rights that can derogate from traditional property rights.[167]

Irrespective of the courts rejecting the prospect that there might be parallel property rights based on article 8, the article still seems to require a proportionality test to determine whether interferences with the home is justified. With respect to applying article 8 of the Convention to the mortgage context, Fox argues that

> "the court would be required to consider whether any interference with the occupier's right to respect for home (ie, losing the home in a possession action) was justified by the need to protect the rights of the creditor, or ... necessary for the economic well being of the country."[168]

This justification test can be divided into a number of questions that the court should ask.[169] In the first place, the court must ask whether the infringement is necessary. In other words, does it fulfil a legitimate need? Secondly, the court must determine whether the interference is proportionate. That is, the interference should not go any further than is necessary to achieve its goal. To answer this question the court would have to enquire whether there are less restrictive means available to achieve that goal.[170] However, as Fox points out,

> "the issue of proportionality between the right to respect for home and the measures imposed to protect the legitimate rights of creditors has not been explicitly worked out in judgments ... "[171]

What is more, the possibility that a postponement of the creditor's rights might provide a more proportionate answer than immediate repossession has not been considered in the article 8 framework.[172] Most article 8 cases have taken place in the context of local authority landlords who evict unlawful occupiers or occupiers whose tenancies have been lawfully

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[164] K Gray & SF Gray *Elements of land law* (5th ed 2009) 124.
[165] *R (Gangera) v Hounslow LBC* [2003] HLR 1028 para 49; *London Borough of Harrow v Qazi* [2003] UKHL 43 para 109. See also K Gray & SF Gray *Elements of land law* (5th ed 2009) 124.
[166] For example, see *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2002] Ch 51 para 51.
[167] K Gray & SF Gray *Elements of land law* (5th ed 2009) 125.
[168] L Fox *Conceptualising home: Theories, laws and policies* (2007) 455.
[169] 455-456.
[170] 480.
[171] 480.
[172] 480.

terminated. Consequently, one has to draw upon principles that have been established in this analogous context to investigate the possible impact of article 8 on mortgage possession cases. Despite Fox's argument that article 8 might contribute to a more coherent conceptualisation of home interests,[173] courts seem to restrict the application of respect for the home in English law. However, as the development in case law illustrates, the door is slowly but surely opening up for the courts to apply a proportionality test in cases where people face the loss of their homes.

5 3 2 Case law

5 3 2 1 Introduction

In what follows I discuss a series of cases where the right to respect for a home was considered in the English repossession context.[174] The cases include ones decided by the House of Lords (now the United Kingdom Supreme Court) and the European Court of Human Rights ("ECtHR"). Although most of these cases are repossessions in landlord-tenant contexts and not repossessions for mortgage arrears, they illustrate principles and arguments that could apply to any kind of home repossession. The central issue is whether the right to respect for the home[175] can trump traditional proprietary rights of landlords and mortgagees. More particularly, the question was whether courts must do a proportionality-type assessment based on article 8(2) of the Convention that also takes into account the personal circumstances of individual occupiers. I do not discuss the cases in detail but only refer to the courts' main findings.

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[173] 456-458.

[174] For discussions of some of these cases, see K Gray & SF Gray *Elements of land law* (5th ed 2009) 125-127; L Fox *Conceptualising home: Theories, laws and policies* (2007) 481-495; L Fox "The idea of home in law" (2005) 2 *Home Cultures* 25-50 28-33; L Fox O'Mahony "Eviction and the public interest: The right to respect for home in English law" in RP Malloy & M Diamond (eds) *The public nature of private property* (2011) 89-131; S Nield "Clash of the titans: Article 8, occupiers and their home" in S Bright (ed) *Modern studies in property law* Vol 6 (2011) 101-129; S Maass *Tenure security in urban rental housing* (2010) unpublished LLD dissertation Stellenbosch University 254-269; AJ van der Walt *Property in the margins* (2009) 50-51.

[175] Art 8 of the ECHR.

5 3 2 2 House of Lords in Qazi

It appears that the House of Lords decision in *London Borough of Harrow v Qazi*[176] ("*Qazi*") removed the possibility of occupiers using article 8 as a defence against possessory actions.[177] In an eviction application by a local housing authority, the tenant argued that the HRA requires that the court must consider the proportionality of the eviction in light of his right under article 8 of the Convention to respect for his home.

With a three-to-two majority the court held that article 8 was limited to issues regarding privacy and intrusion by the state. Article 8 provides no basis to defend actions brought by third parties (such as mortgagees and landlords) when the third party is entitled to possession under domestic law. If the party who seeks possession of a home is merely doing so as a result of enforcing existing proprietary and contractual rights under domestic law, there is no interference under article 8. Accordingly, the court held that there was no discretion based on "the degree of impact on the tenant's home life".[178] Article 8 rights can never defeat contractual and proprietary rights that have crystallised under domestic law.[179] Moreover, article 8 does not confer on occupiers "some countervailing property rights".[180] In other words, the home interest is "automatically defeated", since one cannot argue a violation of article 8.[181]

Although the case dealt with a former tenant who sought to avoid a possession order in favour of the local authority landlord, the majority of the court anticipated that their approach would also apply in disputes between creditors and occupiers.[182] For example, the court relied on *Wood v United Kingdom*,[183] where a mortgagor challenged the repossession of her home (due to default) under article 8 of the Convention. She claimed that the repossession infringed on her right to respect for "private and family life" and the "home". However, the European Human Rights Commission rejected this challenge, since any interference with the mortgagor's home was in accordance with the terms of the loan agreement and domestic English law. In other words, the repossession satisfied the requirement of article 8(2) of the

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[176] [2003] UKHL 43. My summary of the court's conclusions is partially based on L Fox *Conceptualising home: Theories, laws and policies* (2007) 482. For a discussion of the case, see also K Gray & SF Gray *Elements of land law* (5th ed 2009) 125-127; AJ van der Walt *Property in the margins* (2009) 50-51.
[177] L Fox *Conceptualising home: Theories, laws and policies* (2007) 482-483.
[178] *London Borough of Harrow v Qazi* [2003] UKHL 43 para 146.
[179] Paras 84, 108-109, 125, 149 and 151-152.
[180] Para 127.
[181] L Fox *Conceptualising home: Theories, laws and policies* (2007) 483-484, with reference to *London Borough of Harrow v Qazi* [2003] UKHL 43 paras 77, 103 and 149.
[182] L Fox *Conceptualising home: Theories, laws and policies* (2007) 486.
[183] (1997) 24 EHRR CD 69. See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 477-478.

Convention. It was "necessary for the protection of the rights and freedoms of others", namely the mortgage lender.[184]

Even though all five judges in *Qazi* accepted that the property in question was the occupier's home,[185] the judges were divided as to whether the taking of possession interfered with the occupier's rights under article 8. The majority found against the occupier, namely that the taking of possession did not interfere with his right to respect for his home. The court held that it was not necessary for the court to assess whether the taking of possession was proportionate under the circumstances, since it was a "foregone conclusion" that any interference would be justified.[186] Therefore, *Qazi* suggested that it will be unnecessary to balance the rival claims in a dispute between the occupier's home interest and the creditor's contractual and proprietary interests.

5 3 2 3 European Court of Human Rights in Connors

There has been conflicting case law by the ECtHR since the decision in *Qazi*, of which *Connors v United Kingdom*[187] ("*Connors*") is a prime example. This case concerned gypsies living on local authority land without any contractual or proprietary rights to occupy. In other words, the claimant was entitled to possession. The parties agreed that there had been an interference with the gypsies' right to respect for private life, family life and home. They also agreed that the infringement was in accordance with law and that it pursued a legitimate aim.

The question that the court asked, based on article 8(2), was whether the eviction was justified as "necessary in the interests of a democratic society". In other words, the ECtHR applied a proportionality test, in contrast with the majority's decision in *Qazi*.[188] Special emphasis was also placed on the importance of procedural safeguards for occupiers, without

[184] *Wood v United Kingdom* (1997) 24 EHRR CD 69 70-71. See also S Nield "Clash of the titans: Article 8, occupiers and their home" in S Bright (ed) *Modern studies in property law* Vol 6 (2011) 101-129 106; K Gray & SF Gray *Elements of land law* (5th ed 2009) 771; L Fox *Conceptualising home: Theories, laws and policies* (2007) 478. The application of art 8 to creditor-occupier disputes was also rejected in, for example, *Karia v Franses* 12 Nov 2001 (ChD) Unreported; *Ebert v Venvil* 19 Dec 2000 (CA) Unreported paras 16-18; *Birmingham Midshires Mortgage Serviced Ltd v Sabherwal* (1999) 90 P&CR 256. This rejection is despite earlier indications that courts might acknowledge the relevance of art 8 (For instance, see *Albany Home Loans v Massey* [1997] 2 All ER 609 612). See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 478.

[185] *London Borough of Harrow v Qazi* [2003] UKHL 43 paras 8, 67, 96 and 133.

[186] Para 103; A Goymour "Proprietary claims and human rights – a 'reservoir of entitlement'?" (2006) 65 *Cambridge LJ* 696-720 700.

[187] (App No 66746/01) Eur Ct HR (2004). For a summary of the case, see K Gray & SF Gray *Elements of land law* (5th ed 2009) 127-128; A Goymour "Proprietary claims and human rights – a 'reservoir of entitlement'?" (2006) 65 *Cambridge LJ* 696-720 700.

[188] L Fox *Conceptualising home: Theories, laws and policies* (2007) 503-504.

which the proportionality test would fail.[189] As the ECtHR later decided, the need for a proportionality test and procedural safeguards is not limited to gypsies.[190] According to Gray and Gray the decision in *Connors* seems to imply that *Qazi* was decided wrongly and that the article 8 proportionality test remains applicable.[191]

5 3 2 4 House of Lords in Kay/Price

The inconsistencies between the approaches adopted in *Connors* (ECtHR) and *Qazi* (House of Lords) became evident in a case decided by the Court of Appeal, namely *Price v Leeds City Council*.[192] The court held that the decision in *Connors* was clearly in conflict with the approach taken in *Qazi*, where it was held that

> "the exercise by a public authority of an unqualified proprietary right under domestic law to repossess its land will never constitute an interference with the occupier's right to respect for his home, or will always be justified under Article 8(2)."[193]

The Court of Appeal held, on the authority of *Connors*, that the questions of justification and proportionality must be considered under article 8, even if the party who seeks possession has an absolute right to such possession under domestic law.[194] Nevertheless, the court decided to follow the House of Lords' approach in *Qazi* because of the precedent it set, but granted leave to appeal so that the House of Lords could reconsider the matter and accept or reject the approach in *Connors*. In a second Court of Appeal case, *Kay v London Borough of Lambeth*,[195] the court also decided not to follow the ECtHR decision in *Connors* because it deemed that case to apply only in the gypsy context.

Therefore, the matter once again reached the House of Lords in the conjoined appeals of *Kay v London Borough of Lambeth* and *Leeds City Council v Price*[196] ("*Kay/Price*"). Although these cases dealt with repossession of property belonging to local authorities, the court commented that its decision as regards the impact of article 8 will have a broader

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189 *Connors v United Kingdom* (App No 66746/01) Eur Ct HR (2004) para 92.
190 *McCann v United Kingdom* [2008] LGR 474 paras 49 and 50, discussed in 5 3 2 5 below.
191 K Gray & SF Gray *Elements of land law* (5th ed 2009) 128.
192 [2005] EWCA Civ 289.
193 *Price v Leeds City Council* [2005] EWCA Civ 289 para 26.
194 Para 29. See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 504-505.
195 [2004] EWCA Civ 926.
196 [2006] UKHL 10. For discussions, see K Gray & SF Gray *Elements of land law* (5th ed 2009) 128-131; L Fox *Conceptualising home: Theories, laws and policies* (2007) 505-518; A Goymour "Proprietary claims and human rights – a 'reservoir of entitlement'?" (2006) 65 *Cambridge LJ* 696-720 698-708.

impact, possibly on all recovery-of-possession cases.[197] The House of Lords conceded that an eviction constitutes a violation of the occupier's right to respect for his or her home under article 8. However, the majority decided that a court has the power to assume for purposes of article 8(2) that domestic law has already struck the correct proportionate balance between the competing interests. The entire court agreed that in most cases the claimant's (a local authority landlord in this case) entitlement to possession in terms of domestic law will automatically provide the justification prescribed by article 8(2). It is not necessary for the claimant to plead and prove from the outset that its possession is justified.[198]

The minority was of the opinion that the occupant must have a fair opportunity to argue that the requirements of article 8(2) had not been met on the facts of the case. Therefore, if an occupier wants to raise a defence based on article 8, he or she must do so and the defendant must then rebut such claim to the extent necessary.[199] The minority argued that this approach would not be burdensome on the defendant and, in fact, the defence will often be futile.[200]

However, the majority held that it is not necessary to afford occupiers this opportunity to claim defences based on article 8 in every individual case. In other words, a defence based on no more that the occupier's personal circumstances cannot succeed.[201] It would only be in highly exceptional circumstances that article 8 can provide occupiers with a defence.[202] The court would only consider article 8 and conduct a proportionality test if an article 8 violation is "seriously arguable".[203] Therefore, the majority decided that it was possible to attack the legal rules themselves by arguing that they violate article 8, but that it was not possible to use article 8 to challenge the outcome of individual cases based on the circumstances of that case. The argument was that if the rules conform to article 8, the application of such rules to individual cases will by necessary implication also comply.[204]

Even though the court's interpretation of article 8 was quite restrictive and the defences based on it failed in *Kay/Price*, the court modified its approach in *Qazi* to a certain extent. As Fox explains,

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[197] *Kay v London Borough of Lambeth* and *Leeds City Council v Price* [2006] UKHL 10 para 64.
[198] Para 29.
[199] Para 29.
[200] Para 29.
[201] Para 172.
[202] This summary of the court's decision is based on discussions by L Fox *Conceptualising home: Theories, laws and policies* (2007) 506-509; A Goymour "Proprietary claims and human rights – a 'reservoir of entitlement'?" (2006) 65 *Cambridge LJ* 696-720 701-703.
[203] *Kay v London Borough of Lambeth* and *Leeds City Council v Price* [2006] UKHL 10 paras 39, 56 and 110.
[204] See A Goymour "Proprietary claims and human rights – a 'reservoir of entitlement'?" (2006) 65 *Cambridge LJ* 696-720 703.

> "[e]ven if the individual circumstances of the occupier could not be taken into account, the views of the majority in *Kay* and *Price* permitted that the overall balance struck by a legal provision or, indeed, a common law doctrine could – at least in principle – be called into account under Article 8."[205]

According to Bright, the decision in *Kay/Price* makes it clear that a possessory action does involve interference with the right to respect for one's home, even when there is no lawful right to occupy.[206] However, the claimant's lawful right to recover possession will usually justify any interference with article 8.

There is also some scepticism as to whether *Kay/Price* will make any real difference with respect to article 8's impact to mortgage cases. For instance, Gray and Gray[207] regard this decision of the House of Lords as unlikely to improve the legal position taken in *Qazi*,[208] namely that article 8 of the Convention cannot be used as a defence against contractual or proprietary rights to possession that are well established under municipal law. However, the authors doubt whether English law will be able to continue to resist "the rejuvenating force of 'new equity' based on Convention standards".[209]

5 3 2 5 European Court of Human Rights in McCann *and House of Lords in* Doherty

In a more recent case, the ECtHR in *McCann v United Kingdom*[210] ("*McCann*") again emphasised the need for balancing to take place before a home is lost.[211] The court said that

> "the loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his right of occupation has come to an end ..."[212]

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[205] L Fox *Conceptualising home: Theories, laws and policies* (2007) 509, with reference to *Kay v London Borough of Lambeth* and *Leeds City Council v Price* [2006] UKHL 10 paras 110, 185 and 198.
[206] S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 14-40 18, citing *Kay v London Borough of Lambeth* and *Leeds City Council v Price* [2006] UKHL 10 para 465.
[207] K Gray & SF Gray *Elements of land law* (5th ed 2009) 771. See also 131.
[208] [2004] 1 AC 983 paras 135 and 149.
[209] K Gray & SF Gray *Elements of land law* (5th ed 2009) 131.
[210] [2008] LGR 474.
[211] S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 14-40.
[212] *McCann v United Kingdom* [2008] LGR 474 para 50, as quoted by S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 14-40 18-19.

Despite this insistence of the ECtHR that a proportionality test must be applied before homes are lost, English courts remained reluctant to consider personal circumstances under the umbrella of human rights.[213] For example, in *Doherty v Birmingham City Council*[214] the House of Lords displayed "judicial discomfort" with the stance taken in *McCann*.[215] In fact, the court in *Doherty* effectively ignored the approach followed in *McCann*,[216] probably because *McCann* was delivered between the hearing and delivery of judgment in *Doherty*. The court sidestepped the approach in *McCann* by stating that the ECtHR did not fully understand English domestic conditions, neither did it provide proper guidelines as to which procedural safeguards would be adequate.[217] The matter was referred back to the county court, where a judicial review of the local authority's decision had to be conducted.

5 3 2 6 European Court of Human Rights in the Austrian case of Zehentner

Concerning Austrian law, an interesting decision was made by the ECtHR in *Zehentner v Austria*[218] ("*Zehentner*"), a case that is comparable to the South African Constitutional Court's judgment in *Jaftha*.[219] A vulnerable woman who suffered from mental incapacity lost her flat as a result of recovery of a relatively small, unsecured debt. The ECtHR found that the Austrian process for recovering relatively small debts was incompatible with Article 8. The court once again emphasised the importance of procedural safeguards, which were lacking in this case.

Nield argues that *Zehenter* is significant for English law for a number of reasons.[220] Firstly, article 8 was applied to a dispute between private parties, namely the occupier/debtor and her creditors, who used the judgment execution process against her home. Secondly, the

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[213] S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 14-40 19.
[214] [2008] UKHL 57.
[215] S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 14-40 19.
[216] S Nield "Clash of the titans: Article 8, occupiers and their home" in S Bright (ed) *Modern studies in property law* Vol 6 (2011) 101-129 116.
[217] *Doherty v Birmingham City Council* [2008] UKHL 57 paras 20 and 82-22; S Nield "Clash of the titans: Article 8, occupiers and their home" in S Bright (ed) *Modern studies in property law* Vol 6 (2011) 101-129 116.
[218] (App No 20082/02) Eur Ct HR (2009). My summary of this case is based on S Nield "Clash of the titans: Article 8, occupiers and their home" in S Bright (ed) *Modern studies in property law* Vol 6 (2011) 101-129 112-113.
[219] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC), discussed in 3 2 2 above.
[220] S Nield "Clash of the titans: Article 8, occupiers and their home" in S Bright (ed) *Modern studies in property law* Vol 6 (2011) 101-129 113, with reference to *Zehentner v Austria* (App No 20082/02) Eur Ct HR (2009) paras 61 to 65.

ECtHR acknowledged that "the protection of creditors through the enforcement of judgement debts was a legitimate aim which could be justified under Article 8".[221] However, the court emphasised that the problem in this case was proportionality, in other words the relationship between the legitimate goal and the means used to achieve that goal. In the Austrian case, the procedure allowed for strict time limits in which the debtor could defend her case. Since these time limits were too strict, they were not justified by the goal of promoting an efficient enforcement process. Where debtors are vulnerable (for example, mentally weak) the state has a positive duty to provide specific protection for such persons.

Despite the fact that *Zehentner* was decided with reference to the Austrian context rather than English law, it is interesting on a more general level. The case illustrates the ECtHR's willingness to apply article 8 and its proportionality test to conflicts between debtor/occupiers and creditors. Therefore, it is unlikely that English courts can continue to deny the role of article 8 in cases where homes are lost due to the enforcement of debt. Nevertheless, one can predict that English courts will easily assume that the enforcement of debt is a legitimate aim, which will generally justify interferences with debtors' rights to respect for their homes. Whether courts will proactively apply a test concerning the proportionate balance between the legitimate aim and the impact of debt enforcement is, however, unclear. In light of the following cases, English courts might be willing to apply a proportionality test in highly exceptional cases – perhaps also in the mortgage context.

5 3 2 7 United Kingdom Supreme Court in Pinnock *and* Powell

Despite initial resistance, in 2011 the United Kingdom Supreme Court (formerly the House of Lords) delivered a decision that allows more scope for article 8 in the context of evictions by local authorities. In *Manchester City Council v Pinnock*[222] ("*Pinnock*") the court recognised the need for English courts to stop resisting the clear stance adopted by the ECtHR.[223] The effect of this decision is that English courts now have the power to review local authorities' decisions to evict in conflict with article 8 and to make their own assessment as to the proportionality of the eviction.[224] In addition, the court held that article 8 should no longer be

[221] S Nield "Clash of the titans: Article 8, occupiers and their home" in S Bright (ed) *Modern studies in property law* Vol 6 (2011) 101-129 113.
[222] [2010] UKSC 45. My discussion of this case is largely based on the summary by A Goymour "Possession proceedings and human rights – the final word?" (2011) 70 *Cambridge LJ* 9-12. See also T Powell *Mortgage possession proceedings* (2012) 161-164.
[223] *Manchester City Coucil v Pinnock* [2010] UKSC 45 para 48.
[224] A Goymour "Possession proceedings and human rights – the final word?" (2011) 70 *Cambridge LJ* 9-12 10.

confined to exceptional cases, but courts should test the eviction's proportionality whenever the occupier raises article 8.[225]

The court gave some guidance as to how individual evictions should be measured against article 8. The "unencumbered property rights" of the local authority and its "right – indeed the obligation ... to decide who should occupy its residential property" are two factors that weigh heavily in favour of the local authority.[226] Accordingly, as Goymour comments, repossessions by local authorities will almost always comply with article 8.[227] The big step forward in this case was that the court acknowledged that the occupier's personal circumstances may in some cases lead to a different outcome, for instance, in cases of special vulnerability.[228]

The fact that courts should consider article 8 in eviction cases might have created practical risks. Firstly, this approach may unduly burden county courts that hear possession cases and, secondly, existing property rights may be destabilised if occupiers rely on article 8. It seems that these considerations may have been among the reasons why the House of Lords previously resisted the influence of article 8. However, the Supreme Court in *Pinnock* addressed both these hazards. Concerning the first risk, the court held that article 8 should only be considered if the occupier raises it and, therefore, the court would not have to automatically consider it in every case.[229] The second risk was avoided by the court's affirmation that property rights will carry a significant weight during the proportionality test. In effect, article 8 will only prevent the enforcement of existing property rights if such enforcement would exploit the vulnerability of others.

Goymour mentions that this approach strikes "an eminently sensible balance between an authority's property rights and an occupier's rights under Article 8".[230] However, it is important to consider that the court expressly limited its decision to possession proceedings

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[225] *Manchester City Coucil v Pinnock* [2010] UKSC 45 para 51.
[226] Para 54.
[227] A Goymour "Possession proceedings and human rights – the final word?" (2011) 70 *Cambridge LJ* 9-12 11.
[228] *Manchester City Coucil v Pinnock* [2010] UKSC 45 para 53.
[229] This principle is similar to the one implied by the rule of practice that the SCA introduced in the South African case of *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA), discussed in 3 2 3 2 above. Mortgagees must inform mortgagors of their right to bring information to the court if they wish to challenge the foreclosure in terms of the housing clause (s 26). Only if such information is brought will the court consider whether s 26 was unjustifiably infringed. Also under HCR 46, courts will probably only take such relevant circumstances into consideration as the debtor provides it with. Nevertheless, some South African courts have exhibited more lenience in this respect, sometimes not holding it against vulnerable debtors if they did not defend the case properly: For example, see *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ), discussed in 4 3 4 7 above.
[230] A Goymour "Possession proceedings and human rights – the final word?" (2011) 70 *Cambridge LJ* 9-12 11.

brought by local authorities.[231] Moreover, in this case the court held that the particular eviction was in fact proportionate. One will have to see whether the court will eventually expand this approach to possession disputes between private parties. At least this judgment introduces the possibility to present similar arguments in creditor-occupier disputes. As Nield comments,

> "*Pinnock* may have resolved the clash [between the House of Lords and the ECtHR] but in so doing it opens the door on a wholesale reassessment of the compatibility of repossession proceedings affecting the home. As such, it is a landmark decision."[232]

Even so, despite the progressive step taken in *Pinnock*, the court seemed to have retracted the practical application of this position somewhat in *London Borough of Hounslow v Powell; Leeds City Council v Hall; Birmingham City Council v Frisby*[233] ("*Powell*"). Cowan and Hunter contrast the two decisions, stating that *Pinnock* was framed in positive terms, whereas *Powell* was framed in negative terms.[234] In *Pinnock* the court introduced a proportionality-based test, whereas in *Powell* it narrowed the scope of application of this defence to an "uncertain, but constricted, band of occupiers".[235]

The court in *Powell* expressed the opinion that it would have to be a "very highly exceptional" case before a court will even consider a proportionality argument.[236] This qualification was introduced despite the fact that the court in *Pinnock* earlier held that exceptionality is not a proper test.[237] In neither of the cases could the court provide examples of circumstances that would lead to an eviction being regarded as disproportionate.[238] The only guidance *Powell* gave was that disproportionality might be arguable if the occupier used to be homeless and would again face homelessness if evicted.[239] Hence, the fact that

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[231] *Manchester City Coucil v Pinnock* [2010] UKSC 45 para 50.
[232] S Nield "Clash of the titans: Article 8, occupiers and their home" in S Bright (ed) *Modern studies in property law* Vol 6 (2011) 101-129 129. See also T Powell *Mortgage possession proceedings* (2012) 161.
[233] [2011] UKSC 8.
[234] D Cowan & C Hunter "'Yeah but, no but' – *Pinnock* and *Powell* in the Supreme Court" (2012) 75 *MLR* 78-121 78-79.
[235] 78-79.
[236] *London Borough of Hounslow v Powell; Leeds City Council v Hall; Birmingham City Council v Frisby* [2011] UKSC 8 paras 35 and 92.
[237] *Manchester City Coucil v Pinnock* [2010] UKSC 45 para 51.
[238] D Cowan & C Hunter "'Yeah but, no but' – *Pinnock* and *Powell* in the Supreme Court" (2012) 75 *MLR* 78-121 83.
[239] *London Borough of Hounslow v Powell; Leeds City Council v Hall; Birmingham City Council v Frisby* [2011] UKSC 8 para 66.

occupiers are vulnerable seems to be the only clear guiding factor that may lead a court to consider proportionality.[240]

Therefore, although *Pinnock* opened the door to consider proportionality,[241] *Powell* restricted its ambit when faced with the practical implications of this test.[242] This later case illustrates the practical difficulties of trying to find personal circumstances that might outweigh the absolute proprietary rights (and obligations) of parties like local authority landlords. Exceptional vulnerability seems to be the only possible factor that can cause courts to even consider the proportionality aspect.[243]

5 3 3 Remarks

The foregoing discussion of English and ECtHR cases illustrates that "[t]he state of the Article 8 jurisprudence is unclear"[244] and that these cases "are by no means the last word on the subject".[245] In fact, article 8 has had relatively little impact on the actual outcome of possession cases.[246] Despite the more accommodating stance taken by the ECtHR in *McCann*, it seems that, in the words of Bright, "a direct human rights challenge to possession is unlikely to succeed in English law".[247] As Nield explains it,

> "[t]he recognition that Article 8 dictates an appropriate forum and opportunity for the respect due to an occupier's home to be weighed, within the proportionality balance, against legal rights to possession is a message that the House of Lords has found difficult to swallow."[248]

Even in *Pinnock*, where the English court aligned its approach with that of the ECtHR, it was held that the particular eviction was proportionate and, consequently, complied with article 8. Moreover, the emphasis on existing property rights as a factor that weighs heavily in favour of claimants (such as local authorities) remains. One can expect that this argument will also

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[240] D Cowan & C Hunter "'Yeah but, no but' – *Pinnock* and *Powell* in the Supreme Court" (2012) 75 *MLR* 78-121 84.
[241] T Powell *Mortgage possession proceedings* (2012) 164.
[242] D Cowan & C Hunter "'Yeah but, no but' – *Pinnock* and *Powell* in the Supreme Court" (2012) 75 *MLR* 78-121 84.
[243] T Powell *Mortgage possession proceedings* (2012) 163.
[244] S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 14-40 20.
[245] D Cowan & C Hunter "'Yeah but, no but' – *Pinnock* and *Powell* in the Supreme Court" (2012) 75 *MLR* 78-121 79.
[246] S Bright "Dispossession for arrears: The weight of home in English law" in L Fox O'Mahony & JA Sweeney (eds) *The idea of home in law – displacement and dispossession* (2011) 14-40 20.
[247] 18.
[248] S Nield "Clash of the titans: Article 8, occupiers and their home" in S Bright (ed) *Modern studies in property law* Vol 6 (2011) 101-129 118.

play a role in possession disputes between private parties (should article 8 arguments be allowed at all). For example, since the mortgagee has a proprietary right in the debtor's land, courts will almost certainly acknowledge that such a factor outweighs the home interest and, therefore, justifies interferences with article 8.

Although, in principle, personal circumstances can (since *Pinnock*) play a greater role, we are (to my knowledge) yet to see instances where such circumstances actually outweigh existing property rights. As *Powell* illustrates, the proportionality test approved in *Pinnock* will only have an impact in cases with highly exceptional circumstances. It would have to be a case of severe vulnerability and where there is proof that the creditor's insistence on repossession is aimed at exploiting the situation. This position does not seem far removed from the general proposition in South African law, namely that mortgages will usually be enforced unless there is an abuse of the process (or bad faith).

It is pertinent to consider that none of the cases discussed here (except *Wood*, referred to in the discussion on *Qazi*) were mortgage cases. The only other one that related to debt enforcement by execution against a home was the Austrian case of *Zehentner*. Accordingly, it seems unlikely that an article 8 defence will render much assistance to English mortgagors. Nonetheless, in principle the proportionality test should be available in cases where mortgagor/occupiers bring arguments in that regard. If the line of English cases described here is anything to go by, mortgagors would have to prove that their circumstances are highly exceptional and that they are themselves vulnerable in some way or another.

Irrespective of the fact that these judgments are not directly applicable to mortgage cases, they are interesting because of the analogies that can be drawn between landlord-tenant evictions and mortgage repossessions. Any proportionality test that one might apply to these cases will entail similar factors. In both situations the claimants are relying on their proprietary and contractual entitlement (under domestic law) to immediately take possession of the property. In both scenarios the occupiers face the loss of their homes and, hence, an interference with the right of respect for their home.

Accordingly, on a general level, both examples illustrate the tension between the easily quantifiable proprietary and contractual rights of one party and the human rights based home interest of the other. The proportionality test – and particularly the place of personal circumstances in this test – seems to be the main point of contention. Courts are in principle willing to apply it, but only in highly exceptional situations. However, it is unclear whether

there will ever be a case (outside the ambit of exceptionality) where the occupier's personal circumstances indicate a lack of proportionality, at least to the extent that a court will refuse to grant the possession order.[249]

5 4 Conclusion

For comparative purposes, the primary conclusion that South African lawyers can draw from the English experience is that South African law is not behind in the area of protection for homes in mortgage foreclosure situations. In fact, the developments in the South African system are quite progressive when compared to the resistance that English courts have displayed against the influence of the housing right as a human right.

Firstly, judicial oversight is obligatory in all South African cases where the debtor is faced with the loss of his or her home. This is not necessarily always the case in English law, where it is still theoretically possible to take possession of a mortgaged home without a court order.[250] Moreover, out-of-court sales are still the norm in English law.[251]

As a result of section 26 of the Constitution, South African law acknowledges with less discomfort that the landlord or mortgagee does *not* have an absolute claim based on its proprietary and contractual rights. In addition, it is generally accepted in South African constitutional law that section 26 rights may only be limited if such a limitation is justified under section 36 of the SA Constitution. This justification process entails a proportionality test, which courts must apply when faced with infringements of section 26. Conversely, from the cases discussed in 5 3 2 above it is clear that English law has not completely embraced the proportionality standard, at least not on a practical level.

English courts are also less willing than their South African counterparts to even acknowledge the possibility that lawful proprietary and contractual rights might sometimes have to be compromised in favour of sympathy for occupiers' personal circumstances. Even though (since *Pinnock*) the door is now a little more open to allow article 8 to have an impact in extraordinary English cases, the window of opportunity is still very small. In contrast, South African courts seem to be more willing to accept that housing rights may lead them,

[249] In the South African context examples of disproportionality would be cases like *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) (see 3 2 2 above); *ABSA Bank Ltd v Ntsane and Another* 2007 3 SA 554 (T) (see 4 4 3 2 above); *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 1 SA 143 (GSJ) (see 4 3 4 7 above).
[250] See 5 2 2 1 above.
[251] See 5 2 3 1 above.

under appropriate circumstances, to deny claims for direct execution against homes. As a South African judge recently stated, direct execution against a home is "not there for a take".[252] In my assessment of English cases it seems that English judges will probably still say the opposite.

English courts have the discretion to postpone or adjourn possession proceedings if there is a reasonable prospect that the debtor will be able to rectify the arrears within a reasonable time.[253] Under suitable circumstances this discretion is a powerful tool that courts can use to protect debtors from losing their homes. It is comparable to the discretion that South African courts have under High Court Rule 46, namely to grant execution orders only after they have considered all the relevant circumstances. However, in English law it is clear that the discretion is limited to financial considerations. Even though it is not expressly stated, this also seems to be the case in South African law. If the financial circumstances of a case do not indicate that it is feasible to prevent the sale of the home, the execution order will be granted despite the fact that it may lead to homelessness.

As yet, I am unaware of any indications that English courts would be willing to use article 8 to inform their interpretation and application of the statutory discretion to stay mortgage possession proceedings. Although South African courts have a wider discretion based on human rights principles (since High Court Rule 46 was inspired by section 26), they have not found a way either to protect home interests under circumstances where there is no other way to satisfy the creditors' rights but for selling the home. Of course, the National Credit Act 34 of 2005 provides progressive and interesting ways to protect both parties' interests in a balanced way.[254] As I argue in this dissertation, there is room to further develop the influence of consumer credit law in the realm of mortgage enforcement, since courts do not always make proper use of it. The South African legislative initiatives (such as the National Credit Act and High Court Rule 46) at least illustrate a commitment to find creative alternatives to prevent the loss of homes.[255] Nevertheless, both systems are faced with the reality that creditors' rights need to be enforced and can only be postponed to a limited extent.

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[252] *Changing Tides 17 (Pty) Ltd NO v McDonald and Another* (22859/09) [2011] ZAGPPHC 106 (5 May 2011) para 10 per Mavundla J.
[253] S 36 of the AJA. See 5 2 2 4 above.
[254] See ch 4 above.
[255] See also the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998.

It will be interesting to see how English law develops as a result of a greater propensity to apply proportionality-type tests in terms of article 8 when occupiers present personal circumstances to support arguments against them losing their homes. It will also be intriguing to see whether English courts and academics will draw from the South African example.

In conclusion, as I argue here, South African judges are more willing to accept that the human right of access to housing may stand in mortgagees' way than their English counterparts. However, even in South African jurisprudence there has been very few examples of instances where debtors' personal circumstances induced courts to deny mortgagees' claims based on disproportionality.[256] Instead, during the balancing test the mortgagees' proprietary and contractual rights remain strong and continue to be the point of departure for adjudicating mortgage cases. The English and South African positions are similar in this regard. This state of affairs proves that South African law is not alone in the difficulties it faces when trying to protect the homes of the vulnerable, while at the same time trying to maintain the efficiency of the mortgage system. Therefore, finding the proper balance is an universal challenge.

[256] An example of a case where a proportionality-type test could have been done is *FirstRand Bank Ltd v Meyer and Another* (3483/10) [2011] ZAECPEHC 8 (17 March 2011), discussed in 4 4 5 above.

CHAPTER 6
THE PROPERTY CLAUSE

6 1 Introduction

With respect to the recent developments in the law of mortgage foreclosure as a result of the home interest issues, very little (if anything) has been written or said about the role of section 25 of the Constitution of the Republic of South Africa 1996 ("the Constitution") – the property clause.[1] The first subsection provides that

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

The lack of constitutional property discussion surrounding mortgage foreclosure is somewhat surprising, since it is clear that there are various property rights involved in the mortgage relationship and that they are all affected by the regulation of foreclosure law. My hypothesis is that the interests of both parties can be safeguarded and balanced with reference to the property clause. Moreover, in this chapter I argue that section 25 provides a foundation for explaining the way that the various interests interact and for when the law does (or should) allow the sale in execution of a debtor's home. The section 25 analysis also affords certainty on the question how home interests should be protected in a way that does not unjustly infringe on the rights of creditors and ensures a fair balance between the rights of creditors and those of homeowners.

There have been examples of sale-in-execution cases in which section 25 was raised, but only at the appeal stage. Therefore, the courts decided not to base their judgments on a clause that has not been dealt with by the courts of lower instance. When the property clause was raised in the Constitutional Court ("the CC") in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*[2] ("*Jaftha*"), the court decided not to consider the property clause for this very reason and because section 26 provided a sufficient answer in that case. In this regard Mokgoro J commented that

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1 One exception is AJ van der Walt *Constitutional property law* (3rd ed 2011) 302-308, who discusses the restrictions on foreclosure in light of s 25.

2 2005 2 SA 140 (CC) paras 20 and 22.

> "[t]he structure of s 25(1) and its protection of ownership, as well as the uncertainty about the scope of the negative obligation in terms of s 26, mean that s 25(1) could add a new dimension to this case."[3]

This "new dimension"[4] is one of the aspects I explore in this chapter. The CC in *Jaftha* acknowledged that in light of the uncertainties surrounding the scope of section 26, a section 25(1) analysis might be valuable.[5] In *Gundwana v Steko Development and Others*[6] ("*Gundwana*") the CC expressed no opinion as to whether section 25(1) of the Constitution had any application in that matter and found it unnecessary to make such an enquiry. Even though it is now accepted that section 26(1) also entails a negative obligation (even on private parties such as mortgage creditors),[7] this is still a somewhat uncomfortable interpretation of section 26(1). The negative obligation of private parties is not expressly stated and, read with section 26(2), it is clear that section 26(1)'s primary purpose is to place a positive obligation on the *state*. Be that as it may, and even though I accept the negative obligation imposed by section 26(1), the express negative obligation under section 25(1) to not arbitrarily deprive people of "property" – or "ownership", according to Mokgoro J[8] – is much clearer. Consequently, this chapter sets out to evaluate the same issues that came to light and were addressed under section 26, but from the perspective of section 25.

In 6 2 below a general overview of the property clause is provided, as well as the methodology prescribed by the CC for conducting property disputes. In 6 3 below I analyse whether the principles surrounding mortgage foreclosure and sale in execution comply with section 25 of the Constitution – more specifically, whether the law that regulates foreclosure permits arbitrary deprivation of property. In 6 4 below, I explain the impact that the National Credit Act 34 of 2005 ("the NCA") has on the property analysis. I use the property clause to establish where the balance should lie between the protection of credit consumers and credit providers. In this chapter I consequently analyse the position of both parties to the dispute on the basis of section 25.

Whereas the protection provided in section 26 is aimed at home interests and not specifically property, section 25 covers all forms of property. The fact that such property is also a home does not necessarily influence the section 25 analysis, although it could be a

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3 Para 22.
4 Para 22.
5 Para 22.
6 2011 3 SA 608 (CC) para 51.
7 See 3 3 3 above.
8 *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 22.

factor.[9] The section 25 analysis can be extended beyond the question of selling residential property in execution of overdue debts. It can include the entire field of selling (any) property against the owner's will for the purpose of enforcing another person's claim for the repayment of debt, including unsecured debts – in other words, where the property in question is not burdened with a limited real right in favour of the creditor. Nevertheless, for present purposes the focus will remain on the residential mortgage loan scenario. It is section 26 and the questions surrounding the protection of homes that caused uncertainty and controversy in recent years. The section 25 analysis consequently runs parallel to the section 26 analysis in chapter 3 and parts of chapter 4 above. More specifically, this dissertation argues that both sections 25 and 26 play a role when interpreting and applying the NCA and that the constitutional provisions should, hence, not be applied in isolation of the NCA mechanisms.

6 2 The property clause in general

6 2 1 Structure and purpose of section 25[10]

The constitutional protection of property differs from the private law protection of property. The purpose of the constitutional property clause is not to guarantee or insulate existing property interests against all interferences but to establish and maintain a balance between, on the one hand, individually vested rights and, on the other hand, the public interest in the regulation of property.[11] Individual interests must be subject to controls, regulations, restrictions, levies, deprivations and changes that promote or protect legitimate public interests. Although this state of affairs will sometimes have a serious and negative impact on property holders, they will generally not receive compensation for these infringements.[12]

The property clause can be divided into two seemingly contradictory parts.[13] Firstly, it aims to protect existing property interests and, secondly, it provides authority for land and

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9 See AJ van der Walt *Constitutional property law* (3rd ed 2011) 245 n 165.
10 In general, see AJ van der Walt *Constitutional property law* (3rd ed 2011) 12-79; T Roux & D Davis "Property" in H Cheadle *et al* (eds) *South African constitutional law: The Bill of Rights* (2nd ed RS 10 2011) 20-6 - 20-10; T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-2 - 46-5.
11 AJ van der Walt *Constitutional property law* (3rd ed 2011) 91.
12 91.
13 12ff.

other related reforms.[14] This structural tension must be understood correctly if the property clause is to be properly applied, since – as Van der Walt explains – the property clauses "serves both a protective and a reformative purpose".[15] Therefore, this tension must be kept in mind also during my analysis of mortgage foreclosure in terms of the property clause. Consequently, I assume that section 25 will both protect the property interests involved in mortgage foreclosure cases, while at the same time not inhibiting regulatory and reform initiatives undertaken for consumer protection and socio-economic aims. Section 25 also does not insulate vested proprietary interests from the influence of the housing clause[16] or the consumer credit law.[17]

The CC has confirmed that section 25 should be interpreted purposefully, with regard to its historical context and constitutional purpose.[18] In order to accomplish this, the dual structure and purpose of section 25 must be understood.[19] All legislation promulgated to give effect to section 25, as well as legislation that is related to the functions of section 25, should be interpreted and applied in this manner. As a result, all acts of parliament that have a

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[14] Subss (1) to (3) contain the first part and subss (4) to (9) the second. S 25 consists of four clusters of provisions. Subs (1) deals with deprivation, subss (2) and (3) with expropriation, subs (4) with interpretation, and subss (5) to (9) with land and other related reforms. These can accordingly be divided into two main parts, entailing the protective and reform purposes of the property clause. The first part (subss (1) to (3), read with subs (4)) is aimed at protecting existing property rights against unconstitutional interference. Deprivations and expropriations of property may, accordingly, only take place in line with the requirements laid down in s 25(1) (deprivation) and s 25(2) and (3) (expropriation). The second part of the section – subss (5) to (9), also read with subs (4) – is aimed at legitimising and promoting land and related reforms. This second part can be said to include the reform or development of the common law of property in terms of s 39(2) of the Constitution: See AJ van der Walt *Constitutional property law* (3rd ed 2011) 16-22.

[15] AJ van der Walt *Constitutional property law* (3rd ed 2011) 13.

[16] See 7 3 3 below.

[17] See 6 4 below as well as ch 4 above.

[18] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 47-50; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 14-23; *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 6 SA 391 (CC) para 48; *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) paras 47-50.

[19] Even though the first and second part of s 25 (protection and reform) may seem to be in conflict with each other, AJ van der Walt *Constitutional property law* (3rd ed 2011) 22 explains that it is both necessary and possible to read the section "as a coherent whole that embodies a creative tension within itself, without being self-conflicting or contradictory". For this reading to be done successfully, a purposive approach to the interpretation of s 25 is necessary, namely "as a coherent whole, within its historical and constitutional context": See Van der Walt (at 22), with reference to *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC). Therefore, any problem that emanates from the tension within s 25 can be solved by purposefully interpreting the property clause: See Van der Walt (at 29). It is the general trend to interpret constitutional provisions purposefully. To summarise, in the words of Van der Walt (at 34),

> "[t]he most sensible and legitimate interpretation of section 25 is therefore one that allows (and actually obliges) the courts to strike an equitable balance between the protection of existing rights and the public interest (which includes land reform goals)."

regulatory impact on property relationships should be interpreted within the framework of section 25. The non-arbitrariness test, which I explain below,[20] should for that reason serve to strike "a fair balance between the individual property interests affected by regulatory action and the public interest in regulating property in the particular context".[21]

6 2 2 Application of section 25[22]

Section 25(1) provides that no one may be deprived of property, save in terms of "law of general application". Furthermore, no "law" may permit arbitrary deprivation of property. Therefore, the deprivation must be authorised by some source of law that specifically or generally provides for and results in the regulation of property rights. The way that the property clause is phrased in this respect is important because it indicates how the subsection should be applied. The "law of general application" requirement is a formal threshold prerequisite.[23] The court should first enquire whether the law in fact authorises the deprivation that is challenged – in other words, whether the deprivation in its disputed form was foreseen and authorised in the empowering law.[24] If the deprivation in question is not authorised by "law of general application", it is for that reason unconstitutional and it is accordingly unnecessary to apply the arbitrariness test.

All "law" is prohibited from permitting arbitrary deprivation of property. This construct of the prohibition is important for the constitutional property challenge because, when a property holder alleges that someone deprived him or her of property, such party must challenge the specific "law" that permitted the deprivation. The validity of a deprivation depends on the law that authorises it and not the act of deprivation itself.[25] Therefore, the specific action that effected the deprivation should not be challenged as amounting to arbitrary deprivation of property. The reason for this is that section 25(1) does not proscribe

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[20] See 6 2 3 2 below.
[21] AJ van der Walt *Constitutional property law* (3rd ed 2011) 54.
[22] On the application of the Bill of Rights in general, see S Woolman "Application" in S Woolman *et al* *Constitutional law of South Africa* Vol 2 (2nd ed OS 2005) ch 31. On the application of s 25, see AJ van der Walt *Constitutional property law* (3rd ed 2011) 56-72. See also AJ van der Walt "Transformative constitutionalism and the development of South African property law: Part 1" 2005 *TSAR* 655-689; AJ van der Walt "Transformative constitutionalism and the development of South African property law: Part 2" 2006 *TSAR* 1-31; AJ van der Walt "The state's duty to protect property owners vs the state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *SAJHR* 144-161; AJ van der Walt "Normative pluralism and anarchy: Reflections on the 2007 term" (2008) 1 *CCR* 77-128.
[23] See 6 3 4 1 below.
[24] AJ van der Walt *Constitutional property law* (3rd ed 2011) 237.
[25] 235; T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-21.

actions that amount to arbitrary deprivations. Instead, the subsection focuses on the "law of general application" that either regulates the property right or authorises the regulatory action that causes the deprivation. If a certain lawful action (in other words, regulatory action authorised by "law") results in the arbitrary deprivation of property, the law that authorised such action will either be unconstitutional or must be read down so as to not allow such actions. In what follows I firstly ask whether the constitutional provisions can apply between private parties in a private dispute and secondly whether the constitutional provisions can apply directly in any constitutional dispute.

The first question is whether section 25(1) of the Constitution can apply to private disputes like mortgage foreclosures. Section 8(1) of the Constitution provides that the Bill of Rights applies to all law and that it binds the legislature, the executive and the judiciary. This subsection provides for the direct vertical application of the Bill of Rights, in other words the protection of individuals against state power. However, in terms of section 8(2), the Bill of Rights does not only apply vertically, but also horizontally – that is, between private individuals.[26] It follows that section 25 applies not only between the state and private individuals, but can also apply between private individuals. Therefore, section 25(1) does not only protect individuals against arbitrary deprivations of property imposed by the state, but private individuals may also potentially rely on section 25(1) when alleging that another private party is depriving them of property in a private dispute.

What makes the foreclosure scenario interesting that it is not a dispute between a private individual and the state and, therefore, there is no question of vertical application. Yet, even though a foreclosure dispute is between two private parties, the actual enforcement of the judgment debt through sale in execution is effected by a state organ, namely the sheriff.[27] In this sense, there is a vertical relationship involved. However, the state is not a party to the dispute (in the conventional sense) but is involved so as to ensure the peaceful enforcement of private debts. Therefore, the state uses its power to coerce a transfer of property, not because it requires the property but because it has an obligation to ensure that this debt enforcement procedure is conducted in a civilised manner.[28] It is trite that the alternative (private sales in execution, *parate executie*) should not be allowed in the mortgage context.[29]

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[26] See I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 43ff.
[27] See 2 5 2 and 2 5 3 above.
[28] On the nature of this forced transfer of property, see 6 3 3 and 6 3 5 below.
[29] See 2 5 1 n 171 above.

Nevertheless, despite the direct state involvement in sale in execution process, foreclosure disputes are still ones of a horizontal nature, implying that the Bill of Rights can have an impact in the relationship between the parties. However, horizontal application of the Bill of Rights can be either direct or indirect. Direct horizontal application refers to the situation where one party can rely directly on a provision in the Bill of Rights as a cause of action or defence against another party. For example, the debtor may want to use section 25 as a direct and independent defence against the creditor's claim for foreclosure. In other words, a debtor might argue that the creditor is depriving him or her of his or her property and that the creditor's debt enforcement actions should be measured against the non-arbitrariness standard in section 25(1). Conversely, in the case of indirect horizontal application,

> "the cause of action or defence relies on the Constitution in such a way that the (statutory or common law) private law rules that actually govern the dispute are open to amendment or influence from the Constitution, even though a state threat against either party is not directly in issue."[30]

In terms of this approach, the debtor would not directly attack the creditor's actions, but would challenge the existing legal rules that permit the deprivation of property. It is accepted that the Constitution mostly impacts private law in an indirect fashion, in other words "via the so-called radiating (or, in a weaker version, indirect seepage) effect of constitutional principles and values".[31] Consequently, the effect of section 25 on private property law mostly consists of constitutionally-inspired interpretation of legislation as well as development of the common law. This kind of indirect application of section 25 is required by section 39(2) of the Constitution:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

In other words, when the court applies the various laws (whether statutory or common law) that permit deprivation of property, it must do so in a way that promotes (or gives effect to) section 25, which is part of the Bill of Rights.

Although I do not altogether deny the possibility of direct horizontal application, the section 25 analysis of my research question is limited to indirect horizontal application. The

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[30] AJ van der Walt *Constitutional property law* (3rd ed 2011) 59.

[31] 59. See also JWG van der Walt "Perspectives on horizontal application: *Du Plessis v De Klerk* revisited" (1997) 12 *SAPL* 1-31 16-17; JWG van der Walt "*Progressive* indirect horizontal application of the Bill of Rights: Towards a co-operative relation between common-law and constitutional jurisprudence" (2001) 17 *SAJHR* 343-361; S Woolman "Application" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2005) 31-46 - 31-49.

reason for this is that all the possible deprivations of property that may occur during foreclosures are governed and authorised by existing legal rules. Therefore, it is these rules ("law of general application") that must be measured against section 25, as the clause itself provides. The law of general application that regulates foreclosure and that I deal with in this chapter (and throughout this dissertation) is not one individual provision or principle of common law. Instead, I deal with a complex body of common law principles, procedural court rules and consumer protection legislation. Although I evaluate these laws individually, they can be seen as one system of principles that governs the enforcement of mortgage bonds, what Sachs J would call the "defined and carefully calibrated constitutional matrix".[32] I regard this system of laws as the law of general application that, in terms of section 25(1), may not permit arbitrary deprivation of either the debtor's or the creditor's property rights.[33]

If one considers the wording of section 25(1), it seems clear that indirect horizontal application of the constitutional principles is relevant to this body of law. Section 25(1)'s emphasis on the specific "law of general application" that permits the deprivation makes it highly unlikely that the section will ever apply directly horizontally. The subsection itself requires existing "law" to comply with the non-arbitrary deprivation standard. Moreover, the CC has already given a strong indication that a direct reliance on section 25(1) to protect private parties against each others' actions would not be possible.[34]

Considering the application of section 25 to mortgage foreclosure, it is important to refer to the subsidiarity principles that I discussed with reference to section 26 (in 3 5 above). The arguments I made there apply with respect to section 25 as well. To sum up, subsidiarity indicates that the common law may not be applied or developed without considering the effect of section 25 or applicable legislation. In addition, special constitutional remedies may not be developed for individual cases without first considering relevant legislation or the existing common law, which must respectively be interpreted and developed, where necessary, to give effect to the constitutional right in question. Therefore, it would not be possible to base a cause of action or defence on section 25 itself without challenging specific "law" in terms of the property clause. For the most part, these principles indicate that the constitutional analysis of foreclosure and execution principles will focus firstly on the correct interpretation of the applicable legislation, including court rules and practice, and secondly on the development of the uncodified common law principles of mortgage law. My general

[32] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 14.
[33] I discuss the "law of general application" requirement in more detail in 6 3 4 1 below.
[34] *Phoebus Apollo Aviation CC v Minister of Safety and Security* 2003 2 SA 34 (CC) para 4.

hypothesis is that the NCA (as interpreted through a constitutional lens) will give sufficient effect to section 25 in mortgage foreclosure cases. This chapter illustrates my arguments in this regard.

6 2 3 Methodology of the constitutional property challenge[35]

6 2 3 1 The FNB *logic*

In terms of the two-stage approach to constitutional litigation,[36] a litigant who claims protection under a provision in the Bill of Rights must, in the first stage, show that he or she is a beneficiary of that right and that the right had been limited. If this is proven, the opposing party has, during the second stage, the opportunity to show that such a limitation is justifiable under section 36 of the Constitution. I discuss the second stage of the enquiry as it relates to constitutional property law in 6 2 3 3 below. Concerning the beneficiary requirement, although juristic persons are not automatically entitled to the rights in the Bill of Rights,[37] the CC has accepted that juristic persons do enjoy the protection offered by section 25.[38] Hence, I assume that both the debtor and creditor can rely on section 25, as long as the other requirements of the section are met.

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[35] In general, see AJ van der Walt *Constitutional property law* (3rd ed 2011) 74-79; T Roux & D Davis "Property" in H Cheadle *et al* (eds) *South African Constitutional law: The Bill of Rights* (2nd ed RS 10 2011) 20-6 - 20-10; T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-2 - 46-5.

[36] *S v Makwanyane and Another* 1995 3 SA 391 (CC) paras 100-102. This approach comes from Canadian law: See T Roux & D Davis "Property" in H Cheadle *et al* (eds) *South African Constitutional law: The Bill of Rights* (2nd ed RS 10 2011) 20-6, citing the Canadian case of *R v Oakes* (1986) 26 DLR (4th) 200 223-224. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 74-75.

[37] S 8(4) of the Constitution provides that juristic persons are also entitled to the rights in the Bill of Rights "to the extent required by the nature of the rights and the nature of that juristic person". This implies that, at least in principle, juristic persons can claim protection under s 25: See T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-9.

[38] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 41-45, referring to the court's earlier decision in *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) para 57. The CC in *FNB* provided the following reasons for granting juristic persons protection under s 25: In the first place, individual persons' property rights can only be realised if protection is also extended to juristic persons. Secondly, it would lead to grave disruptions and undermine the fabric of the democratic state if juristic persons were denied protection under s 25. In other words, if the juristic entity that owns the hypothecated home is not protected against the arbitrary deprivation of its property, the person behind the juristic entity will also suffer gravely, which would not be justified. In my view, the same can be said for the shareholders of banks and investors in the financial markets, who will suffer severe deprivation of their assets if the corporate banks' property protection under s 25 is denied.

The CC in *FNB* particularised the two-stage approach and laid down a methodology for conducting constitutional property challenges.[39] Any challenge based on section 25 would, in terms of this approach, proceed according to a number of steps. Roux lists the steps as follows:

> "(a) Does that which is taken away from [the property holder] by the operation of [the law in question] amount to property for purpose of s 25?
> (b) Has there been a deprivation of such property by the [organ of state concerned]?
> (c) If there has, is such deprivation consistent with the provisions of s 25(1)?
> (d) If not, is such deprivation justified under s 36 of the Constitution?
> (e) If it is, does it amount to expropriation for purpose of s 25(2)?
> (f) If so, does the [expropriation] comply with the requirements of s 25(2)(a) and (b)?
> (g) If not, is the expropriation justified under s 36?"[40]

Therefore, the starting point would always be section 25(1) and the first question would be whether there was an arbitrary deprivation of property. This enquiry starts off with a threshold question, namely whether the litigant is a beneficiary entitled to protection under section 25; followed by the two establishing questions, namely whether the affected interest is property; and whether such a property interest was infringed or deprived. These three questions are – as Roux explains – likely to be "sucked into" the third question, namely whether the deprivation of property is arbitrary.[41] If there is an arbitrary deprivation of property, the next question would be whether such a deprivation is justifiable under section 36(1) of the Constitution.[42] If the deprivation is arbitrary and not justifiable, the deprivation is unconstitutional and the matter ends there.

However, if the deprivation complies with section 25(1) or is arbitrary but justifiable under section 36(1), the next question is whether the deprivation in question amounts to an expropriation. If this is indeed the case, then such an expropriation must comply with section 25(2) and (3). If it does, the expropriation is valid. However, if the expropriation does not

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[39] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 58-60. The test was confirmed in *Haffejee NO and Others v eThekwini Municipality and Others* [2011] ZACC 28; CCT 110/10 (25 August 2011) paras 25-26; *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 1 SA 530 (CC) paras 32ff.

[40] T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-3, footnotes omitted. Roux draws this list from *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 46.

[41] T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-2 - 46-5.

[42] It has, however, been argued convincingly that – at least for s 25 purposes – the enquiry will seldom (if ever) reach the justification stage: See 6 2 3 3 below.

comply with subsections (2) and (3), such a limitation must be measured against section 36(1) to establish whether it would be justifiable for the expropriation to violate subsections (2) or (3). If the expropriation that violates subsections (2) or (3) passes the test under section 36(1), it is valid. If not, it is invalid.

Because the *FNB* methodology is still the correct approach when bringing any challenge based on the property clause, I analyse my research question based on the steps set out in *FNB*. In terms of the *FNB* methodology, it is not necessary to begin by asking whether the particular interference with property amounts to deprivation or expropriation. The reason for this is that, in terms of the *FNB* logic, all expropriations are also deprivations, since deprivation is the wider category that includes the narrower category of expropriation.[43] In other words, the expropriation question can be ignored until after it has been established that a particular interference amounts to a deprivation that either complies with section 25(1) or does not comply but is nonetheless justifiable under section 36(1) of the Constitution.

6 2 3 2 The non-arbitrariness test

Before commencing with the section 25 analysis with respect to certain foreclosure questions, it is necessary to provide a general explanation of the non-arbitrariness test.[44] The reason for this is that it is the non-arbitrariness test that will in substance be applied during the analyses that follow. The central question of the constitutional property challenge is whether the interference with property rights amounts to non-arbitrary deprivation of property in every individual instance.[45] The test was defined in *FNB* as follows:

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[43] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 57.

[44] On the non-arbitrariness test in general, see AJ van der Walt *Constitutional property law* (3rd ed 2011) 237-288.

[45] T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) ch 46-2 - 46-5 and 46-21 - 46-25 argues that the entire enquiry will probably be "telescoped" into the arbitrariness test and that this test will, therefore, dominate the enquiry. Consequently, the other stages of the enquiry (the questions concerning whether the affected interest is "property" and whether there was a "deprivation") may receive less attention, since the proper balance between the private property interests and the public purpose interest can be struck sufficiently when answering the arbitrariness question. Hence, courts might answer the other questions quite quickly and superficially (but of course not ignore them, since they are threshold requirements), while focusing most of their attention on the arbitrariness question. For the same reason, the general limitation clause (s 36) may fade into the background during constitutional property challenges, since all the issues that would have influenced the s 36 test will be taken into account during the arbitrariness test, leaving a further s 36 test superfluous. See also 6 2 3 3 below.

> "[A] deprivation of property is 'arbitrary' as meant by s 25 when the 'law' referred to in s 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair."[46]

In other words, for a law to not permit arbitrary deprivation of property there must firstly be a "sufficient reason" for the deprivation, and secondly, it may not be procedurally unfair. The CC went on to describe how this "sufficient reason" is to be established, namely that the relationship between the deprivation and the purpose of the law must be evaluated.[47] To do this, "[a] complexity of relationships has to be considered".[48] These include the relationship between the purpose of the deprivation and the person whose property is affected by it and the relationship between the purpose of the deprivation and the nature of the property.[49] In other words, there must be a sufficient *nexus* between the deprivation in question (the means used) and the reasons for the deprivation (the end achieved). In addition, the extent of the deprivation must be considered,[50] in which regard the court commented as follows:

> "Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation than in the case when the property is something different and the property right something less extensive ... ";[51]

and:

> "Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially."[52]

The CC also held that the nature of the arbitrariness test will vary between, in some cases, establishing a mere rational relationship between the means sought and the ends achieved and, in other cases, conducting a proportionality evaluation closer to the proportionality test in section 36 of the Constitution.[53] Therefore, the court has a discretion with respect to how thick or thin the test should be, depending on the nature of the property and the extent of its

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[46] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100. See the discussion by AJ van der Walt *Constitutional property law* (3rd ed 2011) 245-248.

[47] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100(a).

[48] Para 100(b).

[49] Para 100(c) to (d).

[50] Para 100(d).

[51] Para 100(e). The CC also emphasised that its judgment does not concern incorporeal property.

[52] Para 100(f).

[53] Para 100(g).

deprivation.[54] At the end of the day, "sufficient reason" will be established based on the facts of each particular case.[55]

In summary, one can perceive from the *FNB* analysis that the non-arbitrariness standard consists of two elements, a broader and narrower enquiry. The broader question is whether the kind of forced transfer of property (deprivation) we are dealing with serves a valid and legitimate public purpose. It has been argued on logical grounds (and based on foreign examples) that section 25(1) includes this implicit requirement as part of the non-arbitrariness test.[56] This part of the investigation is fairly straight forward and – as I make clear below – not a problematic aspect of the deprivations I discuss.[57]

The narrower non-arbitrariness enquiry is more case specific and asks whether the deprivation (even though generally justifiable) has an unjustifiable (arbitrary) impact on the rights of the specific parties in the circumstances of that particular case. In each case, the court would have to determine whether a thin rationality or thick proportionality standard must be satisfied, which must be determined with reference to the various relationships and factors mentioned in *FNB*. The CC was quite clear that the enquiry would be case and context specific.[58] The contextual nature of the narrower test implies that an abstract discussion of what would be arbitrary and what not, may be difficult. One can, however, assess whether the way in which a legal regime is structured includes enough safeguards to provide for various circumstances. In 6 3 4 3 below, I investigate whether the law that regulates the sale in execution of homes is nuanced enough to ensure that the results of individual cases will comply with the case-by-case non-arbitrariness test. Furthermore, in 6 4 4 to 6 4 6 below, I investigate whether the NCA's debt relief mechanisms ensure that the interferences with creditors' property rights will only go as far as is non-arbitrary in individual cases.

Therefore, after establishing that there is a valid public purpose for the various forced transfers of property that this dissertation deals with, I investigate whether the law is currently sophisticated enough to also allow for case-by-case compliance with the narrower non-arbitrariness standard. I specifically argue – as in chapter 4 above – that the NCA ensures constitutionally satisfactory outcomes in individual mortgage foreclosure cases.

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[54] See AJ van der Walt *Constitutional property law* (3rd ed 2011) 246.

[55] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100(h).

[56] See AJ van der Walt *Constitutional property law* (3rd ed 2011) 225-227, where he discusses foreign law where an implicit public purpose requirement has been accepted.

[57] See 6 3 4 2 and 6 4 3 below.

[58] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100(h).

6 2 3 3 The role of the limitation clause

In 6 3 4 below I argue that sale in execution will generally not violate section 25(1). However, in the event that it does violate the non-arbitrariness standard in individual cases, the *FNB* methodology requires that such infringement of section 25(1) should be measured against section 36(1) – the limitation clause. Therefore, if an infringement of section 25(1) is justifiable the deprivation can be valid (in theory at least), even though it is arbitrary. However, the logic of the *FNB* test indicates that it would be highly unlikely for a constitutional property case to ever reach the section 36 justification stage. This point is convincingly argued by Roux[59] and supported by Van der Walt.[60]

In the first place, a deprivation that was not effected by "law of general application" as required by section 25(1) will fail to comply with the property clause. Yet, to justify such violation under section 36(1) will also require the existence of "law of general application", which implies that section 36(1) cannot save a deprivation where there is no "law of general application". Secondly, a deprivation that does not satisfy the non-arbitrariness test (for the reasons set out in *FNB*)[61] can never be regarded as "reasonable and justifiable in an open and democratic society" (section 36(1)). Something cannot be arbitrary and at the same time reasonable. In fact, the test under section 36(1) is stricter than the section 25(1) (variable) non-arbitrariness test.[62]

Henceforth I do not discuss the applicability of section 36(1) in the constitutional property context and assume that, as Roux argues, the test for section 25(1) compliance will revolve around the non-arbitrariness test.[63] Therefore, I assume that an arbitrary deprivation of property will not be able to satisfy the proportionality test of section 36(1). In the following two parts of this chapter I firstly analyse whether sale in execution complies with section 25 and, secondly, whether certain aspects of the NCA complies with section 25. In both enquiries the starting point will be to evaluate the various interferences in terms of section 25(1), in other words, to establish whether there is a deprivation that is authorised by law of

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59 T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd OS 2003) 46-2 - 46-5, 46-21 - 46-25 and 46-36.

60 AJ van der Walt *Constitutional property law* (3rd ed 2011) 76-79; AJ van der Walt "The limits of constitutional property" (1997) 12 *SAPL* 275-330 325-327.

61 See 6 2 3 1 above.

62 AJ van der Walt *Constitutional property law* (3rd ed 2011) 74. See also 7 2 4 below.

63 T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd OS 2003) 46-2 - 46-5, 46-21 - 46-25. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 77-79.

general application and whether such deprivation is non-arbitrary. The expropriation question (section 25(2) and (3)) will be addressed only after the section 25(1) question has been answered.

6 3 Sale in execution of the debtor's home

6 3 1 Introduction

Does the law of mortgage foreclosure permit arbitrary deprivation of property? As I explain in 6 2 3 2 above, there are two aspects to this question. The first relates to whether the practice of sale in execution in general complies with section 25 of the Constitution. Secondly, the question is how the principles in section 25 impact on the decision of a court whether to sanction a sale in execution based on the facts of each individual case. In other words, HCR 46(1)(a)(ii) must be applied, not only with the aim of giving effect to section 26,[64] but also with section 25 in mind. A declaration of special executability in terms of the court rules can implicate section 25 in the sense that the attachment and forced sale of property may amount to a deprivation of such property. Since section 8(1) of the Constitution provides that the Bill of Rights (including section 25) binds the legislature and the judiciary, court orders may not violate the Constitution. Therefore, when deciding whether to grant an execution order, the court must ensure that a sale in execution will not amount to arbitrary deprivation of the debtor's property. Similarly, a refusal to grant an order of executability may not amount to arbitrary deprivation of the creditor's property. In addition, courts must interpret the legislation and develop the common law (where necessary) to comply with section 25.[65]

In what follows I firstly explain that the debtor's home is "property" for constitutional purposes and, secondly, I describe how a sale in execution amounts to a deprivation of such property.[66] Thirdly, I investigate whether the forced transfer of ownership (the deprivation) complies with the requirements of section 25(1): Is there law of general application and is the non-arbitrariness test satisfied?[67] Finally, I explain why, even though a sale in execution is a

[64] See 3 4 above.
[65] S 39(2) of the Constitution.
[66] See 6 3 2 and 6 3 3 below.
[67] See 6 3 4 below.

deprivation, it is not an expropriation that needs to comply with the requirements of section 25(2) and (3).[68]

6 3 2 Is the debtor's home "property"?

Before asking whether the sale in execution of a debtor's home amounts to a deprivation that is not arbitrary, the first question (in terms of the *FNB* logic)[69] is whether the interest that is affected by the sale in execution qualifies as property for constitutional purposes. The property clause expressly states that property is not limited to land.[70] This implies that property at the very least includes land, in other words, immovable property. Any immovable property over which a mortgage bond is registered must necessarily qualify as property for constitutional purposes.[71]

The fact that there is a mortgage registered over the home does not change the fact that the debtor is the owner of the property, even though such ownership is limited for security purposes.[72] To argue that a hypothecated home is not constitutional property because it is limited for security purposes would imply that mortgaged homes can be expropriated without compliance with section 25(2) and (3), in other words without compensation. Such an approach can obviously not be correct. Property holdings that are hypothecated for security purposes are commonplace and it could never have been the intention to exclude such properties from section 25, since a vast number of objects (both movable and immovable) are subject to limited real rights such as servitudes, mortgages, pledges and so forth. Consequently, the hypothecated immovable property, while it is still owned by the debtor, enjoys constitutional protection under section 25.

In the *FNB* case, the CC confirmed that the ownership of corporeal movables and land is at the heart of the constitutional property concept.[73] Therefore, it is not necessary to elaborate

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[68] See 6 3 5 below.
[69] See 6 2 3 1 above.
[70] S 25(4)(b).
[71] Homes in the form of sectional title units also qualify as immovable property and therefore "property" for s 25 purposes: See GJ Pienaar *Sectional titles and other fragmented property schemes* (2010) 67-70.
[72] This approach is comparable to that taken in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 53-55, namely that property owned for security purposes remains property for purposes of s 25. In other words, the purpose for which property is held does not determine whether it is property. Even if property is held for limited purposes, such ownership (although limited) qualifies for protection under s 25. Consequently, the same can be said for ownership that is limited by a mortgage bond.
[73] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 51. See also *Transvaal*

on this requirement in more detail. Ownership of land (even if it is restricted as a result of a registered real security right) is a right in property and therefore qualifies as "property" for purposes of section 25.

6 3 3 Is sale in execution a "deprivation"?

If one accepts that ownership of immovable property qualifies as the debtor's property for constitutional purposes, the next question is whether the sale in execution of such property amounts to a deprivation thereof. To answer this question it is first of all necessary to establish the definition of "deprived" and "deprivation", the two terms used in section 25(1):

> "No one may be *deprived* of property except in terms of law of general application, and no law may permit arbitrary *deprivation* of property." (My emphasis.)

The question is whether sale in execution falls within what section 25(1) refers to as "deprivation of property". According to the methodology set out in *FNB*, all expropriations are also deprivations, since expropriation is a sub-category of deprivation.[74] Deprivation is the wider category that encompasses "any interference" with property and, therefore, all species of state interference, whereas expropriation is a narrower sub-category.[75]

Agricultural Union v Minister of Land Affairs and Another 1996 12 BCLR 1573 (CC); T Roux & D Davis "Property" in H Cheadle *et al* (eds) *South African Constitutional law: The Bill of Rights* (2nd ed RS 10 2011) 20-17.

[74] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 57.

[75] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 57. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 203-204. However, in *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 1 SA 530 (CC) ("*Mkontwana*") the CC retracted somewhat from this wide definition of deprivation by stating that the presence of a deprivation depends on the extent of the interference. Therefore, the CC in *Mkontwana* (at para 32) required a substantive interference that goes beyond the normal restrictions on property in an open and democratic society. See the criticism by AJ van der Walt *Constitutional property law* (3rd ed 2011) 204-206 and AJ van der Walt "Retreating from the FNB arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* (CC)" (2005) 122 *SALJ* 75-89 75-89. Even if this narrower definition of deprivation was correct, for my purposes it is not necessary to take a position, since sales in execution would certainly not be insubstantial enough to not qualify as a deprivation in this narrow sense. As AJ van der Walt *Constitutional property law* (3rd ed 2011) 206-209 explains, the later judgments in *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 6 SA 391 (CC) para 36 and *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 1 SA 293 (CC) paras 38-39, reverted back to the wider *FNB* approach (perhaps without expressly stating so). It seems that regulations must at least be significant in the legal sense. In other words, the *de minimis* rule would apply. As AJ van der Walt *Constitutional property law* (3rd ed 2011) 209 argues, there is no good reason to exclude regulations from s 25(1) review purely on the basis of the extent of

The term "deprivation" can be confusing in the sense of creating the impression that it refers to the actual dispossession or taking way of property. Yet, the CC has confirmed that a deprivation does not have to involve a taking away or dispossession of property.[76] Van der Walt defines deprivation as any uncompensated, regulatory restriction on the use, enjoyment and exploitation of property.[77] Regulatory control of the use of property (deprivation) might diminish the value of the property or its profitability; yet, it does not refer to a taking away of property. Van der Walt refers to two well-known exceptions to this point, namely forfeiture and confiscation of property, both of which do entail actual taking away of the property.[78] In my view, sales in execution should also qualify as deprivations, even though the property is actually taken away and, therefore, might seem to amount to expropriation. Without presently considering whether a sale in execution results in expropriation,[79] it is clear that the sale in execution would first qualify as a deprivation.

Prima facie it may seem strange to classify a sale in execution as a regulatory (as opposed to expropriatory) deprivation of property. It is not merely a regulation of the use, enjoyment and exploitation of the property. The end result of sale in execution is in fact a total taking away of the property, a forced sale and the transfer of ownership – all without the debtor's cooperation. This is clearly a substantial interference with the debtor's property rights and must therefore be seen as a deprivation, regardless of whether it is also an expropriation.[80] If the *FNB* methodology is to be followed, it is not necessary to go to the expropriation question at this stage of the enquiry. As soon as one establishes that there is any significant

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the impact. *FNB* must be followed and all interferences must consequently be reviewed, subject to the *de minimis* qualification.

[76] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 57; *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett and Others v Buffalo City Municipality; Transfer Rights Action Campaign and Others v Member of the Executive Council for Local Government and Housing, Gauteng and Others* 2005 1 SA 530 (CC) para 32. See further AJ van der Walt *Constitutional property law* (3rd ed 2011) 191.

[77] AJ van der Walt *Constitutional property law* (3rd ed 2011) 192 and 196.

[78] 196. See 6 3 3 n 80 below.

[79] In 6 3 5 below I explain why a sale in execution cannot be seen as an expropriation.

[80] Forfeitures of properties that were used as instrumentalities of crimes are also regarded by the courts as deprivation but not as expropriation, even though the property is physically taken away and not just regulated in its entitlements. For examples of cases where s 25(1) was applied to forfeitures, see *Mazibuko and Another v The National Director of Public Prosecutions* 2009 6 SA 479 (SCA) paras 22-24; *National Director of Public Prosecutions v RO Cook Properties (Pty) Ltd; National Director of Public Prosecutions v 37 Gillespie Street Durban (Pty) Ltd and Another; National Director of Public Prosecutions v Seevnarayan* 2004 (2) SACR 208 (SCA) paras 15 and 29; *National Director of Public Prosecution v Braun and Another* 2009 6 SA 501 (WCC) paras 22.1, 54-56 and 60; *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as* Amicus *Curiae)* 2007 4 SA 222 (CC) para 120; *National Director of Public Prosecutions v Gouws* 2005 2 SACR 193 (SE) paras 196-197; *Prophet v National Director of Public Prosecutions* 2007 6 SA 169 (CC) paras 1, 46, 58, 61-62 and 69. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 311-333.

interference with property (hence, a deprivation) one can apply the requirements of section 25(1) and leave the expropriation question until one finds that section 25(1) was complied with or justifiably infringed under section 36.

A sale in execution culminates in the forced transfer of property from a debtor to the purchaser, without the former owner's cooperation and against his or her will. When the warrant of execution is issued and the property attached, control of the property vests in the sheriff or deputy sheriff.[81] After it is sold at the public auction, ownership is transferred by way of legal operation to the purchaser.[82] Consequently, the deprivation of the debtor's property occurs upon transfer of the property, since this is the point when ownership of the immovable property is extinguished.[83]

When the creditor enforces its entitlement to foreclose the bond (which is inherent to its registered limited real right), the creditor institutes legal proceedings with the purpose of selling the hypothecated property in execution. This is referred to as a forced sale because, even though the debtor agreed to expose his or her ownership to the threat of execution, the debtor does not agree to sell his or her property in the same sense as would be the case during a normal sale transaction. In other words, the debtor does not voluntarily sell his or her property, but previously (in exchange for the loan) agreed to subject the property to the risk of a subsequent forced sale. Whether the property is actually sold in execution depends on the wishes of the creditor as well as the court's approval. Therefore, it is the creditor's choice to foreclose the bond and enforce its execution clause – followed by legal steps to obtain an execution order – that results in the debtor being deprived of his or her immovable property.

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[81] Despite the fact that legal control vests in the sheriff, the judgment debtor usually remains in physical occupation until the property is transferred to the purchaser and he or she voluntarily vacates or is evicted: See *Bisnath NO and Others v ABSA Bank Ltd; ABSA Bank Ltd v Bisnath NO and Others* 2008 4 SA 92 (SCA) paras 24 and 28.

[82] CG van der Merwe *Sakereg* (2nd ed 1989) 374.

[83] See EJ Marais *Acquisitive prescription in view of the property clause* (2011) unpublished LLD dissertation Stellenbosch University, who, in ch 5 of his dissertation, analyses the compliance with s 25 of acquisitive prescription, which is one of the other ways in which ownership of land can be extinguished by way of legal operation, ie without the former owner's consent or cooperation. The loss of ownership pursuant to sale in execution can in some ways be compared to the loss of ownership through acquisitive prescription, at least in as far as both institutions result in ownership being shifted by way of legal operation. The deprivation effected by sale in execution is consequently similar to the deprivation effected by acquisitive prescription. However, they are also not exactly the same. In the case of sale in execution, ownership does not shift automatically (as it does with prescription after the required number of years). Instead, ownership is only transferred when the deed of transfer to the auction purchaser is registered. Yet, both result in the deprivation of ownership not due to the former owner's cooperation but still due to some failure on his or her part, namely default on the loan agreement (in the case of mortgage foreclosure) and failure to vindicate ownership for a certain number of years (in the case of prescription). This similarity strengthens the prospect of describing a sale in execution as a deprivation of property for purposes of s 25, since Marais has convincingly argued that acquisitive prescription amounts to deprivation. See also 6 3 5 n 139 below.

This statement needs to be refined. It is not technically correct to state that, during sale in execution, the creditor deprives the debtor of his or her property. Such an approach would amount to *parate executie* and direct horizontal application of section 25.[84] In other words, the debtor would be able to challenge the creditor's actions directly, based on whether it complies with section 25. Instead, the nature of the deprivation should be explained in accordance with indirect horizontal application. The common law of mortgage as well as the procedural rules and legislation that regulate sales in execution (all of which is law of general application) provide the court with the power to grant execution orders against hypothecated properties when creditors – in terms of their mortgage bonds – apply for such orders. In other words, the applicable legal principles, combined with the action of legal functionaries such as the sheriff, provide for the deprivation of a debtor's property under sale in execution circumstances.

The creditor is not the one effecting the deprivation. The creditor is merely making use of the legal mechanism already in place, which authorises and enforces such a deprivation by the sheriff with the approval of a court and in accordance with the correct procedures. Therefore, any challenge based on section 25 must be brought against the legal institution of mortgage foreclosure (or the court's method of approving it) and not against the creditor's actions in terms of such rules. If the deprivation does not comply with section 25, it is not the creditor's actions as such that are unconstitutional, but the authorising law and the procedure followed in terms of it, in that either the law or the procedure does not measure up to the standards set by section 25. It is not all that important who effects the deprivation, since section 25 places the emphasis on the law that permits the deprivation. Therefore, it is the "law of general application" that allows the deprivation and not any specific party.[85]

The fact that the debtor may have agreed to the risk of his or her property being subject to a sale in execution does not change the fact that foreclosure amounts to a deprivation of property. However, the debtor's initial consent will play a role during the application of the non-arbitrariness test discussed below.[86] Consequently, it is important to consider that, in arguing that sale in execution amounts to a deprivation of property for purposes of section 25, this does not mean that sale in execution should be prohibited or severely restricted as a result of section 25. Rather, bringing sale in execution into the constitutional property framework

[84] In 6 2 2 above I explain that correct approach to follow for purposes of this dissertation is indirect horizontal application.
[85] See 6 3 4 1 below.
[86] See 6 3 4 2 and 6 3 4 3 below.

explains why sale in execution is in fact generally in compliance with the Constitution. Moreover, section 25 is a valuable tool (in combination with section 26) to help explain under which circumstances individual sales in execution may not be lawful.

One argument that can be raised against the proposition that sale in execution amounts to deprivation is the fact the debtor may not actually be deprived of anything in monetary terms. Although he or she is "deprived" of the value of the immovable property when it is forcefully sold in execution, the debtor's outstanding debt is decreased by that same amount. In accounting terms one can say that the debtor's asset (the property) was sold (at the insistence of the creditor) in order to relieve the debtor of a liability (the outstanding debt). Therefore, at least in theory the net value of the debtor's estate might not have decreased. Be that as it may, this line of reasoning has no bearing on whether there was a deprivation of property present. The sale in execution of the debtor's property and the satisfaction of the creditor's claim are separate legal events, even though they are linked. Just because the debtor is relieved of some of his or her debt does not mean that the sale in execution (culminating in forced transfer of ownership) – as an independent legal event – does not in itself amount to a deprivation of property. Deprivation does not necessarily refer to actual monetary loss, but to interference with the specific entitlements of property. The judgment debtor is deprived of his or her right of ownership in the immovable property, and specifically the entitlement to dispose of the property freely. The fact that the sale in execution is aimed at relieving the debtor of his or her debt may have implications for the question whether the deprivation is arbitrary or not. However, the purpose of the deprivation (namely, to settle the mortgage debt) does not change the fact that the debtor is deprived of property in this context.

To summarise, the sale in execution of the mortgage debtor's home is a forced transfer of property that is conducted by the sheriff in terms of the state's power to force a transfer of ownership to peacefully enforce and execute private claims. This forced reallocation of property rights qualifies as "any interference" with property and must, accordingly, comply with the requirements of a valid deprivation in terms of section 25(1).

6 3 4 Does the deprivation comply with section 25(1)?

6 3 4 1 Law of general application

The first formal requirement for a valid deprivation of property is that it may not occur "except in terms of law of general application".[87] Commentators accept that law of general application (a concept that also appears in section 36(1)) will be interpreted widely to include all original and delegated legislation, including rules of court and principles of the common law.[88] The CC has decided that the common law qualifies as law of general application for purposes of section 25(1).[89] Therefore, I assume that the common law principles of mortgage as well as the procedural legislation and rules that govern the enforcement of mortgage bonds qualify as law of general application.

As I explain in 6 2 2 and 6 3 3 above, the focus of the enquiry does not fall on the action that effects the deprivation as such, but on the set of legal provisions that provides the authority for and regulates such deprivation. No law provides for the automatic sale in execution of mortgaged property. Instead, the procedural laws provide courts with the authority to grant execution orders based on the substantive and procedural requirements in statutory and common law. Consequently, whether the deprivation takes place or not depends on the court's discretion, which is based on the substantive laws and principles of mortgage law as well as "all the relevant circumstances".[90] The actual deprivation (by way of attachment, sale and transfer of the home) is then effected by the sheriff as authorised by legislation.[91]

Section 25(1) further provides that "no law may permit arbitrary deprivation of property". In other words, the law that governs the practice of sale in execution may not allow such forced transfers to amount to arbitrary deprivations of property. If a particular sale in execution *does* amount to arbitrary deprivation, the law itself should be attacked for lack of constitutional compliance, since the law may not permit arbitrary deprivation.[92] Even though

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87 S 25(1) of the Constitution.

88 AJ van der Walt *Constitutional property law* (3rd ed 2011) 232-237; S Woolman & H Botha "Limitations" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 2 (2nd ed OS 2006) 34-51 - 34-53; T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-21.

89 *Du Plessis and Others v De Klerk and Another* 1996 3 SA 850 (CC) para 44; *S v Thebus and Another* 2003 6 SA 505 (CC) paras 64-65. See also Z Temmers *Building encroachments and compulsory transfer of ownership* (2010) unpublished LLD dissertation Stellenbosch University 151, who argues that the common law principles of encroachment qualify as law of general application.

90 HCR 46(1)(a)(ii), in the case of the debtor's primary residence.

91 HCR 46(13); MCR 43(13). See also *Sedibe and Another v United Building Society and Another* 1993 3 SA 671 (T) 676 and, regarding the sheriff's powers, 2 5 2 and 2 5 3 above.

92 See also 6 2 2 above.

the actual deprivation is the one conducted by the sheriff, the law that should be attacked is not the one that authorises the sheriff's actions, but the principles that govern how the courts decide whether to authorise a sale in execution. The sheriff has no discretion and the law merely provides it with the authority and obligation to do what the court commands it to do under the warrant of execution. So the sheriff himself cannot truly be blamed for an individual sale in execution that violates section 25, since he merely does what the court commanded. If the sale indeed violates section 25, there is a problem with the court's decision and not the sheriff's execution of the court order (unless he actually operates outside his authority).

Hence, if there is a constitutional problem with an applied-for execution order, the law itself should be amended, interpreted or developed in such a way that the sale in execution it permits complies with section 25(1). If this is not the case, the problem lies with the authorising law and not with the specific execution order as such. Sale in execution only takes place after a court has authorised it, which is interesting, since it is also the courts that should apply and interpret the law so as to comply with section 25(1). This implies that execution orders should generally not amount to arbitrary deprivation of property provided, of course, that the court applied and interpreted the law so as to avoid that result.

6 3 4 2 General justification under the non-arbitrariness test

As explained in 6 2 3 2 above, the first part of the non-arbitrariness test is to establish whether the sale in execution of homes, generally speaking, complies with section 25(1). In other words, is there a sufficient public purpose that underlies this process? It is relatively simple to perceive the public purpose served by the principles of sale in execution. This requirement resembles closely my analysis of the broad rationale for having residential property sold in execution of mortgage debts in 3 4 2 above. I do not repeat those arguments in detail, although they are applicable in the section 25 context as well.

The CC has confirmed the immense importance of an effective debt enforcement system.[93] Also, in *FNB* – with direct reference to section 25 – the CC held that

> "to exact payment of a customs debt ... is a legitimate and important legislative purpose, essential for the financial well-being of the country and in the interest of all its inhabitants".[94]

[93] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) paras 37-40. See also *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 4 SA 363 (GSJ) para 17; *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) para 39.

By analogy, the same can be said for the enforcement of private debts. It is the state's responsibility to assist private creditors with the enforcement of their valid contractual debts.[95] It is difficult to argue that the law should not provide for a mechanism like this that will effect deprivation of property for this public purpose. In fact, one can probably argue that a legal system that does not provide for this mechanism is failing its citizens, since the effective enforcement of contractual debts is vital for the proper functioning of any market-based system. It has even been suggested – correctly in my view – that it would undermine the social and commercial stability of society if debts are not enforced effectively.[96] In *Jaftha* the CC moreover confirmed the important social value that even poor people should take responsibility for their debts, especially those associated with owning a home.[97] In 3 4 2 above, I also emphasise that the effective enforcement of mortgage debt encourages private homeownership and, therefore, the realisation of section 26's goals.

It is difficult to imagine how any credit system can function without this mechanism. Without allowing mortgaged homes to be sold in execution when debtors default, the practice of registering mortgage bonds will cease to exist, with the effect that home loan financing will dry up. This is something that the South African society cannot afford, especially in light of the battle against homelessness. Mortgage bond financing (which is impossible without allowing sales in execution) is crucial for homeownership. This justifies the conclusion that sales in execution are generally not arbitrary. The CC in *Gundwana* acknowledged that sale in execution is part and parcel of normal economic life.[98]

The general justification for the sale in execution of mortgaged properties can also be illustrated with reference to the facts in *FNB*. In *FNB*, the end sought by the relevant legislation[99] was to exact payment of certain customs debts. The CC acknowledged this purpose as one that is legitimate and important.[100] In my view, the same applies to the state's duty to assist private parties in the enforcement of their debts. Moreover, the effect (the deprivation) would practically be of the same nature, namely the attachment of property and

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94 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 108.

95 S 34 of the Constitution – the right of access to courts. According to *Ivoral properties (Pty) Ltd v Sheriff, Cape Town, and Others* 2005 6 SA 96 (C) para 40, the courts have a civil duty to assist people with the enforcement of their rights, including civil claims. Moreover, the right to have claims enforced is incidental to the s 34 right of access to courts.

96 *FirstRand Bank Ltd v Folscher and Another, and Similar Matters* 2011 4 SA 314 (GNP) para 39.

97 *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 53.

98 *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 54.

99 S 114 of the Customs and Excise Act 91 of 1964.

100 *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 108.

divesting of ownership. However, in *FNB* the law casts the net of debt enforcement too wide.[101] The legislative provision provided for the creation of a statutory lien over all the property present on the custom debtor's premises, whether owned by such a debtor or not.[102] The enforcement procedure – the means that the Act employed to achieve its end – included the deprivation of property under circumstances when the affected property owner had no connection with the debt, the property itself had no connection with the debt and the property owner did not transact with or place the property in the debtor's possession.[103] Therefore, the CC found that there was insufficient reason for the legislation to deprive persons other than the debtor of their property.[104]

By analogy, the CC's application of the arbitrariness test to the facts in *FNB* can be used in the context of private debts as well. The first issue in the foreclosure context, the broad question that corresponds to *FNB*, is whether there is generally a legitimate justification for the practice of sale in execution. In this regard, and with reference to the factors considered in *FNB*, if one were to consider these factors from the opposite perspective, it seems that the CC would have accepted the attachment of the property under circumstances where there was a connection between the owner and the debt, between the property and the debt, and where the parties transacted with each other to create the debt and the security. All these connections are present under mortgage circumstances. In the first place, the owner of the property is the person who owes a debt to the person claiming execution, as a result of the credit transaction between them. Secondly, there is a direct link between the property and the debt in the sense that the property is burdened with a limited real right to secure payment of the debt. In fact, there can be no closer link between debt and property than the one created by a real security right, especially a consensual one like mortgage or pledge. These relationships are present in all "normal" mortgage cases, which indicates that mortgage foreclosure and the ensuing sale in execution are, broadly speaking, justifiable under section 25(1) of the Constitution.

In light of the important purpose served by the sale in execution of immovable property (namely to enforce valid credit agreements), combined with the clear and direct relationship between the debtor, the debt and the property, it seems that the law concerning sale in

[101] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 108.
[102] S 114 of the Customs and Excise Act 91 of 1964. See *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 4.
[103] Para 108.
[104] Para 109.

execution does not permit arbitrary deprivation of property in broad terms. Without considering the facts of any particular case, there is a very good reason for the law to allow sales in execution of mortgaged immovable property.

Another factor in favour of direct execution being non-arbitrary is the fact that the debtor agreed to the registration of a mortgage bond against his or her property in favour of the creditor. It is not necessarily arbitrary for a deprivation of property to occur in accordance with a validly concluded contract. Giving effect to peoples' freedom of choice is sufficient reason for the deprivation under a system where there is consumer protection available to prevent abuses of contractual freedom and to equalise the possible imbalances in bargaining power. In itself this factor may not be conclusive, but combined with factors such as the social and economic importance of debt enforcement and the existence of protective measures in the NCA, the existence of a mortgage agreement contributes to the non-arbitrary nature of the deprivation caused by foreclosure.

Therefore, it is clear that in general the Constitution allows the existence of a process whereby the state can effect the forced transfer of properties so as to achieve certain valid public purposes. In the next section I assume the general justification for sale in execution but ask whether the result in individual cases will satisfy the non-arbitrariness test.

6 3 4 3 Non-arbitrariness in individual cases

Despite the public purpose fulfilled by sale in execution, the deprivation of property brought about by sale in execution will be invalid when it violates the non-arbitrariness standard in a particular case. To assess case- and context-specific foreclosures, the presence of a valid public purpose is in itself not an automatic indication that the deprivation is not arbitrary. Moreover, just because the process of sale in execution is in general not arbitrary, does not without more imply that individual sales in execution will always be justifiable. The impact of the forced transfer on the debtor must be assessed on a case-by-case basis. However, as section 25(1) provides, "no law may permit arbitrary deprivation of property". Therefore, one must ascertain whether the current law is nuanced enough to ensure that individual foreclosures do not amount to arbitrary deprivations of property.

Since sale in execution results in the complete loss of ownership as well as the loss of a home, it is clear that strong, proportionality-like justification will have to be provided to

satisfy the non-arbitrariness test in this context.[105] Therefore, the question in any individual instance is whether there are sufficient reasons to have the particular debtor's home sold, thereby effecting a deprivation of the debtor's property. In other words, all factors being considered, do the means justify the ends?

The first indication that the law does not seem to be overbroad is the fact that the courts have an obligation to evaluate the facts of each case before granting the execution order.[106] Therefore, the deprivation does not happen automatically but will only occur after a court has judged whether this would be lawful in the individual case. This prospect, however, does not explain *how* courts are to evaluate the arbitrariness of each individual case. The courts have to apply the law and it is, consequently, necessary to establish whether the law contains sufficient safeguards and mechanisms that courts can employ to ensure case-by-case compliance with section 25(1). If this is not the case – in other words, if execution orders can be lawfully granted despite an arbitrary result – it may render the law in need of constitutionally inspired development. This approach is similar to the one I conducted with respect to section 26(1)'s proportionality test in 3 4 3 above. The same problematic factors I discuss there will, hence, play a role in the non-arbitrariness test.

One challenging issue concerning the enforcement of mortgage bonds is the common law principle that mortgage creditors can directly enforce their claims against the hypothecated immovable property. This is the case despite the fact that such property is a home and regardless of whether the outstanding debt can be rectified in a less intrusive manner. This stance is the basic premise of mortgage law and a condition that the parties agreed to.

In theory this means that a sale in execution of immovable property can occur despite the availability of movables and other assets. Accordingly, one can argue that, since the law of mortgage foreclosure permits the sale in execution of immovable property while there may be other assets available to satisfy the debt, the applicable legal principles may in effect permit arbitrary deprivations of property in certain contexts. The argument could be that foreclosure law spans the net too wide, especially when home interests may be unjustifiably infringed by the sale in execution. Therefore, foreclosure principles should debatably allow for exceptions to direct execution in circumstances where it would otherwise violate constitutional principles.

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[105] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100(e) and (f).

[106] HCR 46(1)(a)(ii); MCA 66(1)(a); s 26(3) of the Constitution; *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC); *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC).

The end sought by foreclosure is the enforcement of the creditor's claim and the means employed is the direct sale in execution of the hypothecated immovable property. Moreover, the effect of the deprivation is quite extensive; not only does the debtor lose ownership but he or she loses his or her home, with the possibility of other personal hardships. In light of the fact that alternatives to sale in execution might be available, the loss of the home could possibly be disproportionate in particular circumstances, when the same end might be achieved by first executing the claim against the debtor's other assets that are of less socio-economic importance than the home. The fact that mortgage law does not even allow for the obligation to first seek execution against movables may indicate that the deprivation is arbitrary.

Although the result may not be arbitrary for every debtor, it may be so for some. This is where the problem lies, since the law does not ensure that the financial and personal context plays a role in how the foreclosure is handled. This situation is exacerbated when the immovable property is the debtor's home. Therefore, the conclusion might be that the common law of mortgage does not live up to the standard of section 25(1) and should be remedied so as to provide a more nuanced regulation for foreclosure disputes. Factors such as the size of the full outstanding debt, the size of the arrears, the value of the property, *et cetera* may have to play a role in allowing creditors to insist on direct execution, which is technically – in terms of first principles – not the case. It is also difficult to perceive a way in which these considerations can be incorporated in the traditional structure of mortgage law. A wholesale amendment of the law may be required in order to restrict creditors' ability to rely on their rights under the mortgage. The alternative would be an uncertain case-by-case analysis by courts of all the facts and the possibility that courts can deny foreclosure actions based on various factors. In the absence of exact guidelines (which currently do not exist), creditors would not be able to foresee when foreclosures would be allowed and when not. Since incremental development of the common law may not be sufficient to ensure the kind of certainty required, it seems that legislation might be called for.

However, in this respect I make the same argument as in chapter 4 above. If the common law principles of mortgage foreclosure are read together with the legislative framework that was provided to regulate the enforcement of credit agreements (the National Credit Act), the combined effect complies with section 25(1). The fact that the NCA provides debtors with opportunities to avoid the sale in execution of their immovable properties justifies the entitlement that mortgage creditors have to execute their claims directly against the

hypothecated immovable properties of debtors, should the debtors not have availed themselves of the possibilities offered by the NCA. In other words, the application of the NCA will ensure that when a court grants an execution order (with the effect of depriving the debtor of immovable property) it is the last resort (and, therefore, not arbitrary), since justice-enhancing alternatives had been exhausted. Hence, the availability of the NCA's mechanisms brings the deprivation of property (that is effected by sale in execution) within the acceptable bounds of proportionality, also on an individual level.

A further consideration in favour of non-arbitrariness is that debtors have ample opportunity to settle their debts and thereby free their immovable property from the execution process. Especially the right of reinstatement is a mechanism that significantly counterbalances the detrimental effects that otherwise would have ensued.[107] The principle of direct execution does not preclude the debtor from liquidating his or her other assets or investments so as to get the arrears up to date or to completely settle the debt. The fact that a debtor can apply for debt review and have his or her obligations rearranged in such a way as to avoid sale in execution is another mitigating factor. The reason for this is that debt review and rearrangement are not precluded by the law governing sale in execution. Therefore, consumer protection mechanisms available to debtors (in the form of the NCA) are sufficient to render the deprivation of property resulting from sale in execution non-arbitrary in all individual cases.[108] The NCA provides for all eventualities that would otherwise have rendered particular sales in execution unconstitutional. In view of the subsidiarity principles, there is sufficient reason for the common law to remain as it is, since the legislature has already intervened to protect debtors from the potentially detrimental effects of debt enforcement.[109] For example, instances where it may seem that execution is unnecessary (because the amount in arrears is small) are provided for by the right to reinstate the credit agreement by simply getting payments up to date and/or the opportunity to obtain a debt rearrangement order.

[107] See 4 3 2 as well as 4 4 2 and 4 4 3 above.
[108] In 6 4 below I explain that an over-protection of debtors' rights would lead to an arbitrary deprivation of creditor's property rights, which should also be avoided.
[109] See 3 5 above.

6 3 4 4 Procedural fairness

There is some uncertainty concerning what exactly is meant by the second element of the arbitrariness test, namely that it must be procedurally fair.[110] However, in the context of this research this requirement can be related to the procedure for effecting sales in execution. Since judicial oversight is now required before a debtor's home is sold in execution,[111] it can be assumed that a judge or magistrate will always evaluate the circumstances of each case before granting an execution order. Not only does this exercise of judicial discretion contribute to the non-arbitrary nature of the sale in execution process in general, but it also ensures that individual cases comply with the constitutional values in sections 25 and 26. Courts have to apply the common law principles of mortgage foreclosure (read with the NCA) in each individual case on the assumption that the effect of foreclosure should not amount to arbitrary deprivation of property or, for that matter, an unjustifiable limitation of the right to have access to adequate housing (section 26(1)). The former lack of judicial oversight was probably in contravention of section 25 in the same way that it violated section 26.[112]

The procedure for obtaining execution orders does not unfairly prejudice the debtor. The procedure for debt enforcement is clearly set out in the NCA. Debtors are notified in terms of section 129(1)(a) of the NCA when they are in default.[113] In this notice they are presented with options for how to solve their situation, including referral to a debt counsellor. They can even ask the court to refer them to debt counselling. Before the debtor defaults, he or she can also make use of debt counselling when he or she foresees that their over-indebtedness will lead to default.[114] The point is that the deprivation (in the form of sale in execution) will never occur without the creditor having followed a prescribed procedure, which includes notification to the debtor and options for the debtor to remedy the default and avoid sale in execution when appropriate. Moreover, debtors have the opportunity to go to court and present their defence against any action brought by the creditor. They are allowed to present

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[110] See AJ van der Walt *Constitutional property law* (3rd ed 2011) 264-270.
[111] HCR 46(1)(a)(ii).
[112] The CC in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 22 alluded to this possibility. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 270 n 250 and accompanying text.
[113] See 4 3 1 2 above.
[114] See 4 3 4 above.

any information that may influence the court's discretion, including proof that they would lose their access to adequate housing.[115]

The principle of abuse of process, which is discussed with reference to section 26(1) in 3 4 3 2 above, can also be explained in terms of section 25. It would be procedurally unfair to allow a sale in execution to go through if the creditor abused the process. Therefore, if the law permitted a sale in execution to occur under circumstances when the creditor is abusing the process, it would amount to arbitrary deprivation. The motivation for this is that there is insufficient reason to allow creditors to abuse the system and thereby effect a deprivation of property. Under abusive conditions, even the voluntary nature of the mortgage agreement will not save the sale in execution or cause the deprivation to be non-arbitrary.[116] Since it is now clear that creditors may not abuse the execution process, the law provides for another safeguard that should prevent individual foreclosures from constituting arbitrary deprivation of property.

6 3 4 5 Conclusion

Under mortgage bond conditions, the point of departure should be that the deprivation is not arbitrary, since the sale in execution process is generally justified and non-arbitrary. In individual cases the court's discretion in terms of HCR 46(1)(a)(ii) and the mechanisms under the NCA should be applied and interpreted so as to promote the spirit, purport and objects of the Bill of Rights,[117] more specifically the prohibition against arbitrary deprivation of property. Therefore, with reliance on the subsidiarity principles, I submit that the NCA provides solutions for struggling debtors. These measures are nuanced and far-reaching enough to render lawful sales in execution compliant with section 25(1) of the Constitution, on both a general and case-by-case level.

6 3 5 Does the sale in execution comply with section 25(2) and (3)?

If one accepts that a sale in execution amounts to a non-arbitrary deprivation of property, it consequently complies with section 25(1) of the Constitution.[118] However, in terms of the

[115] *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 2 SA 264 (SCA) para 25.
[116] With reference to the same point, but in terms of s 26, see *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) paras 44-46.
[117] S 39(2) of the Constitution.
[118] Or, if the sale in execution violates s 25(1), it may be justifiable under s 36(1). However, see 6 2 3 3 above.

FNB methodology[119] this is not the end of the constitutional property challenge. The next question is whether the deprivation amounts to an expropriation and, therefore, whether it complies with section 25(2) and (3) of the Constitution.[120] The significance of the answer to this question is that expropriation requires just and equitable compensation, whereas deprivation does not. Hence, the question is: Does sale in execution result in expropriation that requires compensation?

There is some uncertainty as to the exact distinction between deprivation and expropriation. As a point of departure, the CC has accepted that deprivation is the wider category, which includes the narrower category of expropriation.[121] Unlike deprivation, expropriation does not include any interference with property but only a specific subset of interferences. Unless one can prove that a certain deprivation is also an expropriation, it is unnecessary to prove compliance with section 25(2) and (3). The claimant who challenges the validity of a sale in execution based on the allegation that it amounts to an invalid expropriation or that compensation should be rendered, bears the burden of proving, in the first place, that the deprivation is also an expropriation. This approach stems from the two-stage approach to constitutional litigation. In what follows I provide a brief analysis of how expropriation has thus far been defined in South African law. Although the definition has not conclusively been established yet, some general characteristics have come to light. It does not seem that a litigant would be able to prove that sale in execution amounts to an expropriation.

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[119] See 6 2 3 1 above.

[120] S 25(2) and (3) provides as follows:

> "(2) Property may be expropriated only in terms of law of general application -
> (a) for a public purpose or in the public interest; and
> (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -
> (a) the current use of the property;
> (b) the history of the acquisition and use of the property;
> (c) the market value of the property;
> (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
> (e) the purpose of the expropriation."

[121] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 57-58. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 341; T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-2 - 46-5 and 46-23 - 46-25. This approach is a departure from the initial one provided by the CC in *Harksen v Lane NO and Others* 1998 1 SA 300 (CC), where the court assumed a categorical distinction between deprivation and expropriation under s 28 of the 1993 (interim) Constitution.

The reason for this is that sale in execution is highly unlikely to fulfil most of these indicia of expropriation.

Ostensibly, the only substantive difference between the outcomes of deprivation and expropriation is that the state is required to pay compensation for expropriation but not for deprivation. Therefore, it seems that the only reason a litigant would argue that a sale in execution is an expropriation is to try and compel the state to grant him or her compensation for the forced transfer of property. On a purely logical basis, it does not make sense for the state to compensate debtors when their land is sold in execution to satisfy a contractual debt.[122] In addition to this logical argument, if one looks at the general ways in which expropriation has been defined, it becomes even more unlikely that sale in execution can be an expropriation.

The point of departure is that expropriation traditionally entails state acquisition of property to fulfil a public purpose.[123] In terms of this narrow definition, sale in execution is clearly not an expropriation, since a sale in execution never culminates in state acquisition of the property. However, this definition does not paint the full picture, since it is accepted that expropriation can also include the situation where a person's rights in property are forcibly transferred to a third party, but only if this serves a public purpose.[124] An example is when the state expropriates property and then transfers it to a third party who is responsible for providing some public function, like the provision of electricity. Other examples are third party transfers for land reform purposes.[125] This wider definition of expropriation may make it somewhat easier to argue that sale in execution should be included in the definition, since there is a third party (and not the state) who acquires ownership of the debtor's property, namely the auction purchaser. Also, it is a state official (the sheriff) that effects the forced transfer. However, this kind of transfer does not serve the type of public purpose that is usually envisioned by third party transfers in expropriation cases. Moreover, the fact that a deprivation leads to a third party acquiring the property does not in itself mean that the deprivation amounts to expropriation. The role that the state fulfils (by virtue of the sheriff) is to act as a statutory agent of the judgment debtor, so as to effect the orderly resolution of

[122] AJ van der Walt *Constitutional property law* (3rd ed 2011) 347-348 makes the same argument with regard to taxation and laws that permit the enforcement of tax debt. To require the state to compensate people for being taxed does not make sense.
[123] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another* 2009 6 SA 391 (CC) paras 63-64; *Harksen v Lane NO and Others* 1998 1 SA 300 (CC) para 32. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 192 and 196.
[124] A Gildenhuys *Onteieningsreg* (2nd ed 2001) 8.
[125] S 25(4)(a) of the Constitution.

private debt enforcement. In other words, the transfer effected by the sheriff does not originate from the state's power to expropriate but from its duty to resolve private disputes and judicially enforce private contracts.

Furthermore, because mortgage foreclosures form part of the solution of private disputes, it is difficult to argue that the state is involved in an expropriatory sense. The only part that the state plays is in a law-enforcement capacity, namely through the courts and sheriffs who ensure that debt enforcement is conducted in an orderly fashion. Van der Walt[126] explains that when the state plays a role in settling civil matters (which mortgage foreclosures are) it is not using its power to expropriate. Instead, it is "necessary and legitimate for the state to deprive persons of their property in the course of regulating civil disputes".[127] In my view, sale in execution is a classic example of a situation where the state (by way of the courts and sheriffs) deprives property to settle private credit disputes.[128]

Probably the strongest argument against sale in execution being classified as expropriation is the way the sale in execution is effected and, more specifically, the authority under which it is conducted. It seems clear that expropriation requires an administrative action in terms of authorising legislation, which administrative decision must be taken based on the exercise of a discretion by an administrator.[129] In addition, expropriation must not only be authorised by legislation, but such legislation must also determine the circumstances, procedures and conditions under which expropriation must be executed.[130] In other words, legislation should specifically identify the public purpose and require compensation for a specific deprivation before it can be regarded as an expropriation. If this is not the case, then the deprivation (regardless of how far it intrudes upon private rights) is not an expropriation. If the deprivation nevertheless goes so far that it looks like an expropriation (a so-called constructive expropriation) that would necessitate compensation, the deprivation will simply

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[126] AJ van der Walt *Constitutional property law* (3rd ed 2011) 349.

[127] 349.

[128] With regard to this argument, Australian law takes a similar approach, as AJ van der Walt *Constitutional property law* (3rd ed 2011) 373 n 135 explains with reference to the example of *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155:

> "Not every deprivation of property is an acquisition of property, even if the complainant's property is taken away or extinguished ... [C]ases where property is taken from someone without the state acquiring the property or any other benefit do not qualify as acquisitions of property for purposes of the compensation requirement in the Australian property clause".

[129] *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 213 and 456; A Gildenhuys *Onteieningsreg* (2nd ed 2001) 49 and 93. On administrative law in general, see further C Hoexter *Administrative law in South Africa* (2nd ed 2012).

[130] A Gildenhuys *Onteieningsreg* (2nd ed 2001) 9-10.

be invalid for non-compliance with the arbitrariness requirement; it will not become an expropriation.[131] The procedural legislation that authorises courts to grant execution orders and provides for the way in which sheriffs should conduct sales in execution does not mention anything about expropriation, compensation or the circumstances, procedures and conditions for expropriation. This is simply not legislation that authorises expropriation; it authorises forced transfers of property of a different kind and for different purposes, namely to enforce payment of private debts for the public purpose of ensuring security in the market. Moreover, sheriffs do not act in an administrative capacity and do not have any discretion when effecting a deprivation by way of attachment, sale and transfer of property.

This prospect is strengthened by the principle that expropriation must be authorised by legislation and not the common law.[132] Even though the common law qualifies as "law of general application", it is impossible that rules of the common law can be a source of expropriation.[133] Van der Walt asks the question "whether the loss of property caused by operation of the common law (in some cases confirmed or ordered by a court) constitutes expropriation".[134] Even though Gildenhuys[135] argues that such forced transfers (for example, when a right of way of necessity is granted) are expropriations, Van der Walt[136] points out that it is highly unlikely that these examples can be described as expropriation. Instead, as the author states,

> "[t]hese forced transfers of property in terms of the common law should therefore rather be regarded as a special category of deprivation of property, authorised by the common law, for a valid purpose".[137]

The author also argues that

> "[e]ven where a court orders forced transfer of property on the authority of legislation that does not explicitly or clearly make provision for expropriation, it is probably preferable to see the forced transfer as a regulatory state action and not as expropriation."[138]

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[131] AJ van der Walt "Constitutional property law" (2009) 3 *JQR* para 2.2. Since all sales in execution have the exact same reach, namely the extinguishment of ownership, it cannot be said that some will be so invasive that they amount to constructive expropriation. Therefore, either all sales in execution are mere deprivations or they are all expropriations.

[132] *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671; AJ van der Walt *Constitutional property law* (3rd ed 2011) 346; A Gildenhuys *Onteieningsreg* (2nd ed 2001) 10 and 49.

[133] AJ van der Walt *Constitutional property law* (3rd ed 2011) 453, with reference to T Roux "Property" in MH Cheadle *et al* (eds) *South African constitutional law: The Bill of Rights* (2002) 429-472 and 458 n 144 (left out of the current T Roux & D Davis "Property" in MH Cheadle *et al* (eds) *South African constitutional law: The Bill of Rights* (2nd ed 2010) ch 20).

[134] AJ van der Walt *Constitutional property law* (3rd ed 2011) 346.

[135] A Gildenhuys *Onteieningsreg* (2nd ed 2001) 56-57.

[136] AJ van der Walt *Constitutional property law* (3rd ed 2011) 346.

[137] 346.

The right to foreclose mortgage bonds and claim execution against the hypothecated property is, in terms of the common law, an incident of the limited real right of mortgage. It is based on this substantive principle that the procedural legislation authorises courts to grant execution orders and sheriffs to implement the actual sale in execution. However, as I explain, neither these common law rules, nor the procedural legislation, provide for expropriation of property. Also, any involvement of the state in sales in execution cannot be regarded as administrative decisions to expropriate.

These prospects make it, in my opinion, almost impossible to prove that a sale in execution is an expropriation.[139] Since sale in execution does not amount to expropriation it is unnecessary for it to comply with section 25(2) and (3). Therefore, it is not only unnecessary for the state to pay compensation to a debtor who loses his or her property as a result of sale in execution, but it would also make no logical sense. The validity of sales in execution – from a constitutional property law standpoint – must, consequently, be challenged under the auspices of the deprivation provision (subsection (1)) and not the expropriation provisions (subsections (2) and (3)). If the effects of a particular sale in execution allegedly start to resemble those of an expropriation, the debtor would have to challenge it under the non-arbitrariness test of section 25(1), so as to render the deprivation invalid. There is no scope for the debtor to claim expropriatory compensation from the state (and certainly not from the creditor) under section 25(2) and (3).

6 3 6 Conclusion

In this part of the chapter I investigated whether the sale in execution of a judgment debtor's immovable property complies with section 25 of the Constitution. Since the hypothecated home qualifies as "property" for section 25 purposes, deprivation of such property must comply with the requirements of section 25(1). Since a sale in execution results in the forced

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[138] 346-347 (footnotes omitted).

[139] See also EJ Marais *Acquisitive prescription in view of the property clause* (2011) unpublished LLD dissertation Stellenbosch University 284ff, who convincingly argues that acquisitive prescription does not amount to expropriation but amounts to a regulatory deprivation of property, even though a shift of property is effected from one party to another. Marais provides similar arguments concerning the general definition of expropriation. His argument that prescription is not expropriation strengthens my argument that sale in execution is not expropriation either. The reason for this is that the shift in ownership pursuant to prescription is similar to (although not exactly the same as) the transfer of ownership due to sale in execution. See 6 3 3 n 83 above. Similarly, Z Temmers *Building encroachments and compulsory transfer of ownership* (2010) unpublished LLD dissertation Stellenbosch University 169-176 argues that the compulsory transfer of ownership that might result from encroachment does not amount to expropriation. Forfeiture is another example of a deprivation where the property is completely taken away from its owner but nevertheless is not regarded as an expropriation: See 6 3 3 n 80 above.

transfer of property from the debtor to the auction purchaser, the procedure effectively deprives the debtor of his or her property. I explained that this "deprivation" is indeed authorised by law of general application and that it serves a valid public purpose.

However, the crucial part of the enquiry is whether the sale in execution has a non-arbitrary effect on individual debtors. After explaining that the traditional common law approach and structure of mortgage law may not be nuanced enough to promote the spirit, purport and objects of section 25(1), I suggested that the NCA represents sufficient legislative innovation to render sales in execution constitutionally compliant. In the next part of the chapter I consider the other side of the foreclosure coin. In other words, to the extent that the NCA's consumer protection mechanisms interfere with creditors' property rights, these interferences would also have to comply with section 25, even if they are aimed at the legitimate goal of alleviating debtor hardship. By considering the constitutional considerations on both sides of the dispute, one will ensure that an unbalanced result is avoided.

6 4 Regulation of the creditor's rights to enforce the mortgage

6 4 1 Introduction

Although the following statement was not made with express regard to section 25, it may summarise the approach courts will follow when confronted with a constitutional property challenge of any of the NCA's mechanisms:

> "The court will restrict the statutory limitation of the credit provider's rights to the extent that it is reasonable and justifiable to do so in our democratic order while promoting the objects of the NCA."[140]

In the following part of this chapter I analyse some of the mechanisms provided by the NCA in terms of the property clause. The NCA provides over-indebted debtors who are in default (or in danger of default) with a number of ways to restrict the enforcement of such debt by the creditor. Although these measures can present debtors with the opportunity to not suffer an infringement of their housing rights, they also restrict the contractual and registered rights of creditors. Debt review can culminate in a rearrangement of the debtor's obligations under the credit agreement. In addition, when credit was extended recklessly, the force and effect of

[140] *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SE) para 14.

the credit agreement can be suspended for a period or the rights and obligations of the debtor can be fully or partially set aside.

Although these remedies are aimed at repairing the negative effects of over-indebtedness and reckless credit, they are legislatively sanctioned interferences with the creditor's rights. In the following sections I explain that the creditors' interests can be classified as property for section 25 purposes and that interferences with these rights must comply with the requirements set out in the property clause. My goal is not to attack or discredit these mechanisms but to use the section 25(1) non-arbitrariness test as a tool to explain how courts should determine the content, extent and legitimacy of these remedies. Even though these remedies serve a valid purpose and can have a significant impact in resolving and preventing the social and economic harms associated with over-indebtedness and reckless lending, courts have to strike a fine balance when granting the respective orders. Accordingly, I explain how the logic behind the non-arbitrariness test can assist courts in striking this balance so as to ensure that debtors are protected, but not to such an extent that it creates a disequilibrium in the credit and property market.

6 4 2 Deprivation of property

6 4 2 1 Introduction

The deprivation of creditors' property potentially brought about by the NCA is different and perhaps less obvious than the limitation of debtors' rights discussed in the previous part of this chapter. Before discussing and analysing whether the interferences comply with the non-arbitrariness requirement, it first has to be established which property interests are affected. Unlike the property discussed in 6 3 2 above, namely the ownership of immovable property, the property rights of creditors are not as straightforward. These are what Van der Walt refers to as the more "difficult cases" (as opposed to "easy" cases like those concerning corporeal things), which might require a more comprehensive analysis.[141]

In terms of the two-stage approach, the claimant will have to provide proof that there was in fact "property" at stake. It seems that South Africa might follow the same approach as in foreign law,[142] namely that the meaning of "property" would not be all that important but that courts would focus on whether the interference is proportionate and justifiable. This seems to

[141] AJ van der Walt *Constitutional property law* (3rd ed 2011) 85.
[142] 84.

be a side-effect of the *FNB* methodology, which (as Roux argues) "telescopes" all the section 25(1) issues into the arbitrariness test.[143] Therefore, the property question may often be ignored or be disposed of with low scrutiny. In cases involving movable or immovable corporeal things, courts should readily assume the presence of constitutional property.

Even though land and corporeal movables are at the heart of the constitutional property concept,[144] it is not limited to these objects, since the clause does not exclude intangibles. Most scholars agree that one should interpret section 25 to protect a relatively accommodating notion of property.[145] This will ensure that economically significant intangible property interests that may not be considered property in private law are included under section 25.[146]

The theoretical notion of "dephysicalisation of property" has become commonplace in foreign constitutional property law.[147] In terms of this theory, intangible objects are becoming increasingly important for personal wealth, security and social welfare, whereas the importance of traditional tangible property is on the decline. The argument is that certain intangibles have become so important and valuable in modern society that they should be treated and protected as property – at least for constitutional purposes – even if they are not protected as private law property. Examples of such intangibles are mostly rights. When rights are protected as property in private law, it is difficult to deny them protection under the Constitution. Also, in South Africa dephysicalisation is an economic reality that is already recognised in private law. Therefore, intangible interests and assets that are protected as property in private law or dedicated legislation should be recognised and protected in constitutional law as well.[148]

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[143] T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-2 - 46-5 and 46-21 - 46-25; AJ van der Walt *Constitutional property law* (3rd ed 2011) 93.

[144] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 51. See also *Transvaal Agricultural Union v Minister of Land Affairs and Another* 1996 12 BCLR 1573 (CC); T Roux & D Davis "Property" in H Cheadle *et al* (eds) *South African Constitutional law: The Bill of Rights* (2nd ed RS 10 2011) 20-17.

[145] AJ van der Walt *Constitutional property law* (3rd ed 2011) 114; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 351-353; T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-15 - 46-17; T Roux & D Davis "Property" in H Cheadle *et al* (eds) *South African Constitutional law: The Bill of Rights* (2nd ed RS 10 2011) 20-12; H Mostert & PJ Badenhorst "Property and the Bill of Rights" in Y Mokgoro & P Tlakula (eds) *Bill of Rights compendium* (RS 29 2011) 3FB-22.

[146] AJ van der Walt *Constitutional property law* (3rd ed 2011) 93.

[147] 93-96; AJ van der Walt "Unity and pluralism in property theories – a review of property theories and debates in recent literature: Part I" 1995 *TSAR* 15-42 28-29; KJ Vandevelde "Developing property concepts" (1980) 29 *Buffalo Law Review* 333-340.

[148] AJ van der Walt *Constitutional property law* (3rd ed 2011) 96.

The main arguments in favour of a restrictive definition of property are not based on private law doctrinal arguments related to the nature of "things". Rather, these arguments generally revolve around fears that a wide interpretation of property would insulate too many property interests against legitimate reform and regulatory initiatives. However, this fear has largely been dispelled. In any event, these arguments have no relevance for creditors' rights. Van der Walt argues that it would be best not to restrict the scope of the property clause but to focus on developing a suitable transformation-oriented interpretation and adjudication theory.[149]

Based on the trend in foreign law, Van der Walt[150] concludes that property in constitutional law will differ from its meaning in private law. Objects of property in section 25 should not be limited to tangibles; rights in property should not be restricted to ownership; and these rights are not absolute or exclusive. The author proposes that not only a range of objects (tangible and intangible) should be included, but also a range of traditional property rights and interests (real and personal). In addition, a range of other rights and interests should be included even though they are not necessarily considered property in the civil law tradition. In this respect one should be guided by the general promotion of values that underlie an open and democratic society based on dignity, equality and freedom.[151]

The two interests of creditors that may be affected by the NCA are the limited real right of mortgage and the claim for repayment of the debt. In 6 4 2 2 below I explain that the mortgage, as a real right in property, is recognised as property for constitutional purposes. Secondly, in 6 4 2 3 below I argue that there is a strong probability that the creditor's claim for repayment of the debt should also receive protection under section 25.

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[149] 92.

[150] 104-108.

[151] This would be similar to the principle that is used in German law, where courts base the inclusion of interests within the constitutional protection of property on the question, as AJ van der Walt *Constitutional property law* (3rd ed 2011) 104-105 explains it,

> "whether the inclusion of a specific object or right of property under the protection of article 14 *GG* would serve the constitutional purpose of creating and protecting a sphere of personal freedom where the individual is enabled (and expected to take responsibility for the effort) to realise and promote the development of her own life and personality, within the social context."

See BVerfGE 51, 193 (1979) (*Warenzeichen*) 218. See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 151-157.

6 4 2 2 The mortgage

It is trite that the real right of mortgage is regarded in private law as incorporeal immovable property.[152] Moreover, all the major commentators agree that real rights recognised by common law should be protected as constitutional property.[153] In *FNB* the CC also confirmed that constitutional property not only refers to objects of property but also to rights in property themselves,[154] real rights (such as mortgages) being prime examples. One of the factors that the CC highlighted during its arbitrariness enquiry was that when the property right is something less extensive than ownership, a less compelling reason for the deprivation might be sufficient to render it non-arbitrary.[155] Therefore, the court acknowledged that rights in property that are less extensive than ownership will in principle be protected in terms of section 25. One of the most obvious examples of such lesser rights in property is limited real rights.[156]

An example of a limited real right that has already been expressly accepted as property for section 25 purposes is the servitude.[157] Despite the differences between servitude and mortgage, both are in nature *iura in re aliena* that limit the owner's entitlements in his or her property. In the case of mortgage bonds, the owner's power to freely dispose of the property is limited by the security interest registered in favour of the creditor. Just as servitudes qualify as constitutional property, mortgages must by analogy also qualify.[158] The SCA has also indirectly alluded to the fact that it would accept a registered mortgage bond as constituting a real right that qualifies as property under section 25. In *Gainsford and Others NNO v Tiffski*

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[152] See PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 35-38, also discussed in 2 4 1 above.

[153] AJ van der Walt *Constitutional property law* (3rd ed 2011) 140; T Roux & D Davis "Property" in H Cheadle *et al* (eds) *South African Constitutional law: The Bill of Rights* (2nd ed RS 10 2011); H Mostert & PJ Badenhorst "Property and the Bill of Rights" in Y Mokgoro & P Tlakula (eds) *Bill of Rights compendium* (RS 29 2011) 3FB-30 - 3FB-31; I Currie & J de Waal *The Bill of Rights handbook* (5th ed 2005) 538; PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 536; T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-13.

[154] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 51.

[155] Para 100(e).

[156] AJ van der Walt *Constitutional property law* (3rd ed 2011) 140; PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 536; T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-13.

[157] *Ex parte Optimal Property Solutions CC* 2003 2 SA 136 (C) para 19. See also L Kiewitz *Relocation of a specified servitude of right of way* (2010) unpublished LLM thesis Stellenbosch University 79-81, with reference to *Linvestment CC v Hammersley and Another* [2007] 3 All SA 618 (N) paras 41-43.

[158] PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 536. In terms of art 1 of the first protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, it is also "clear that the proprietary rights enjoyed by a secured creditor would qualify as 'possessions' under" the protocol: See L Fox *Conceptualising home: Theories, laws and policies* (2007) 468.

Property Investments (Pty) Ltd and Others[159] the SCA upheld the argument that the particular mortgage bonds were *not* property, but only because they were *ab initio* void as a result of section 34(1) of the Insolvency Act 24 of 1936. It seems clear that the court would have accepted valid mortgage bonds as constituting real rights worthy of protection under the property clause.

In the context of this dissertation, the creditors I discuss are all holders of mortgages. In other words, they have limited real rights (for security purposes) in the debtors' land. These limited real rights are rights in property and therefore they qualify as property for constitutional purposes. The mortgage may be a lesser right than ownership but – in light of the discussion above – this does not disqualify the mortgage from constitutional protection. Therefore, no law may permit the arbitrary deprivation (or regulation) of the creditor's right of mortgage.

6 4 2 3 The claim to receive payment of the debt

A more difficult question is whether the creditor's personal right to receive repayment of the loan (the debt) is property for constitutional purposes. This personal right is neither a traditional object of property nor a right in property. However, a debt is a commercially valuable personal right, which is playing an increasingly important role in modern society. Even though a debt is not traditionally seen as an object of property, it has been treated as such for practical purposes. For example, as a result of commercial need it has been accepted that debts as personal rights can be pledged as security for another debt. In this sense the debt is treated as an object of another property right, namely the limited real right of pledge.[160] Save for this exception, debt is generally not regarded as an object of private property law. Even for security purposes, the pledge theory is by definition only a construction that was developed to satisfy a commercial need.

In the Roman-Germanic tradition, objects of property rights are limited to tangible things. However, exceptions have even been recognised in private law. For example, a company's loan account has been recognised as private property by the SCA.[161] In addition, shares

[159] 2012 3 SA 35 (SCA) paras 42-47.
[160] It is now generally accepted in South African law that the cession of claims for security purposes (cession *in securitatem debiti*) can be explained on the basis of the pledge construction (similar to how movables are pledged): See *Grobler v Oosthuizen* 2009 5 SA 500 (SCA). See also SJ Scott *The law of cession* (2nd ed 1991) 231-252.
[161] *Graf v Buechel* 2003 4 SA 378 (SCA).

(which are personal rights) have been recognised as incorporeal movable property in private law.[162] Therefore, even in private law it is not uncommon for South African courts to acknowledge certain personal rights as property. It is generally accepted that intangible objects that have been recognised as property in private law will also qualify as property in constitutional law.[163] For example, a trademark[164] – which is recognised as property in private law – has already been recognised as constitutional property by the CC.[165]

Van der Walt[166] explains that those intangibles that are not already protected as property in private law can be protected as constitutional property on the same basis as those already recognised. One should determine whether the interest at stake has constitutionally relevant value for the claimant and whether it has vested or was acquired in accordance with the applicable principles of law. Even in Germany, where the private law concept of property is restricted to corporeal objects, incorporeals (or rights) are recognised as constitutional property on a similar basis.[167] In the same way, South African courts may not be opposed to the idea of recognising certain intangibles as constitutional property even though they are not regarded as property in private law.

According to Roux, incorporeal property should enjoy protection under section 25 for the same reasons that the CC in *FNB* extended protection to juristic persons,[168] namely because of its role in economic growth and in the consolidation of democracy.[169] This is a strong argument that supports the proposition of recognising debt as constitutional property. That the credit industry (and by implication the sufficient protection of creditors' rights) supports economic growth, goes without saying. If these interests are not protected, democracy and freedom will be undermined by the economic devastation that will result from unhindered state interference with creditors' rights.

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[162] *Cooper v Boyes NO and Another* 1994 4 SA 521 (C); *Ben-Tovin v Ben-Tovin and Others* 2001 3 SA 1074 (C).
[163] AJ van der Walt *Constitutional property law* (3rd ed 2011) 96.
[164] S 34 of the Trade Marks Act 194 of 1993.
[165] *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 1 SA 144 (CC). See also *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* 2006 8 BCLR 883 (CC).
[166] 96.
[167] AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 153. However, general wealth is not regarded as property, but only concrete rights and interests that have vested or have been acquired according to normal law.
[168] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) paras 41-45.
[169] T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-15 - 46-17. On the inclusion of juristic persons, see 6 2 3 1 n 38 above.

There have already been indications in case law dealing with the NCA that the courts would be willing to measure interferences with creditors' rights against section 25. Without hesitation (or further explanation), Otto and Otto refer to contractual rights as property for constitutional purposes.[170] The authors took this position in their discussion of an issue concerning the correct interpretation of section 130(2) of the NCA.[171] The SCA in *Rossouw and Another v Firstrand Bank Ltd*[172] provided as one of its reasons for holding that a certain interpretation of section 130(2) cannot be correct, that such an interpretation would lead to iniquities for credit providers[173] and that it "would constitute a serious inroad upon the rights of the mortgagee which would probably be constitutionally unjustified".[174] Although the court did not elaborate on this argument or decide the case on this point, it is clear that it would have been willing to challenge the validity of section 130(2) in terms of section 25(1) of the Constitution. However, the court found that the correct interpretation of section 130(2) was not the one that possibly would have violated section 25(1) and, therefore, the question did not come up.

In another case, *First Rand Bank v BL Smith*,[175] the court (in an arguably *obiter* statement) described the right to receive payment as property for constitutional purposes. If the NCA had made it possible for debtors to abuse the debt review process so as to enjoy a permanent moratorium, it would (according to the court) have contravened section 25(1) of the Constitution. At the end of the day this conclusion was not necessary, since the court interpreted and applied the debt review process so that it did not result in this state of affairs. However, this case is another example of how courts would be willing to protect creditors' rights in terms of section 25 if the appropriate case were to arise. In my view, both these cases are examples of how courts can use the section 25(1) non-arbitrariness standard when interpreting legislation that impacts on property rights.

Even the CC recently gave indications that when deciding issues in the NCA, it would be willing to regard creditors' rights as property. In *Cherangani Trade & Invest 107 (Pty) Ltd v*

[170] JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 115 n 158.
[171] See 6 4 8 below.
[172] 2010 6 SA 439 (SCA).
[173] Para 17 per Maya JA.
[174] Para 42 per Cloete JA.
[175] (24205/08) WLD (31 October 2008), not available online (copy on file with author) para 25. The case is also discussed in 4 3 4 4 above.

Mason and Others,[176] the effect of section 89(5)(c) of the NCA was challenged in terms of section 25(1). Without going into details, since this aspect of the NCA does not concern my research, the section provides that courts can declare certain debts under invalid credit agreements forfeit to the state. The argument was that this forfeiture amounts to an arbitrary deprivation of property, since the section does not provide courts with a discretion in this regard. The court dismissed the application for appeal, since this aspect was not argued in the lower courts and because all interested parties were not before the court. Yet, the court made it clear that this situation did raise a constitutional question based on section 25 of the Constitution.[177] It seems that if the CC had heard the case, it would not have dismissed the claim on the basis that it did not regard debt as property. In fact, the court seemed willing to regard forfeiture of the debt as a deprivation of property, but refused to make any decision on the arbitrariness issue for reasons unrelated to the property clause.

In another recent case that dealt with the forfeiture of debts under unlawful credit agreements, the court in *Opperman v Boonzaaier and Others*[178] held expressly that there is

> "no doubt that the claim would fall to be counted as an asset in the applicant's estate and thus part of his patrimony. The claim not only has a monetary value, it is amenable, like any corporeal property owned by the applicant, to being disposed of and transferred by him to a third party".

In this respect the court relied on Roux[179] who, in turn, relies on Van der Walt.[180] Therefore, the court explicitly assumed that the forfeiture of the debt is a deprivation of property and applied the *FNB* test to it.[181] In fact, the court found a particular provision of the NCA to be unconstitutional because it effected an arbitrary deprivation of property. The CC is yet to confirm this decision.

Foreign courts are also willing to protect contractual rights under the property clause.[182] For example, in German law – where contractual rights are not regarded as property in private law – such personal rights have been accepted as property for purposes of

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[176] (CCT 116/2009) [2011] ZACC 12 (8 April 2011). This was an appeal against an order of the Free State High Court in *Cherangani Trade and Investment 107 (Edms) Bpk v Mason NO and Others* (6712/2008) [2009] ZAFSHC 30 (12 March 2009) paras 30 and 37-38.
[177] *Cherangani Trade & Invest 107 (Pty) Ltd v Mason and Others* (CCT 116/2009) [2011] ZACC 12 (8 April 2011) para 8.
[178] (24887/2010) [2012] ZAWCHC 27 (17 April 2012) para 18 per Binns-Ward J.
[179] T Roux "Property" in S Woolman *et al* (eds) *Constitutional law of South Africa* Vol 3 (2nd ed OS 2003) 46-16.
[180] AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 30-71.
[181] *Opperman v Boonzaaier and Others* (24887/2010) [2012] ZAWCHC 27 (17 April 2012) para 19.
[182] AJ van der Walt *Constitutional property law* (3rd ed 2011) 117ff.

constitutional law.[183] However, not all intangible interests are recognised as property, but only those that have vested in terms of the "normal" law on the basis of the person's own investment or performance.[184] Furthermore, only specific assets are classified as property and not general wealth or financial status.[185] In United States and Commonwealth constitutional law, some personal and creditor's rights are also protected as property.[186] The European Court of Human Rights has also held that debt is property for constitutional purposes if the applicant can prove the claim.[187] In my opinion, it is unlikely that South African courts will go in a different direction than these jurisdictions, especially in view of the fact that the court in *Opperman v Boonzaaier and Others*[188] already expressly acknowledged a claim to receive payment of a debt as property for section 25 purposes.

6 4 2 4 Conclusion

Therefore, the mortgage as a limited real right is constitutional property in the hands of the creditor. Moreover, the right to receive repayment of the debt may probably also be regarded as property. In any event, as a result of the accessoriness principle, when there is an interference with the creditor's ability to enforce its claims, the enforcement of the mortgage bond will also be affected. This prospect makes it not all that important whether the courts will explicitly regard debt as property. Even if one were not to accept debt as constitutional property, the creditor will by virtue of the mortgage enjoy constitutional protection against any arbitrary deprivation of property. Henceforth I take it for granted that the creditor's right in the outstanding debt as well as its right of mortgage (being accessory to one another and therefore inseparably linked) are property for section 25 purposes.

One of the central entitlements resulting from the mortgage bond is the ability of the creditor to enforce it when the debtor defaults. The creditor's exercise and enforcement of this entitlement may be affected by credit regulation in terms of the NCA. In 6 4 3 below I

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[183] BVerfGE 83, 201 (1991) (*Vorkaufsrecht*). See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 131 and 152.
[184] AJ van der Walt *Constitutional property law* (3rd ed 2011) 119, citing BVerfGE 69, 272 (1985) (*Eigenleistung*).
[185] AJ van der Walt *Constitutional property law* (3rd ed 2011) 119, citing BVerfGE 4, 7 (1954). See also AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 153 and with regard to US law, *Eastern Enterprises v Apfel* 524 US 498 (1998).
[186] AJ van der Walt *Constitutional property law* (3rd ed 2011) 122 and 150-152.
[187] *A & B Company v Federal Republic of Germany* [1978] 14 DR 146. See also AJ van der Walt *Constitutional property law* (3rd ed 2011) 120-121 n 125; AJ van der Walt *Constitutional property clauses: A comparative analysis* (1999) 116-118.
[188] (24887/2010) [2012] ZAWCHC 27 (17 April 2012) paras 18-19.

look at the general justification for the existence of these debt relief mechanisms, with reference to the purposes of the NCA. Once it is determined that the NCA serves a legitimate and valid public purpose, one can assess whether the impact of these measures will have constitutionally justifiable results on the rights of creditors in individual cases. Hence, in 6 4 4 to 6 4 6 below I evaluate regulation aimed at, firstly, debt review and rearrangement and, secondly, the effects of reckless credit against the non-arbitrariness test of section 25(1). The premise is that none of these mechanisms may permit arbitrary deprivation of property.

6 4 3 Broad justifications: Purposes of the NCA

As indicated, whenever a debt relief measure regulates a creditor's property rights (or deprives the creditor of those rights), it must satisfy the section 25(1) non-arbitrariness test. Because I described the specifics of the test in 6 2 3 2 above, they are not repeated here. However, to summarise, the enquiry consists of two legs, namely a general and individual justification. As I explained in 3 4 above, a similar approach applies to the assessment for justifying infringements of section 26(1) rights. The first, broad question relates to the general justifications for the deprivation in question. In 6 3 4 2 above, I conducted a similar test with regard to the deprivation effected by a sale in execution. In this part of the chapter I do the same thing, but with respect to the deprivation of creditors' property rights. So, the broad question (the first leg of the non-arbitrariness test) asks whether there is a valid and legitimate public purpose for the debt relief effected by the NCA. This aspect of the section 25(1) enquiry is not that problematic, since the valid purpose of the Act can quite easily be perceived. For example, the main purpose of the NCA is provided in section 3 of the Act:

> "The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers ... "[189]

The section further mentions ways in which the Act purports to achieve this goal (the most relevant of which are also quoted in 4 2 above). Even though consumer protection is the central aim of the NCA, this is (as explained and illustrated throughout chapter 4 above) not the sole purpose. It is clear that there must be a balance between the interests of credit providers and consumers. The purpose of the NCA (as well as the balance it aims to strike) must be kept in mind when evaluating whether the means used justify the ends sought. In

[189] S 3 of the NCA.

other words, the valid and important purposes of the NCA will not always be enough to justify the infringement of creditors' rights. In line with the *FNB* test,[190] one must ascertain whether these debt relief mechanisms ensure that there is a sufficient nexus between the purposes of the Act and the effect on creditors.

6 4 4 Debt review: Restriction of the creditor's right to enforce the debt

The details of debt review and debt rearrangement are provided in 4 3 4 2 and 4 3 4 3 above. Here I only provide an analysis of how these mechanisms might interfere with creditors' rights. The purpose is to evaluate whether the NCA (by way of these mechanisms) permits arbitrary deprivation of property. If a debtor applies for debt review prior to defaulting on the credit agreement, the creditor is prohibited from enforcing the credit agreement or claiming any right of security while the debt review is running.[191] Therefore, during this period the creditor's rights are restricted in the sense that it cannot exploit its mortgage or enforce its claim, at least temporarily. I present reasons why this deprivation of property is not arbitrary; in other words, why there is a sufficient nexus between the deprivation and its purposes. Therefore, I argue that the internal working of the debt review process ensures that the creditor in each individual case will not experience unconstitutional deprivation, since the process is sensitive enough to provide for various factual eventualities that impact the creditor.

In the first place, the purpose of debt review is to resolve (or attempt to resolve) an over-indebted consumer's financial predicament. This argument relates to the general, broad policy justifications of the NCA discussed in 6 4 3 above. Many people suffer from over-indebtedness, with the result that many mortgage debtors face not only the claim for repayment of the loan, but also the sale in execution of their homes. For the legislature to intervene by providing a mechanism to assist and try to resolve debtors' repayment problems is a valid and justified government purpose. This is in line with the purpose of the Act. One of the means used to further this goal is to restrict the creditor's ability to enforce the debt during the period that the debt review is being conducted. If this restriction was not in place it would have rendered the debt review ineffective, since creditors would nevertheless have been able to foreclose the bonds despite the fact that debt review is running. The result would have been that debt review would often not lead to its desired result. The only way for debt

[190] See 6 2 3 1 above.
[191] Ss 88(3), 130(3)(c)(i) and 130(4)(c) of the NCA.

review to stand a chance of success is to place this restriction on creditors' rights during this period. Therefore, this restriction is reasonably necessary to achieve the purposes of debt review.

However, one should also look more closely at the effect of debt review on the rights of the creditor. The rights involved are the limited real right of mortgage and the claim to receive payment of the debt. As the CC in *FNB* held, where the property involved is something less than ownership, a less compelling reason for the deprivation would be required. Moreover, the degree to which the various entitlements of the property right are effected will also determine the extent of the scrutiny.[192] With regard to the restriction imposed by the debt review period on the creditor's rights, the rights affected are clearly less than ownership. In addition, the extent of the interference entails that the creditor's ability to enforce its rights are inhibited; none of the rights is extinguished. Also, this restriction is not permanent; in fact, the time period is relatively short. After 60 business days (roughly three months) the creditor can terminate the debt review by way of a notification, after which debt enforcement can continue normally.[193] The debtor's window of opportunity to have his or her debt reviewed and the corresponding moratorium on the creditor's right to enforce the debt will only last for 60 business days. However, it is possible for a debtor, after termination of the debt review, to request a magistrate to have the review continued.[194] Generally this prolongation of debt review will only be allowed if there is a good reason or if the creditor terminated the debt review in bad faith. Courts will not allow creditors' rights to be restricted in perpetuity.[195]

Therefore, the nature of the property (less than ownership) and the degree of the deprivation (temporary moratorium on enforcement) indicate that a rational connection between the deprivation and the purpose thereof would suffice to render it non-arbitrary.[196] Even if one were to apply the stricter proportionality test, it seems that there would be enough of a nexus to ensure that the deprivation is non-arbitrary. The safeguard that creditors have (the right to terminate overdue debt reviews) is a strong argument in favour of the proposition that the moratorium imposed on debt enforcement by the debt review process will not lead to

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[192] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100(e) and (f). See 6 2 3 1 above.
[193] S 86(10) of the NCA. For more details on the termination of debt review, see 4 3 4 4 above.
[194] S 86(11) of the NCA.
[195] *Firstrand Bank Limited v Smith* (4752/2008) [2008] ZAFSHC 89 (4 September 2008) para 25.
[196] MA du Plessis "The National Credit Act: Debt counselling may prove to be a risky enterprise" (2007) 32 *JJS* 74-92 84 explains that the time periods for debt review, serve to avoid an unjustified moratorium from valid obligations.

unjustifiable results in individual cases. To expect creditors to wait 60 business days in order for the legitimate and important purpose of debt review to be fulfilled does not place an undue burden on them. Their right to terminate debt reviews sufficiently protect them against debtors who abuse the debt review process. Also, the court's power to order the continuation of a terminated debt review will always take into account how such continuation will effect creditors. In summary, the reason for this restriction is legitimate and important, whereas the restrictive effect that it has on creditors is small in comparison to the potential good it may accomplish.

6 4 5 Debt rearrangement

One of the results of debt review is the possible rearrangement of the debtor's obligations. There are various ways in which the debt can be restructured, and these options seem to allow for quite a large degree of creativity.[197] Rearrangement is of course not something that happens automatically as it must be ordered by the court, based on the debt counsellor's recommendations. In light of section 25(1), two questions can be asked. Firstly, is the debt rearrangement mechanism itself in line with section 25(1) and, secondly, can one evaluate individual restructuring orders against the non-arbitrariness requirement of section 25(1)? The first question is a broader one that relates to whether there is a legitimate public purpose for the rearrangement mechanism. This question only needs to be settled once – on a general level – and does not need to be reinvestigated in every individual case. However, the second question requires a more nuanced case-by-case approach. The question is whether the deprivation of creditor's property (as effected by the rearrangement) is justified under the facts of that specific case in terms of the impact it has on the individual creditor.

The most common way in which debt is rearranged is by decreasing the monthly instalments and lengthening the period of repayment.[198] In other words, repayment of the loan is spread over a longer period of time. This can be combined with suspending payments for certain periods.[199] This rearrangement will certainly bring relief to debtors who struggle to keep up with their monthly obligations. Consequently, it satisfies the broad purpose of the NCA. It will also prevent many debtors from losing their homes and, hence, serves to give effect to section 26 considerations. Therefore, the possible effects of rearrangement for the

[197] See 4 3 4 3 above
[198] S 86(7)(c)(ii)(aa) of the NCA.
[199] S 86(7)(c)(ii)(bb) of the NCA.

debtor are positive and it has the potential to significantly soften the detrimental effects that over-indebtedness otherwise would have had. The rationality of the goals behind debt rearrangement cannot be doubted.

However, the next question is: Is the means used justified by the ends sought? As a result of debt rearrangement the creditor will receive less each month but eventually still recover its entire investment. Ultimate satisfaction of all obligations is after all one of the aims of the Act.[200] Therefore, the creditor will probably not suffer prejudice in the sense of diminished profits, since interest will continue to accumulate for the extended period and – in the long run – make up for the monthly decrease in payments. Yet, it will take longer to settle the debt than the parties contracted for. The creditor will also receive less each month than it budgeted for.

It is clear that debt rearrangement is a noteworthy inroad into the creditor's rights and a limitation on what it expected to receive when the contract was concluded. Nevertheless, generally this effect may be justified. One reason is that when a debtor defaults on the rearranged repayment plan, the courts will allow the common law to run its course and foreclosure will, therefore, continue without further ado.[201] In other words, debt rearrangement represents the debtor's second chance, but no third or fourth chances will be allowed. This principle contributes to ensuring that the debt rearrangement stays within the bounds of what would be a justifiable infringement of the creditor's rights.

Since debt rearrangement must be ordered by the court, one can assume that the decision will be made judicially. In other words, it will be based on all the information available to the court. In addition, the mechanism must be applied in such a way that the limitation placed on creditors is not arbitrary. Since no law may permit arbitrary deprivation of property, the NCA must be applied to not have such an effect. The fact that the deprivation does not occur automatically but only upon the court's authorisation indicates that the general mechanism of debt rearrangement is not contrary to section 25(1), since the details of the deprivation will always be evaluated by a court before it is effected. In other words, when courts decide on how to rearrange a consumer's debt, they must do so with the creditor's property and contractual rights in mind. The court must structure the rearranged payment plan in such a way that the deprivation effected by it will not be arbitrary. The rearrangement order must be

[200] S 3(c)(i), 3(g) and 3(i) of the NCA.
[201] See 4 3 4 2 n 278 above.

aimed at fulfilling the purpose of the NCA, namely the eventual satisfaction of the debtor's obligations.

It has been accepted that the court may not restructure the debt in such a way that it deprives the creditor of what it is entitled to under the agreement, namely the eventual repayment of the full debt.[202] For example, the court may not decrease the monthly payments without increasing the number of instalments.[203] In addition, the court may not decrease the interest rate, since this would lower the total debt.[204] Another example of an arbitrary rearrangement order would be one that would only lead to the final repayment of the debt in an outrageously long time, for instance, 60 years. Sympathy for the debtor and his or her family's socio-economic condition cannot be the driving force behind the court's decision either. Instead, the court's decision and the structure of the rearranged payment plan must take all factors into account. These factors, no doubt, include socio-economic considerations but must equally make provision for commercial sensibility.

The advantages attached to debt rearrangement for over-indebted debtors are potentially momentous and may prevent the negative consequences usually associated with full-blown debt enforcement and foreclosure, such as the sale in execution of the mortgaged home. If the loss of a home can be prevented in a way that does not destabilise the credit market by, for instance, arbitrarily depriving creditors of their contractually agreed-upon expectations, that route should be followed. Debt rearrangement might be the best solution in this respect, since it neither completely relieves debtors of their contractual obligations, nor does it prevent creditors from recovering their investments. The full repayment of the debt is only postponed and restructured in a way that is reasonable for the protection of both parties' interests. At the end of the day, the interference with the creditors' rights is only a restructuring and not a taking away of those rights. Yet, even a restructuring of property will qualify as a deprivation, since it interferes with the property. The positive results of a successful debt rearrangement, combined with the fact that creditors will in the long run not suffer financial prejudice, indicate that there is sufficient reason for the deprivation of property that is effected by this mechanism.

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[202] *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 19. It is important to consider that the term "deprives" was not used in this case to refer to "deprivation" under s 25(1). Instead, it was used in a more general sense. Nevertheless, the principle the court established is valid and renders the purported effects of the NCA in compliance with s 25(1).

[203] *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 19.

[204] *Taxi Securitisation (Pty) Ltd v Mongezi Moni and Others* (CA 265/10, CA 266/10, CA 267/10) [2011] ZAECGHC 11 (28 April 2011) paras 35-36.

In 4 3 4 6 above I explain how the courts exercise their discretion when a debtor alleges his or her over-indebtedness and asks the court to rearrange the order. As illustrated there, the courts are quite strict. For example, they require debtors to provide an explanation why they did not apply for debt review earlier and why they did not respond to the notice of default. In addition, debtors must act in good faith and provide information to show that they are over-indebted and prove that debt rearrangement would be a viable solution to the situation. Furthermore, it seems that courts will investigate whether the sale of the property might in fact be preferable to solve the over-indebtedness. The strictness with which the courts go about making these decisions indicates that they will not easily yield to superficial allegations of over-indebtedness and that they will not interfere with creditor's rights unnecessarily. The factors that the courts developed for exercising their discretion indicate, in my opinion, that individual debt rearrangement orders will not be arbitrary. The reason for this is that creditors are sufficiently protected against the possible abuse of the debt review process.

In conclusion, the value that debt rearrangement can have for debtors who wish to save their homes is so significant that it justifies the existence of this mechanism. Moreover, a restructuring will remain within the bounds of reason, since they must have the eventual satisfaction of the creditor's claim in mind. In many foreclosure cases, therefore, debt rearrangement provides a rescue plan for homeowners who would otherwise have lost their homes. Yet, this measure has a balanced effect in that it takes account of the legitimate contractual and property rights of creditors.

6 4 6 Reckless credit

6 4 6 1 Introduction

Before the NCA was enacted, when the issues pertaining to the effects of housing rights on debt enforcement first came to light in the *Jaftha* case,[205] the CC made a reference to the role that reckless credit would play when courts decide whether to grant execution orders. The court noted that it may count against a debtor if he or she concluded the agreement despite having knowledge of the fact that he or she would be unable to repay the loan.[206] Therefore, the CC suggested that the blame for reckless credit might have to rest with the debtor and not with the creditor.

[205] *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC).
[206] Para 41. See also L Steyn "'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure" (2007) 11 *LDD* 101-119 117-118.

Generally speaking, it is one of the main goals of the NCA to prevent and remedy over-indebtedness.[207] One of the foremost causes of over-indebtedness is reckless credit agreements, in other words, credit agreements that are unaffordable.[208] To address this problem the legislature had to make a policy choice. Even though both debtors and creditors are generally to blame for the practice of concluding unaffordable credit agreements, the legislature had to choose whether to place the blame at the doorstep of debtors or creditors. Another way to ask the policy question is: On which party should the responsibility fall not to conclude credit in a reckless manner? In reality one would suppose that both have that responsibility. If one assumes that both parties would properly look out for their own interests, it would imply that neither of the parties would take the risk of concluding reckless credit agreements. The risk of not retrieving their investments should logically inspire creditors to only grant credit to debtors who can afford to repay.

If this line of argument is correct, normal economic considerations should generally prevent reckless credit. However, this is evidently not the case. The strength of the creditor's security in the immovable property may cause it to be less concerned with ensuring the debtor's ability to repay. In addition, many consumers will probably not realise that the credit agreements they are concluding will end up being unaffordable. Moreover, the prospect that the immovable property will increase in value over the years makes mortgage debt such an attractive option that debtors seem willing to take the risk or may not even consider the affordability of instalments on a monthly basis.

Be that as it may, the legislature has decided to take a strict approach when it comes to preventing and remedying reckless credit. It has expressly placed the obligation on creditors not to extend credit in a reckless fashion.[209] In other words, the policy choice was made in favour of placing a greater burden on creditors than on debtors. The reason is possibly that creditors can prevent reckless credit more effectively, since they can develop assessment

[207] S 3(g) and (i) of the NCA.
[208] For the details of reckless credit, see 4 3 3 above.
[209] S 81(3) of the NCA. Yet, a certain degree of responsibility is also placed on the consumer. When the debtor applies for credit, he or she must, in terms of s 81(1), fully and truthfully answer any questions and provide any information requested by the creditor as part of its assessment. This approach absorbs at least some of the burden that is otherwise placed on the creditor: See also CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 397. However, ML Vessio "Beware the provider of reckless credit" 2009 *TSAR* 274-289 279 points out that the credit should still ask the right questions. In terms of s 81(4)(a) and (b), it is a complete defence against allegations of reckless credit if the creditor can prove that the consumer did not fully and truthfully answer any requests for information and if the Tribunal establishes that such a failure materially affected the creditor's ability to make a proper assessment. See also CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 400; C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 3 2011) 11-41.

mechanisms to ensure that debtors who cannot afford to do so are not provided with credit. The legislature's aim of combating reckless credit and over-indebtedness would be achieved more effectively if creditors are prohibited from granting reckless credit. They are the ones with bargaining power and who are rich in capital, whereas consumers are often desperate for financing and willing to take greater risks. Therefore, the Act aims to protect debtors against this unequal bargaining position by preventing them from obtaining unaffordable loans. However, this protection is provided not by directly restricting debtors but by compelling creditors to not grant loans to these consumers, despite the fact that these consumers apply for credit.

The prohibition on reckless lending in itself is not problematic or controversial. It serves a valid purpose, namely the prevention of over-indebtedness, which is clearly in the public interest. The proscription itself does not deprive anyone of existing property. Nevertheless, the question is: What happens when reckless credit was not prevented? In other words, what is the effect on the relationship between the debtor and creditor under circumstances where reckless lending occurred? What is the nature of a recklessly concluded credit agreement? This issue is important because the consequences that the Act attaches to reckless lending can interfere with the otherwise lawfully obtained rights of creditors and can place obstacles in the way of debt enforcement and mortgage foreclosure.

Without providing reasons for its decision, the court in *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases*[210] held that a reckless credit agreement that is set aside is null and void, "as it had never been".[211] In light of the construction of the Act, this explanation is probably incorrect. The NCA provides for certain credit agreements that are unlawful and consequently *ab initio* null and void,[212] but reckless credit agreements are not included in the list. Therefore, as Boraine and Van Heerden point out, a credit agreement that was recklessly concluded is not null and void or even regarded as unlawful.[213] Nevertheless, the legislature has undoubtedly expressed its displeasure with reckless credit granting.[214] I agree with Boraine and Van Heerden, who suggest that reckless credit agreements remain valid and that

[210] 2011 1 SA 310 (GSJ) para 47.
[211] See also CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 403.
[212] S 89 of the NCA.
[213] A Boraine & C van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 650-656 650. See also CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 401.
[214] A Boraine & C van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 650-656 656.

the courts merely have to decide upon the consequences of such agreements in terms of sections 83 and 84 of the NCA.[215] The court has a discretion to decide between two possible consequences of reckless credit, namely either to suspend the force and effect of the agreement for a certain period or to set aside (in part or in full) the rights and obligations of the debtor.

I describe the circumstances under which these options are available in 4 3 3 above. In the following paragraphs I focus on how these remedies impact on the rights of creditors, more specifically their protection against arbitrary deprivation of property. As will become clear, this section 25 analysis will assist courts in deciding how to exercise their discretion. Boraine and Van Heerden[216] comment that there are no guidelines to steer a court in exercising this discretion. The authors ask how a court is supposed to decide between setting aside and suspension, and furthermore, how a court should decide between setting the rights and obligations aside in part or in full. The authors state that a court should usually have facts before it that will direct its decision. In another publication the same authors express the opinion that this apparent uncertainty will lead to a fragmented approach by the courts and, therefore, that clarification is required.[217] In the following paragraphs I aim to shed more light on these remedies, with reference to section 25(1) of the Constitution.

6 4 6 2 Suspending the force and effect of the agreement

The effect of a suspension is that during this period the creditor is not entitled to receive any repayment instalments.[218] In addition, during this time no interest or costs may be added to the capital debt.[219] Therefore, the creditor's rights under the agreement are unenforceable.[220] Although Van Heerden and Boraine refer to this consequence as a penalty,[221] it is more accurate to refer to it as a deprivation of property for the purpose of remedying the negative effects of reckless credit. Although the consumer remains indebted to the credit provider, he or she may benefit from the suspension in the sense that a "payment moratorium" is created

[215] 651.
[216] 652. See also CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 402.
[217] CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 403.
[218] S 84(1)(a) of the NCA.
[219] S 84(1)(b) and (2)(b) of the NCA.
[220] S 84(1)(c) of the NCA.
[221] CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 405. In 6 4 6 3 below I refute the idea that reckless-credit remedies should have punitive results.

for a certain period of time.[222] This is clearly an interference with what the creditor would otherwise have been entitled to, and this interference must be investigated in terms of the property clause. In section 25 terminology, the NCA (through the suspension remedy) may not permit arbitrary deprivation of the creditor's property. In other words, there must be a sufficient reason for the suspension – a rational purpose as well as a sufficient nexus between the purpose and the negative effects of the deprivation.

The purpose of the period of suspension is to afford the consumer the opportunity to get his or her financial affairs in order. As a result, it will afford him or her the chance to get back into a position where the adverse effects created by the reckless credit granting are no longer present. The idea is that he or she should eventually repay the debt.[223] Therefore, the suspension of the credit agreement may provide some relief but only for as long as the agreement is suspended, after which the consumer will be liable for the outstanding debt.[224]

In general there should be no problem with the fact that the NCA makes this remedy available. The mere presence of the mechanism does not permit a deprivation of property. The deprivation only occurs when the court makes an order that suspends the force and effect of the agreement for a certain period. During this period there is a deprivation of property in the sense that the creditor cannot enjoy any of its rights under the agreement.[225] However, the practical details and effect of this remedy are not allowed to result in arbitrary deprivation of property. Since section 25(1) prohibits the NCA from permitting arbitrary deprivation of property, all suspension orders must live up to this standard and the Act should be interpreted accordingly. When the court decides on how long the period of suspension should be, it must consider the purpose of such a suspension and compare it to the impact it would have on the creditor. In my view, the result of the suspension may not extend beyond what the NCA intended for such a remedy to accomplish. Although the Act does not expressly state the purpose of suspending the force and effect of the agreement, in my opinion it is reasonably clear that it is aimed at remedying the negative consequences of reckless credit. Therefore, the purpose of the period of suspension should be to afford the debtor some time to recover from the prejudice that came as a result of the reckless lending. The duration of the suspension will, hence, be indicative of its constitutional validity.

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[222] A Boraine & C van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 650-656 654.
[223] 654.
[224] S 84(2)(a) of the NCA. See also A Boraine & C van Heerden "To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments" (2010) 13 *PELJ* 84-124 98.
[225] S 84(1)(c) of the NCA.

I suggest that the length of the suspension must be determined based on a calculation of how long it will take for the debtor to recover if he or she were relieved from his or her obligations under the reckless credit agreement. For instance, if the debtor is – as a result of the reckless nature of the agreement – over-indebted by R1 000, the agreement should only be suspended for as long it would have taken the debtor to repay instalments to the value of R1 000. In other words, if the monthly instalments are R100, the agreement should be suspended for 10 months. The fact that the debtor saves R1 000 over the course of the suspension will relieve his or her over-indebtedness and, therefore, sufficiently remedy the consequences of reckless credit. If this approach is followed, there will be a sufficient nexus between the suspension and the effects thereof on the creditor. It would be justified, since the suspension does not go further than what is necessary to achieve its purpose. In as far as the suspension achieves this goal, the creditor cannot complain, since it provided the credit in a way that was prohibited and could, consequently, have avoided the prejudice if it diligently complied with the Act.

However, if the debtor is relieved of anything more than he or she suffered as a consequence of the reckless credit, the suspension would have gone further than the Act intends. Consequently, a part of the period of suspension would be unjustified, since there is no longer a sufficient relationship between the suspension and the purpose of the Act. Therefore, in as far as the period of suspension (which goes beyond what is necessary to remedy the over-indebtedness) deprives the creditor of property, such deprivation would be arbitrary. In other words, because there is no reason for the benefit that extends beyond what is necessary to remedy the over-indebtedness, the ensuing deprivation is arbitrary for lack of sufficient reason.

This discussion illustrates how the section 25(1) non-arbitrariness standard can assist courts in deciding how to determine what would be a just and reasonable period of suspension in every particular reckless credit case. To the degree that the suspension mechanism serves the valid purposes of the NCA, it generally does not permit an arbitrary deprivation of property. However, when applying this mechanism to specific facts, courts should scrutinise whether the length of the suspension period does not perhaps result in a violation of the non-arbitrariness standard by unnecessarily or unjustifiably interfering with creditors' property rights. The details of the suspension order will consequently depend on the facts of each case and, as I suggest, the non-arbitrariness test should be used as an interpretational yardstick when courts decide on the content of the order.

6 4 6 3 Setting aside the debtor's rights and obligations

The second remedy available to the court is to have the rights and obligations of the debtor set aside in part or in full.[226] The court has a choice between this remedy and the one discussed in the paragraph immediately above, except under circumstances (as contemplated by section 80(1)(b)(ii) of the NCA)[227] when only the suspension remedy is available. I argue that the court's choice between suspension and setting-aside should be based on fulfilling the purpose of these mechanisms, namely relieving the debtor of the prejudice he or she suffered because of the reckless lending.[228]

It has been suggested that courts will probably prefer to make use of the suspension remedy as opposed to the setting-aside remedy.[229] The reason for this suggestion is that the suspension remedy's consequences are clearly set out, whereas those of setting aside are not. However, circumstances may arise when the suspension of the force and effect of the agreement for a certain period will not be adequate to remedy the negative consequence of reckless lending. Due to the setting-aside remedy's far-reaching consequences on the rights of creditors, I suggest that courts should generally only resort to this remedy when the suspension remedy (which is less invasive to creditors) will not suffice to repair the damage caused by the reckless lending. Hence, a direct and unqualified resort to the setting-aside remedy would not be justified. The following discussion illustrates this position.

Unlike the suspension remedy, the Act provides almost no indication as to how the setting-aside remedy should work, save that it may be done in part or in full. The only guideline that the NCA provides is that the court should grant this order in accordance with what it determines to be just and reasonable under the circumstances.[230] In addition, since the mechanisms of the NCA must be interpreted to comply with the Bill of Rights,[231] the section 25(1) non-arbitrariness standard must be adhered to. Therefore, the content of a setting-aside

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[226] This remedy is not always available, but only in the circumstances described in 4 3 3 above.
[227] Read with s 83(3)(a) and (b)(i) to (ii) of the NCA.
[228] CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 404 make another suggestion as to how courts should choose between the remedies. In summary, they submit that suspension should be chosed if the debtor became over-indebted subsequent to concluding the reckless credit agreement and only needs a "'debt-breather' ... to recover financially to a situation where he or she is again able to resume payments". However, if suspension will not lead to the debtor's financial recovery, it will be "futile ... to order such suspension" and setting aside would seem to be the only solution.
[229] C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 11-32.
[230] S 83(2)(a) of the NCA.
[231] S 39(2) of the Constitution.

order may not have the effect that the NCA permits arbitrary deprivation of property. The non-arbitrariness test of section 25(1) offers interesting and valuable content to the test that the courts should apply when granting setting-aside orders.

Firstly, it is necessary to look more closely at the nature of the setting-aside remedy. The court may not set aside the *agreement* in the sense that the agreement is voidable; and it may only set aside the *rights and obligations* of the consumer, not those of the credit provider.[232] At least, this is how the discretion is phrased. However, setting aside a specific right or obligation of the consumer implies that the credit provider's corresponding obligation or right is by necessary implication also set aside, since credit agreements are reciprocal in nature.[233] A setting-aside is not the same as a cancellation of the credit agreement. In a sense, it is strange that reckless credit is prohibited, but that recklessly concluded credit agreements remain valid. It seems as if the purpose of the prohibition is not to make such agreements unlawful (which is clear from the fact that reckless credit is not included in the list of unlawful credit agreements)[234] but merely to discourage the negative results caused by reckless lending. One can also infer this from the nature and purpose of the two remedies, neither of which results in invalidity of the agreement. Reckless lending is prohibited, but when it does take place the negative consequences of such reckless credit should be remedied.

The fact that the setting-aside may be done in part or in full implies that certain effects of the agreement may continue as normal, whereas certain aspects can be set aside. Van Heerden[235] suggests that if a court decides on the setting-aside remedy, it will probably do so in full. This is apparently due to the uncertainty regarding what it means to set aside the rights and obligations in part only. However, I do not believe that the meaning of a partial setting-aside is all that uncertain. In fact, I suggest that a full setting-aside should seldom be used, except when it is truly necessary and just and reasonable. In my view, a partial setting-aside of the debtor's rights and obligations simply means that only as much of these rights and/or obligations are set aside as is required to remedy the prejudice caused by the reckless lending.

One might want to argue that this remedy should in fact be punitive so as to discourage reckless lending. However, in light of the fact that such agreements are neither illegal nor

[232] S 83(2)(a) of the NCA. See also A Boraine & C van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 650-656 652.
[233] 653.
[234] S 89 of the NCA.
[235] C van Heerden "Over-indebtedness and reckless credit" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 11-32.

unlawful, I do not support any setting-aside order that will go beyond what is necessary to remedy the over-indebtedness caused by the reckless lending. In my opinion, Van Heerden and Boraine incorrectly focus on the penal effect of the reckless-credit remedies on the credit provider.[236] Although the remedies may have the effect of penalising reckless credit providers, this is not the remedies' purpose. The effects of the remedies on the credit provider are not to punish it but to provide debt relief to the debtor who suffered from the creditor's prohibited practice. A punitive or overtly strict attitude by courts would arguably also stifle the availability of credit, as the court in *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases*[237] held:

> "While one purpose of the NCA is to discourage reckless credit, the Act is also designed to facilitate access to credit by borrowers who were previously denied such access. An overcritical armchair approach by the courts towards credit providers when evaluating reckless credit, or the imposition of excessive penalties upon lenders who have recklessly allowed credit, would significantly chill the availability of credit, especially to the less affluent members of our society."[238]

This approach is in line with what was decided in *Standard Bank of South African Ltd v Kelly and Another*,[239] namely that it is unlikely that the court would relieve a debtor of his or her obligations to the extent that it would amount to unjustified enrichment of the debtor at the expense of the creditor. Accordingly, the purpose of the setting-aside remedy should never be to grant an undeserved advantage to a debtor who falls victim to reckless credit. Moreover, any prejudice that the creditor might suffer must be limited to what is strictly necessary to relieve the debtor of the over-indebtedness caused by the reckless lending. Anything more (for example, a purely punitive effect) would transcend the purpose of the NCA, namely to relieve over-indebtedness. Therefore, the setting-aside order may not advance the debtor's position more than the Act intends, nor may it punish the creditor beyond that point. If this balance is not struck, it would amount to an arbitrary deprivation of the creditor's property.

To give a practical example: If credit is extended recklessly to the amount of R1 000 000 and the effect of this agreement is that the debtor is over-indebted by R50 000, the court may consider to set aside a part of the debtor's obligation to repay the debt, namely R50 000. Therefore, the setting-aside remedy should be restricted to what is necessary to remedy the

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[236] For example, see CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 405.
[237] 2011 1 SA 310 (GSJ).
[238] Para 37. See also CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 401.
[239] (23427/2010) [2011] ZAWCHC 1 (25 January 2011) para 8.

R50 000 over-indebtedness. To set aside the full outstanding R1 000 000 would go beyond what the Act intends. A deprivation of the creditor's property to the amount of R50 000 would not be arbitrary because of the sufficient nexus between this result and the valid purpose of the remedy. Also, because the creditor acted in a manner prohibited by the Act when it extended the credit in this way, it cannot complain when it suffers prejudice in the process of rectifying the situation. However, any part of the deprivation that exceeds this amount (that is, the balance of R950 000) would be an arbitrary deprivation of property, since there is insufficient reason for doing so. Even if one contends that there is a valid reason, namely to relieve the victim of reckless credit, the effects of the remedy would not be proportionate to its purpose. The reason for this is that there is no rational link between the creditor being deprived of R950 000 and the benefit that the debtor derives from this setting-aside. In effect, one can reason that the R950 000 part of the loan does not qualify as reckless credit, but only the R50 000 part. Therefore, to set aside a part of the debt that was not extended recklessly goes beyond the scope of the NCA itself as well as contravenes section 25(1) of the Constitution. Since the NCA may not permit deprivation that is arbitrary, the Act must be interpreted to restrict the effects of setting-aside remedies to that which is non-arbitrary.

As was argued earlier, the suspension remedy should always first be considered before resort is had to the setting-aside remedy. Therefore, the R50 000 part of the debtor's obligations should only be set aside if a suspension of the force and effect of the agreement cannot achieve the same purpose, namely to relieve the debtor of the R50 000 over-indebtedness. This will depend on the facts of each case. For example, if the time of suspension that is necessary to remedy the over-indebtedness would be too long to make reasonable commercial sense (for instance 5 years), a setting-aside may be appropriate, since it has immediate effect. The debtor can experience instantaneous relief and the creditor can absorb its loss and move on. However, since suspension may cause a less intrusive deprivation of the creditor's rights while at the same time relieving the debtor sufficiently, this option should remain the point of departure. At the end of the day, based on the facts of each case, the option that the court chooses must be based on an equitable balance between the interests of the parties. If one of the remedies can repair the effects of reckless credit in a way that is less invasive to the creditor than the other remedy, then the less invasive remedy should be chosen. If the more invasive remedy is chosen despite the fact that the lesser one

would have accomplished the purpose of remedying the effects of reckless credit, choosing the more invasive remedy would amount to arbitrary deprivation of property.

It seems as if the courts are allowed quite a large degree of creativity when it comes to the setting-aside remedy. As long as the resulting deprivation of property is not arbitrary (in other words, just and reasonable), courts can structure the setting aside in any way that would fulfil its purpose. Another option might be that the court decides to remedy the reckless credit without setting aside the creditor's entitlement to claim its security. In other words, the sale in execution may still go ahead. The court may then decide to set aside that part of the outstanding debt that was not satisfied by the proceeds of the sale in execution. It does not seem as if anything in the Act prohibits this option. Nonetheless, despite the possibility of still granting execution orders, courts should be careful to ensure that the debtor's rights under section 26 (access to housing) are also protected. If the setting-aside order can be structured in a way that prevents the sale in execution of a home, that route should be preferred. Restricting the creditor's rights due to the debtor's housing interest would generally be acceptable under reckless credit circumstances, especially because of the creditor's blameworthiness.[240]

Another option may be that the court sets aside the debtor's obligation to pay interest for a specific period or perhaps for the remaining duration of the loan. The court might also deem it appropriate to decrease the size of the monthly instalments for a period or until the debt is repaid. The normal debt rearrangement remedy is of course also available. There may also be other interesting ways. However, the court must decide the case in way that does not violate the non-arbitrariness benchmark. In other words, the court's decision should be directed by what course of action would best resolve the debtor's over-indebtedness and, at the same time, would be the least invasive option for the creditor (keeping its blameworthiness in mind). Rather than making a blanket order that sets aside all rights and obligations, I propose that courts engage in a creative search for the option that balances the rights of the parties in the most reasonable way. A full setting aside might be appropriate, but should not be the automatic recourse.

[240] The situation might be simpler when motor vehicle finance was found to have been extended recklessly. For example, in *SA Taxi Securitisation (Pty) Ltd v Mbatha and Two Similar Cases* 2011 1 SA 310 (GSJ) para 47 the court held that after the debt is set aside the creditor will be entitled to the return of the vehicle, since it is still the owner (under the retention-of-title clause). At the same time, the debtor would be relieved of further indebtedness, since he or she no longer has any obligations under the agreement.

Boraine and Van Heerden[241] refer to possible uncertainty pertaining to the effects of reckless credit and the setting-aside remedy. The authors comment that the NCA does not make a distinction between cases where the agreement has merely been entered into and cases where either or both parties have already performed in terms of the agreement.[242] The situation seems simpler when no performance has occurred yet. In such a case a court can just decide that the consumer has no further rights and obligations.[243] Therefore, the credit relationship can simply end before any performance is rendered and the practical effect is similar to a cancellation of the contract.[244] However, there seems to be more uncertainty in cases where one or both parties has performed, either fully or partially. If the rights and obligations are set aside, the next question is whether and how restoration should occur of that which has already been performed. Will the creditor be able to reclaim any part of the loan or the goods delivered and will the debtor be able to reclaim any payments made by him or her?[245] Boraine and Van Heerden suggest that it was not the legislature's intention to prevent the creditor from reclaiming any money and goods performed, and they argue that the parties should be entitled to reclaim at least part of what was performed.[246] Consequently, the possibility of no restoration of what was performed seems unlikely to the authors.[247] Boraine and Van Heerden argue that it may have been a better solution if the NCA provided for the court to declare the agreement void instead of setting the rights and obligations aside.[248] Moreover, many issues would also have been resolved if the NCA provided for restoration.

I am not convinced that the issue of performance and restoration (as explained by Boraine and Van Heerden) is all that relevant. In my view, a reckless credit agreement should not be treated like a void or voidable agreement in terms of the normal rules of contract law, with consequences such as restoration of performance rendered. The setting aside of some or all of the rights and obligations does not have anything to do with restoring that which had already

[241] A Boraine & C van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 650-656.
[242] 652. See also CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 402.
[243] A Boraine & C van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 650-656 653.
[244] 653.
[245] 653. See also CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 403.
[246] A Boraine & C van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 650-656 655.
[247] 656. See also A Boraine & C van Heerden "To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments" (2010) 13 *PELJ* 84-124 98.
[248] A Boraine & C van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 650-656 653 & 656.

been performed. Setting aside does not mean that the relationship between the debtor and creditor comes to an end. In fact, it can continue normally, depending on how extensive the setting aside was. If only a part of the rights and obligations was set aside, the remaining part will continue until the loan is repaid. When there is a full setting aside of the debtor's obligations, the normal relationship between the debtor and creditor will clearly end. However, this is not because the agreement was cancelled or declared invalid, but merely due to the practical reality brought about by a full setting aside of the debtor's rights and obligations. Nevertheless, the question of restoring to the parties that which had already been performed does not arise. As explained earlier, the extent of the setting aside will depend on what is just and reasonable or – in section 25(1) terminology – what is non-arbitrary. This enquiry will include taking into account whether there had already been performance under the agreement. The setting-aside order should never include an order to restore certain parts of that which has been performed in light of the fact that the agreement is not void but remains in force. Rather, the calculation of the extent to which the rights and obligations are set aside will take into account the value of performances already rendered.

Subsequent to a setting-aside order being granted, if the creditor wants to enforce the credit agreement, it would only be able to do so with respect to the remaining part of the debtor's obligations. Accordingly, the part that was set aside cannot be enforced. When the debtor's rights and obligations are fully set aside, the mortgage would in effect also become unenforceable, since the debt it secures has been set aside.[249] This consequence follows from the principle of accessoriness.[250] Therefore, a full setting aside will completely prevent foreclosure. However, there seems to be no reason why the mortgage bond cannot be relied on as security for the remaining part of the obligation to repay the loan – subject, of course, to the other principles that govern foreclosure.

Does a full setting aside mean that the debtor can simply retain ownership of immovable property, with the loan used to purchase it never being repaid? If the full debt is set aside and foreclosure is restricted, the answer to this question seems to be in the affirmative. However, despite this seemingly disproportionate advantage that the debtor would enjoy, courts would (as I argue) never grant a setting-aside order without considering the impact that it would

[249] 653.

[250] See *Thienhaus NO v Metje & Ziegler Ltd and Another* 1965 3 SA 25 (A) 32; *Kilburn v Estate Kilburn* 1931 AD 501 506. See also PJ Badenhorst *et al Silberberg and Schoeman's the law of property* (5th ed 2006) 358-359 and 378; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2nd ed 1994) 746-749 and 753; CG van der Merwe *Sakereg* (2nd ed 1989) 613 and 636; TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) 4-5.

have in the facts of each case. The debt should only ever be set aside if the result would be just and reasonable. If, on the facts of a case, it would be unjust to relieve the debtor to such a degree that he or she can keep the property without repaying the debt, the setting-aside order should not go that far. After all, the NCA does not permit setting-aside orders to be unjust and unreasonable. As I argue throughout this section of the chapter, the goal of the setting-aside remedy should only be to correct the over-indebtedness that was caused by the reckless lending and not to unduly benefit or prejudice either party. Adhering to this principle should prevent situations like the one contemplated by the question posed at the beginning of this paragraph. Consequently, to simply state that "bad debt becomes no debt"[251] (with the debtor being completely set free) does not paint the full picture of what reckless credit is all about. Courts have leeway to be creative when making these orders, which should ensure that the results of reckless credit are not unbalanced or contrary to section 25(1) of the Constitution.

Boraine and Van Heerden suggest that a setting-aside order does not limit the credit provider's right to claim money or goods in terms of a cause of action independent of the credit agreement.[252] An example of such an independent cause of action is one based on unjustified enrichment. However, how this would work is just as uncertain and may "pose its own difficulties".[253] In line with how I argue in this section, I believe it is unnecessary to think in terms of unjustified enrichment claims. In fact, as already mentioned, my position is that the setting-aside order itself will take into account that unjust and unreasonable results such as unjustified enrichment will be prevented. Accordingly, the courts would not be willing to allow a state of affairs where the debtor is unjustifiably enriched at the expense of the creditor.[254]

In summary, the setting-aside order will have the effect that the creditor is deprived of what it is entitled to under the credit agreement, or perhaps only a part thereof. The impact is not merely a postponement or rearrangement of the claim but a total divesting of the specific part. In fact, there is a forced transfer of property, since the creditor loses a certain asset (the value of the setting-aside), whereas the debtor is relieved of a debt of the same value. Courts

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[251] N Petzer "When bad debt becomes no debt – beware the National Credit Act" *Petzer, Du Toit & Ramulifho: The Legal Edge* (date unknown) <http://www.legaledge.co.za/baddebtnodebt.htm> (accessed 26-01-2011).

[252] A Boraine & C van Heerden "Some observations regarding reckless credit in terms of the National Credit Act 34 of 2005" (2010) 73 *THRHR* 650-656 653. See also CM van Heerden & A Boraine "The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005" (2011) 44 *De Jure* 392-415 403.

[253] 656.

[254] *Standard Bank of South African Ltd v Kelly and Another* (23427/2010) [2011] ZAWCHC 1 (25 January 2011) para 8.

should be vigilant when assessing whether this reshuffling of assets has a good enough reason. As stated earlier, the purpose of this remedy is to rectify the over-indebtedness effect of reckless credit. That this is a rational and legitimate public purpose cannot be doubted, since it aims to prevent as well as remedy the negative impact that reckless credit granting has on consumers. Yet, in terms of section 25(1) logic, a valid public purpose is not enough to justify a deprivation in every individual case. Rather, the relationship between the effect on the creditor and the purpose of the setting-aside order must be scrutinised.

There are some factors that, in my view, will cause the outcome of individual reckless-credit cases to be justifiable under section 25(1). Firstly, the granting of reckless credit is expressly prohibited by the Act and creditors, therefore, have ample opportunity to avoid the negative consequences that will befall them should they transgress in this manner. Their blameworthiness will normally void any argument that the amount of the setting aside is disproportionate, unless it has an arbitrary effect otherwise. Secondly, courts have the obligation to ensure that a setting-aside order only goes as far as would be just and reasonable on the facts of each case. Accordingly, creditors can rest assure that courts will not grant blanket setting-aside orders but will scrutinise the facts in order to reach a non-arbitrary result. Courts must ensure that the setting-aside order does not go further than what is necessary to remedy the over-indebtedness that was caused thereby. Hence, creditors will probably seldom face the setting aside of the full debt, unless this is truly necessary. I argue that it is possible to interpret the setting-aside remedy in a nuanced enough manner so as to satisfy the non-arbitrariness standard in each case that it is arises.

6 4 6 4 Conclusion

The provisions in the NCA that govern the two remedies described here are quite open-ended and the effect of the mechanisms depends on courts granting the relevant orders. Hence, it is my position that neither of these remedies are contrary to section 25(1). However, when a setting-aside or suspension order is granted, courts must consider the full extent to which the remedies will impact on the rights of both parties. Arbitrary deprivation of property should be prevented by ensuring that the effect of the remedies does not go beyond what is necessary to repair the negative consequences that were caused by the reckless lending. Moreover, the setting-aside remedy (which is more invasive) should not be employed if the suspension

remedy can solve the over-indebtedness sufficiently. Therefore, the NCA must be interpreted and applied so as to not permit the arbitrary deprivation of property.

These remedies may go a long way in preventing the unnecessary loss of homes as well. Where debtors' over-indebtedness and resultant mortgage default is a direct consequence of the creditor granting them reckless credit, it seems unjust to allow their homes to be sold under such circumstances. It may even amount to an unjustified limitation of the debtors' access to adequate housing, since it would be disproportionate for the debtor to lose his or her home as a result of the creditor's prohibited behaviour. Accordingly, these remedies contribute to ensuring that also section 26 is given effect to, since they provide debt relief and may result in the home being saved. As long as the impact on the creditor does not violate its section 25(1) rights, the reckless-credit remedies can contribute to finding the correct balance between the rights of the interested parties.

6 4 7 Expropriation of the creditor's rights?

In 6 3 5 above I provide the definition of expropriation and argue that a sale in execution does not amount to expropriation. Similarly, in this part of my enquiry, after it has been established that the deprivations effected in terms of the NCA are not arbitrary, the next question is whether the deprivation also amounts to expropriation. In 6 4 4 and 6 4 5 above I discuss two deprivations that can follow from debt review, namely the moratorium on debt enforcement during the period of the review and the debt rearrangement. It is highly unlikely that either of these interferences with the creditor's rights can qualify as expropriation. The reason for this is that, although it is clear that there are interferences with property, neither of them entail the acquisition or extinguishing of any of the creditor's property rights. Enforcement of the debt can be postponed or spread out, but it is clear that the creditor will eventually still be entitled to what it contracted for. Therefore, the most basic characteristic of expropriation is not satisfied. However, even though there is no extinguishing of property, there is a deprivation because of the fact the enforcement of the debt (and the mortgage) is interfered with. Yet, this deprivation does not amount to expropriation because nothing is taken away, transferred or extinguished, as is usually the case with expropriation. To the extent that the state is involved (through legislation and the courts), it is not using its power to

force a transfer of ownership to the state, as is the case with expropriation. Rather, the state is using its power to balance the conflicting rights of parties to private disputes.[255]

In 6 4 6 above I analysed whether the remedies that the NCA provide for reckless credit, namely suspension and setting aside, comply with section 25(1). I argue that both mechanisms are generally in compliance with the non-arbitrariness standard. Therefore, the next question is whether the remedies' effect can amount to expropriation. A suspension of the force and effect of a credit agreement is similar to a moratorium on debt enforcement explained in the paragraph above and is not expropriation for the same reason. However, the setting-aside remedy may look closer to expropriation, at least in its effect. The reason for this is that certain obligations of the debtor can be set aside, with the effect that the corresponding rights of the creditor (which are property) are also set aside. In other words, property of the creditor is extinguished and a patrimonial shift takes place from the creditor to the debtor. The creditor's assets decrease and the debtor's liabilities decrease, with the result that the former's estate declines while the latter's increase.

Although the effect of setting aside seems to extend beyond mere regulatory deprivation and looks like expropriation, it is not an expropriation for the same reasons explained in 6 3 5 above. There is no administrative decision by the state to expropriate the creditor's property in terms of legislation that provides for such power as well as compensation for such expropriation. The setting-aside order is granted by a court under the authority of the NCA, which says nothing about expropriation or compensation. The shift in assets is aimed at rectifying the result of a prohibited action, namely the granting of reckless credit. This is an

[255] See 6 3 5 above. A similar approach is found in Australian law, where, as AJ van der Walt *Constitutional property law* (3rd ed 2011) 371 explains with reference to *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155 171,

> "a law that adjusts or resolves competing civil claims or that creates, modifies, extinguishes or transfers rights and liabilities as part of the state's general regulation of the conduct, rights and obligations of citizens in relationships or areas that need to be regulated in the common interest, is not a law with respect to the acquisition of property as meant in section 51(xxxi) of the Constitution and is not subject to the compensation requirement."

Van der Walt (at 371-372 n 131) also quotes from the Australian case of *Health Insurance Commission v Peverill* (1994) 179 CLR 226 236, where the court found that the deprivation

> "was effected not only by way of genuine adjustment of competing claims, rights and obligations in the common interests between parties who stand in a particular relationship but also as an element in a regulatory scheme ... "

interference with property and, therefore, a deprivation but it does not go as far as to qualify as expropriation.[256]

6 4 8 An example: Constitutional implications of section 130(2)

Section 130(2) of the NCA, when interpreted in a certain way, has the potential to pose a serious threat to the rights of mortgage creditors. Though the SCA has denied this interpretation,[257] it deserves mention, since it signifies the useful role that constitutional property law can play in consumer credit law. The SCA judgment illustrates how the courts will not lightly accept an interpretation of the Act that arbitrarily limits credit providers' rights. Section 130(2) provides as follows:

> "(2) In addition to the circumstances contemplated in subsection (1), in the case of an instalment agreement, secured loan, or lease, a credit provider may approach the court for an order enforcing the remaining obligations of a consumer under a credit agreement at any time if -
> (a) all relevant property has been sold pursuant to -
> (i) an attachment order; or
> (ii) surrender of property in terms of section 127; and
> (b) the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement."

This subsection deals with the enforcement of the remaining debt after the property was sold in execution and where the proceeds were insufficient to satisfy the entire debt.[258] It appears that this provision must be complied with in order for the credit provider to enforce the remaining part of the debt.[259] However, the subsection only applies to instalment agreements, secured loans and leases. *Prima facie* it seems that the subsection allows only for credit providers in these three types of credit agreements to enforce the remaining parts of their debts. Though it may appear as if secured loans should be wide enough to include mortgage agreements, they do not. This is because the two are defined separately in the Act.[260] Hence,

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[256] See the reference I make to the Australian approach in 6 4 7 n 255 above.

[257] *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA). In another context (forfeiture of debts granted by unregistered credit providers), see also the application of the *FNB* test in *Opperman v Boonzaaier and Others* (24887/2010) [2012] ZAWCHC 27 (17 April 2012).

[258] C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 12-21.

[259] According to C van Heerden "Enforcement of credit agreements" in JW Scholtz *et al* (eds) *Guide to the National Credit Act* (RS 2 2009) 12-21, the phrase "[i]n addition to" implies that the credit provider my enforce the remaining obligations only if it complies with all the criteria mentioned in s 130, including those mentioned in s 130(1).

[260] S 1 *s v* "mortgage agreement" and "secured loan". See also JM Otto *The National Credit Act explained* (2006) 96; M Sawyer "Depriving the wolves of their dinner" (2008) 8 *WP* 47-48 47.

the implication is that a credit provider who is a mortgagee may not enforce the remaining part of its debt after the property was sold and its proceeds set off against the debt. This principle can apparently be inferred from the fact that mortgages were excluded from the list of credit agreements.[261]

This construal of section 130(2) has serious implications for mortgagees and places a severe limitation on their usual rights. It is a deviation from the common law principles, since it erodes established common law and contractual rights of mortgagees.[262] In practice it is not uncommon for mortgagees to not satisfy their entire claim from the sale of the attached hypothecated property.[263] Though some credit providers may choose to simply abandon the remaining claim, many credit providers will insist on enforcing it, as they are entitled to do in terms of the personal rights they have against their customers.[264]

Though it seems unthinkable to Otto that it could have been the intention of the legislature to "annihilate mortgagees' established rights", he concludes – from the fact that mortgage agreements and secured loans are defined separately – that mortgages where left out on purpose.[265] Therefore, the effect would be that mortgagees may only look to the value of the properties and their proceeds to satisfy their claims. This would provide immense relief for a consumer who has just lost his or her property, since he or she would not face the additional pressure of having to repay the outstanding part of the debt.

What would be the reason for this amendment of established rights? One motivation of the legislature (if this were the correct interpretation) might have been to stop the practice of many mortgagees who neglect to obtain the best possible price for the properties.[266] The result is often that mortgagors are left – after the sale in execution – with large outstanding debts they still have to repay. Consequently, the purpose of section 130(2) may have been to inspire credit providers to pay more attention to obtaining a good price at the auction.[267] Another reason is that it might encourage a mortgagee to first allow the debtor in default to try and sell the property on the private market, since this will normally cause the property to be sold for a higher price than during an auction.

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[261] JM Otto *The National Credit Act explained* (2006) 96.
[262] 96-97.
[263] 95.
[264] 96.
[265] 96.
[266] 97.
[267] 97. See also M Sawyer "Depriving the wolves of their dinner" (2008) 8 *WP* 47-48, who supports this purpose.

However, there would clearly be a constitutional challenge to this state of affairs, based on section 25(1) of the Constitution.[268] This is due to the strong probability of contractual claims being recognised as property for constitutional purposes.[269] In addition, the right of mortgage is clearly a property right.[270] Otto and Otto explain that although property can be limited (or the holder can be deprived of the property), this has to be justified (non-arbitrary) and any limitation, therefore, is "subject to attack and scrutiny".[271]

Regardless of the above-mentioned arguments, the SCA came to the conclusion that this is not the way section 130(2) should be interpreted. The matter first came before the North Gauteng High Court in *First National Bank Ltd v Rossouw and Another*.[272] It was argued – as a result of the interpretation of section 130(2) explained earlier – that the court may not grant a judgment in excess of the value of the property.[273] Therefore, the submission was that the court may only order a sale in execution of the property and may not grant default judgment for the full amount of the debt. The court rejected this argument, finding that the matter fell within the ambit of section 130(1) and that this section does not limit the mortgagee's claim.[274] However, the court did not explain its reasoning in great detail.

The case went on appeal to the SCA in *Rossouw and Another v Firstrand Bank Ltd*,[275] where the court upheld the North Gauteng High Court's decision and, in other words, dismissed the disputed interpretation of section 130(2).[276] Maya JA referred to the "inequities that may result for credit providers" in the event that section 130(2) were to be interpreted in this way.[277] Furthermore, the judge held that, although the NCA aims to protect consumers, the interests of credit providers should not be overlooked.[278] Since the proposed interpretation of section 130(2) would drastically alter the common law, the SCA per Maya JA held that it was inconceivable that the legislature would do away with vested rights without doing so

[268] JM Otto *The National Credit Act explained* (2006) 96.
[269] See 6 4 2 3 above.
[270] See 6 4 2 2 above.
[271] JM Otto & R-L Otto *The National Credit Act explained* (2nd ed 2010) 115.
[272] (30624/09) [2009] ZAGPPHC 165 (6 August 2009).
[273] Para 6.
[274] Para 7.
[275] *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA).
[276] The decision of the SCA consists of two concurring judgments, delivered by Maya JA and Cloete JA respectively. All the judges concurred with both judgments. Maya JA (at paras 14-20) analysed s 130(2) of the NCA and Cloete JA (at paras 40-43) elaborated.
[277] *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA) para 17.
[278] Para 17.

expressly.[279] Maya AJ confirmed the finding of the court *a quo*, namely that section 130(1) is applicable and that section 130(2) is not relevant to the case.[280] In a concurring judgment Cloete JA added more reasons for holding that section 130(2) should not be interpreted in the disputed manner and held that

> "[t]he omission of a credit provider who is a mortgagee in [subsection] (2) cannot mean that to the extent that the debt is not satisfied by execution against the mortgaged property, that part of the debt is unenforceable. That would constitute a serious inroad upon the rights of the mortgagee which would probably be constitutionally unjustified ..."[281]

Therefore, it is reasonably clear that section 130(2) has no bearing on the enforcement of mortgage-backed debts and that the interpretation of the section as explained by Otto and Sawyer is probably not valid. The interpretation given by Flemming[282] seems to be the correct one, namely that a credit provider's claim to the entire debt is validly created by the agreement and that it needs no statutory empowerment to claim the balance of the debt. Flemming explains that section 130(2) merely provides that, for the three types of agreements mentioned, it softens litigation by not requiring compliance with section 130(1). Therefore, section 130(2)'s impact on mortgages is simply to state that mortgages are not exempt from section 130(1).[283]

Although it is clear that section 130(2) does not deprive the mortgage creditor of the remaining part of the debt, one can still ask the question whether an express restriction in this regard would necessarily be constitutionally unjustified. Such an approach would certainly

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[279] Paras 18-19. S 90(2)(c) of the NCA acknowledges the common law rights of parties. S 83, relating to the suspension or setting aside of reckless credit, is an example of a provision where the Act expressly altered common law rights.

[280] *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA) para 20. See also *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP) para 27.

[281] *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA) para 42. By describing it as "constitutionally unjustified" Cloete JA presumably referred to an infringement of s 25(1).

[282] HCJ Flemming *Flemming's National Credit Act* (2nd ed 2010) 202.

[283] The true meaning of s 130(2) was also explained in *Rossouw and Another v Firstrand Bank Ltd* 2010 6 SA 439 (SCA) para 41 per Cloete JA:

> "What the section means is that in the three types of credit agreement mentioned (ie an instalment agreement, a secured loan and a lease), if the further requirements of the section are satisfied (ie all relevant property has been sold, pursuant to an attachment order or the surrender of property in terms of s 127; and the net proceeds of sale were insufficient to discharge all the consumer's financial obligations under the agreement), then the credit provider is excused from complying with subsec (1) (ie the credit provider does not have to send a notice and wait for the days to elapse). The circumstances under which a credit provider in the three types of contract mentioned in subsec (2) may approach a court for the enforcement of a credit agreement, are in addition to the circumstances set out in subsec (1) ─ that is why subsec (2) commences with the very words 'in addition to the circumstances contemplated in subsec (1)'."

cause great relief for credit consumers whose mortgaged homes are worth less than the outstanding mortgage debt. However, if a principle like this was introduced the matter will probably result in more litigation, since mortgagees would almost certainly want to argue that the resulting limitation of their rights amounts to a violation of section 25(1) of the Constitution. One can perceive from the SCA's attitude that protecting over-indebted consumers by prohibiting mortgage creditors from enforcing the debt that remains after the home had been sold would likely go too far. Therefore, it may be an arbitrary deprivation of the creditor's "property".

Conversely, Sawyer argues that it would not be an arbitrary deprivation of property, since it has a valid purpose of protecting consumers and makes it easier for them to repay their debts.[284] Not only will a restriction like this provide significant relief for debtors, but it may also encourage creditors to ensure that attached properties achieve the highest selling price possible. The problem with Sawyer's argument is that he only applies the section 25(1) test partially. The author stops at the first, broad question, namely whether there would be a valid reason for the deprivation. As Sawyer correctly states, there would arguably be such a valid purpose, namely to protect consumers. However, the author did not take the next step to answer the narrower question, namely whether there is a sufficient nexus between this public purpose and the effects of the deprivation on individual creditors. In my view, there would be no sufficient nexus. In the first place, the aims of such a principle can be achieved in ways that do not amount to such a burdensome deprivation of the creditor's claim to repayment of the remaining debt. Debt relief is sufficiently provided for by debt rearrangement, the right of reinstatement and the remedies that follow reckless credit. Also, ensuring that the selling price of the property reaches as high a level as possible can be achieved by developing better procedures for the auction. The auction procedure falls outside the scope of my dissertation, but there is certainly scope for improvement through, for example, enhanced advertising of auctions. Another way to reach this goal may be to introduce a rule that the public auction should be preceded by an attempt to sell the property in the private market. Be that as it may, it seems clear that getting better selling prices of mortgaged properties can be achieved in more reasonable and balanced ways than the envisioned restriction of the ability to enforce the remaining debt. In my opinion, this factor indicates that a deprivation in this regard will be arbitrary since there is no rational or proportionate nexus between its purposes and effects.

[284] M Sawyer "Depriving the wolves of their dinner" (2008) 8 *WP* 47-48 48.

The application of section 25(1) to the potential way that section 130(2) of the NCA might be interpreted is interesting, because it illustrates the immense value of the property clause in the interpretation of the NCA. Consumer protection in the form of debt relief is noble, legitimate and necessary to give effect to, amongst others, debtors' housing rights. Nonetheless, it is clear that a balance must be struck. Unjustified inroads into creditors' rights would clearly destabilise the credit and housing market, which would in turn prejudice debtors as well. Therefore, the constitutional protection of creditors' property rights serves a tool to ensure that debt relief only goes as far as would remain within the bounds of reason.

6 5 Conclusion

In this chapter I explained how section 25 can and should be used as a supplementary standard for reaching the optimal result in foreclosure cases. The test is that the result of the court's decision may not entail that the law permits the arbitrary deprivation of either party's property. Therefore, there should be a sufficient reason when one of the parties' property rights are limited. The justifiable need to give effect to one party's property right will often adequately explain why it is constitutionally acceptable to limit the other party's property.

In wide terms, this chapter dealt with the property rights of ownership and mortgage. On the one side of the dispute is the debtor, whose ownership of the hypothecated immovable property qualifies as property for section 25 purposes.[285] In chapter 3 above I also indicate that the debtor's right of continued occupation of the property is protected by section 26 of the Constitution. Although these are separate provisions with different tests, they should be applied concurrently and will, in my view, reach the same conclusion.[286] On the other side of the dispute is the creditor, whose limited real right of mortgage (registered against the debtor's land) also qualifies as property for section 25 purposes.[287] In addition, the creditor's claim for repayment of the debt (which is accessorily linked to the mortgage) will probably also meet the criteria of the property concept in section 25.[288]

Whereas the sale in execution of the debtor's land entails a deprivation of property,[289] there are consumer protection mechanisms in the NCA that might restrict the creditor's

[285] See 6 3 2 above.
[286] See 7 2 3 below.
[287] See 6 4 2 2 above.
[288] See 6 4 2 3 above.
[289] See 6 3 3 above.

ability to enforce the mortgage debt and, therefore, deprive it of its property.[290] Often, both these aspects will be present in a foreclosure case. Courts will frequently be faced with situations where they not only have to decide whether to declare the property executable, but also whether any of the NCA's interventions should apply to the case and, hence, curb debt enforcement. Moreover, the housing matter and the obligation to take all relevant circumstances into consideration before granting the execution order will be ever present. Even though I discuss sale in execution and the NCA in separate parts of this chapter (as well as detailed discussions of the NCA and the housing clause in previous chapters), I suggest that courts must not analyse these questions in isolation. Since all these issues will usually be implicated (to a greater or lesser extent) in the typical consumer home loan mortgage scenario, it would make more doctrinal sense to take account of all aspects. With reference to each other, the NCA and sections 25 and 26 will – in my view – lead to the correct conclusion.

Generally speaking, the institution of sale in execution and the remedies contained in the NCA do not amount to arbitrary deprivations of property. The existence of these mechanisms serves valid purposes, with the aim to either enforce validly concluded contractual debts (in the case of sale in execution) or to provide relief for over-indebted consumers who face social and economic devastations (in the case the NCA). Therefore, in and of themselves none of these legal apparatuses amount to arbitrary deprivation of property. In fact, the actual deprivation of property will only take place once these mechanisms are triggered by the applicable parties' decisions to invoke them. Furthermore, none of the deprivations will be effected without judicial oversight and discretion. For example, courts have to grant orders before sales in execution, debt rearrangements or suspensions of credit agreements can take place. In other words, the deprivation will only occur in accordance with an order of court, which should set out the exact terms of the deprivation. My argument is that the court order should take account of all the affected parties' various property and housing interests. If this enquiry is done correctly, it will ensure that none of the deprivations (that come about as a result of the court order) is arbitrary.

In the next chapter I conclude my dissertation by summarising my arguments, bringing the various arguments together and illustrating how sections 25 and 26 of the Constitution can be applied harmoniously under the auspices of the NCA.

[290] See 6 4 above.

CHAPTER 7
CONCLUSION: HARMONY BETWEEN THE VARIOUS INTERESTS PROTECTED BY SECTIONS 25 AND 26

7 1 Introduction

In separate chapters, this dissertation has thus far considered the impact on mortgage foreclosures of the housing clause, the National Credit Act and the property clause.[1] In addition, I also investigated similar issues in English law.[2] In the introductory chapter I provided an overview of the research problem and hypothesised that my conclusions will be based on the application of the subsidiarity principles with reference to the NCA.[3] Therefore, it is appropriate to conclude this dissertation with a discussion that brings the various elements together and to explain how they answered my research problem.

In 7 2 below I explain the most suitable manner in which a balance should be struck between the various interests protected by the housing and property clauses. Since both provisions will often be applicable to the same scenario, it is necessary to not only apply one but rather to apply both so that a constitutional harmony is established. However, in line with the subsidiarity principles, the constitutional clauses will not find direct application where appropriate legislation applies so as to give effect to the relevant constitutional rights provisions. Yet, the harmony that I propose must remain the underlying basis for interpreting the relevant legislation and, where necessary, test the legislation's constitutional compliance. The dissertation subsequently draws to a close in 7 3 below, where I summarise how the NCA fits into my argument and conclude that the NCA should be the central focus of establishing a constitutionally satisfactory paradigm for adjudication mortgage foreclosure cases.

1 See chs 3, 4 and 6 above.
2 See ch 5 above.
3 See ch 1 above.

7 2 Balancing the property and housing clauses

7 2 1 Introduction

The CC has confirmed that sections of the Constitution should be interpreted in a way that creates harmony between the various sections and gives effect to all of them.[4] This is especially true in cases where more than one section protects the rights of either or both parties to the dispute. Sections 25 and 26 of the Constitution are good, albeit complicated, examples of sections in the Bill of Rights that will often both apply to the same dispute. It has become clear in this dissertation that a mortgage debtor enjoys the protection of his or her property (namely ownership of the immovable property) against sale in execution, but only in circumstances when such a sale amounts to arbitrary deprivation of property. In addition, when section 26 applies to the debtor's situation, his or her home is protected by the qualification that all the relevant circumstances must be taken into account before the execution order is granted. That is, the result may not be disproportionate in terms of section 36 of the Constitution.

Therefore, in the first place, the debtor's home is protected because it is "property" for section 25 purposes; secondly, the debtor's home is protected for the reason that the structure on the land is the debtor's primary residence. At the same time, section 25 protects creditors from being arbitrarily deprived of property, namely the limited real (security) right of mortgage as well as the claim for repayment of the loan. In the following two sections I explain how a dispute can be resolved when section 25 protects both parties' rights and when section 25 protects the one and section 26 the other.[5] On a more theoretical level, I then draw a link between the Constitution's housing-property balance and Margaret Radin's property-for-personhood theory, as Lorna Fox also discusses it in the mortgage context.[6]

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4 *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others* 2010 6 SA 182 (CC) para 61; *United Democratic Movement v President of the Republic of South Africa and Others (African Christian Democratic Party and Others Intervening; Institute for Democracy in South Africa and Another as* Amici Curiae*) (No 2)* 2003 1 SA 495 (CC) para 83.

5 L Fox *Conceptualising home: Theories, laws and policies* (2007) 472-474 does a similar analysis with regard to the balance between "respect for ... home" and "peaceful enjoyment of ... possessions" (ie property) – respectively art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 and art 1 of the first protocol to the same convention.

6 See 7 2 4 below.

7 2 2 Property versus property

Since both the debtor and the creditor are protected by section 25(1) against the arbitrary deprivation of property, the outcome of any foreclosure case must give effect to both parties' property rights. When the one party's property right is given effect to, there is by implication a deprivation of the other party's property. The best way for section 25(1) to be upheld is to balance the interests of both parties. The one party's property may only be protected against deprivation if the ensuing deprivation of the other party's property is not arbitrary. The lone possible exception to this approach is when one party's property is protected despite the fact that the other is arbitrarily deprived of his or her property and the ensuing violation of section 25(1) is justifiable under section 36(1) of the Constitution. However, the likelihood of this qualification is diminished by the doubtful prospect that an arbitrary deprivation will ever satisfy the section 36(1) proportionality test, since the two tests will probably arrive at the same conclusion (should Roux's prediction be correct).[7] Be that as it may, there may only be a deprivation of either party's property if the deprivation satisfies the non-arbitrariness test or – in the unlikely case – the section 36(1) test.

A practical example of this approach is necessary. When a creditor's rights are honoured and the debtor's immovable property is sold in execution after the court has properly exercised its discretion, the result should be that the deprivation of the debtor's property is not arbitrary. However, if the execution order had been refused despite the prospective deprivation (sale in execution) not being arbitrary, there may have been an arbitrary deprivation of the creditor's property, namely its rights under the mortgage.

Another example is that when an execution order is refused due to an abuse of the process, such a denial of the creditor's rights is not arbitrary. However, if the execution order had been granted despite the abuse of process, it would have been an arbitrary deprivation of the debtor's property. The reason for this is that it would not have been an arbitrary deprivation of the creditor's property if it were denied its rights due to abuse of the process. In other words, if it would not be arbitrary to deny the creditor that which it claims in terms of its property rights, it would be constitutionally justified to deny the execution order and thereby protect the debtor's property.

To satisfy the prospect of constitutional clauses operating in harmony, the application of section 25(1) can be described in the way I do immediately above. The structure of the

[7] See 6 2 3 3 above.

section 25(1) test does *not* provide for a weighing up of two competing property rights – ownership of immovable property on the one hand and the limited real right of mortgage on the other, the court having to make a value judgment. The dispute should not be resolved by placing the two interests on a scale and evaluating which one is stronger on the facts of the specific case. Although ownership is in principle the stronger right, it is inherently limited by the mortgage, with the result that the mortgage should – dogmatically speaking – always win. The deprivation of property effected by sale in execution is for this reason generally not arbitrary and, therefore, complies with section 25(1). The enforcement of the mortgage can only be denied if the ensuing deprivation of the real right is not arbitrary. In other words, the result of a foreclosure dispute can be determined by using the arbitrariness test.

In most normal foreclosure cases, the point of departure will be that the non-arbitrariness of the sale in execution is accepted *prima facie*. For constitutional property purposes at least, the mortgage creditor does not have to justify this deprivation afresh, since the voluntary mortgage agreement and registered bond are *prima facie* proof of non-arbitrariness. This principle is explained in 6 3 4 2 above, namely that sale in execution is generally in line with section 25(1), which justifies a *prima facie* presumption (unless proven otherwise) that the sale should be authorised. However, if a debtor wishes to prevent the sale in execution, he or she would have to show that the deprivation of his or her ownership would be arbitrary despite the *prima facie* justifiability of enforcing the mortgage bond. This aspect relates to the case-by-case non-arbitrariness test described in 6 3 4 3 above. By implication, this enquiry would also have to establish that a denial of the mortgagee's rights (by, for example, rather rearranging the debt) will not be arbitrary, which relates to my discussion in 6 4 above.

7 2 3 Property versus access to housing

Not only is each of the parties entitled to protection under section 25, but one of them – the home-owning debtor – is also entitled to protection under section 26. In other words, there may be a conflict between the creditor's property rights on the one hand and the debtor's access-to-housing rights on the other. Protecting one may involve the infringement of the other. However, despite the apparent difficulty in weighing two such diverse interests against each other, the assumption is that there should be harmony between these two apparently conflicting interests as well. Not only does the Constitution protect property against arbitrary deprivations, but it also protects occupiers of homes against infringement of their right of

access to housing and against arbitrary evictions.[8] Therefore, a non-arbitrariness test seems to form the substantive foundation for the infringements that both sections 25 and 26 aim to prevent. However, the test under section 26 would usually be stricter, since proportionality is always required, whereas the section 25(1) test may be less stringent, depending on the facts.[9] The point is that neither interest is absolute and both can be limited if there is a sufficient reason for doing so. In this section I argue that the necessary protection of either interest should serve as strong justification to allow a limitation of the other. Therefore, courts should not consider one without considering the other, at least in the type of cases this dissertation deals with.

In *Port Elizabeth Municipality v Various Occupiers*[10] ("*PE Municipality*") the CC per Sachs J aimed to establish "an appropriate constitutional relationship" between sections 25 and 26.[11] This case was not decided in relation to mortgage foreclosure, but in the context of unlawful occupiers being evicted from private land by a municipality. However, the conflict that the issues raised concerning the balance between property rights and housing rights can by analogy also be discussed in light of the conflict between the creditor's property right of mortgage and the debtor's right of home occupation. In this discussion the focus does not fall on the debtor's property right (ownership of the land) but on his or her security of tenure, in other words his or her right to occupy the house as protected against infringement by section 26.

Although the right to continued occupation of land is in itself not a common law right to property (except in so far as occupation is based on a lawful *causa*), Sachs J alluded to the principle that

> "the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home."[12]

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[8] See S Wilson "Breaking the tie: Evictions from private land, homelessness and a new normality" (2009) 126 *SALJ* 270-290 271.

[9] See 6 2 3 2 above and 7 2 4 below.

[10] 2005 1 SA 217 (CC). also See AJ van der Walt *Constitutional property law* (3rd ed 2011) 521-528; S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 273-279.

[11] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 19. AJ van der Walt *Constitutional property law* (3rd ed 2011) 54 argues that s 25 and the *FNB* test should also be interpreted according to the balance described by Sachs J in *PE Municipality*.

[12] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23.

It seems that people who occupy land for residential purposes have a constitutional right to continued occupation of that property, independent of any common law *causa*.[13] Moreover, it appears that people have "substantive interests"[14] in their homes for the mere fact that it is their "place of abode".[15] Accordingly, the "right not arbitrarily to be deprived of a home" is equal in relevance to the traditional rights to property that the common law recognises.[16] It seems that Sachs J wanted to do away with a hierarchical approach in terms of which one right is regarded as more important or more deserving of protection than the other, regardless of the context.

Van der Walt explains that "the Constitution requires a fundamental shift from abstract, rights-based to contextual, non-hierarchical thinking about property rights".[17] Liebenberg points out that this approach "fundamentally changes the traditional approach of courts in eviction cases";[18] the same can be said for sale in execution that leads to (or can lead to) eviction. In the conflict between the landowner's right of ownership of property versus the unlawful occupiers' rights, Sachs J commented as follows:

> "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."[19]

However, this approach does not entail that occupation without a *causa* is sanctioned as such. The CC emphasised that the eviction of unlawful occupiers remains possible, even if it means that they lose their homes.[20] The role of section 26 in unlawful occupation circumstances was explained by Sachs J in the following way:

> "The rights involved in s 26(3) are defensive rather than affirmative. The land-owner cannot simply say: This is my land, I can do with it what I want, and then send in the bulldozers or sledgehammers."[21]

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13 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 274, discussing the interpretation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998: "[E]ven unlawful occupiers are now the bearers of constitutionally enshrined housing rights."
14 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 274.
15 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 17 per Sachs J.
16 Para 23 per Sachs J.
17 AJ van der Walt *Constitutional property law* (3rd ed 2011) 521.
18 S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 275.
19 *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23.
20 Para 21.
21 Para 20.

If one were to translate Sachs J's approach for purposes of the mortgage foreclosure conflict, one could say that, in a non-hierarchical sense, the mortgage creditor's right to have the specific immovable property of the debtor sold in execution is not automatically superior to the debtor's right to continued occupation of that property. In as far as the sale in execution may lead to the eviction of the debtor from his or her home, the creditor cannot simply say, "this is my mortgage and I can do with it what I want" and then send in the foreclosure "bulldozer" (to borrow the analogy from Sachs J). Section 26(3) – as reflected in HCR 46(1)(a)(ii) – restricts the creditor's right to execution by requiring that eviction may not be arbitrary and, furthermore, that a court must authorise the eviction based on all the relevant circumstances.[22] Section 26(3) places a wide duty on courts to "seek concrete and case-specific solutions to the difficult problems that arise".[23]

Similarly, section 26(3) does not provide debtors with the right to continued occupation (or ownership for that matter) of hypothecated property that is subject to lawful foreclosure. However, the section does provide them with a defensive right, based on the fact that the property is their home, to ensure that there is a good reason for the loss of occupation, perhaps independent of (but closely related to) whether there is a good reason to lose ownership. Section 26(3) adds another layer to the court's obligation to ensure that mortgage foreclosure occurs in a just manner. Although the justification for the deprivation of ownership may in itself be enough to also justify the ensuing eviction, the fact that the property is the debtor's home requires extra vigilance and sensitivity that would not have been necessary if the property was non-residential. The extent to which the sale in execution will disrupt the debtor's family life and result in homelessness should also play a role.

This raises the question: How does one reconcile the interests protected under sections 25 and 26 in a manner that does not unjustifiably infringe either of these sections? The answer to this question is similar to the one given with regard to the balance between either parties' protection under section 25.[24] Section 26(1) – which gives substantive content to section 26(3) – requires that "the right to have access to adequate housing" may only be limited if such a limitation will be justifiable in terms of section 36(1) of the Constitution. Therefore, the section 26(1) test can be used to ensure that the debtor's rights are protected in as far as the mortgaged property is his or her home. On the other side of the dispute, the creditor may

[22] For an expanded explanation of s 26(3), see 3 3 2 above.
[23] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 22 per Sachs J.
[24] See 7 2 2 above.

only be deprived of his or her right of mortgage (as "property") if such a deprivation is non-arbitrary.

To satisfy the CC's harmonisation approach,[25] the court must search for a solution that satisfies the requirements of both section 26 (the debtor's housing rights) and section 25 (the creditor's property rights). When the creditor's right to sale in execution is denied because the forced sale of the home would unjustifiably infringe the debtor's section 26(1) rights, the assumption is that the resultant deprivation of the creditor's property (effected by the restriction of its right to execution) would not be arbitrary. On the other hand, if it would be arbitrary to deprive the creditor of its entitlement to execute the mortgage, sale in execution should be allowed on the assumption that the resultant infringement of the debtor's section 26(1) rights would be justifiable. In other words, the one clause will only be given effect to if the corresponding limitation of the other clause is justifiable and *vice versa*. Therefore, the two tests based respectively on sections 25 and 26 will be applied concurrently, both with reference to how its limitation or protection will impact the limitation or protection of the other. This approach should ensure that courts do not choose either of the sections and centre their enquiries on that one section alone, but that they find a rational solution that gives effect to both interests in a constitutionally justified manner. This process implies that courts should refrain from looking at the various rights involved in a hierarchical manner; one is not *per se* more important or stronger than the other. In my view, the court should not decide to base its enquiry only on the clause that seems easier to deal with either, since this approach may not paint the full picture of how the rights are impacted in various ways.[26]

As concluded in 3 4 2 above, the presence of a voluntarily agreed-upon mortgage agreement and registered mortgage bond is a *prima facie* indication that any infringement of section 26(1) rights will generally be justifiable. In other words, creditors who apply for execution orders do not have to justify the limitation of the debtor's right to adequate housing in advance. This burden-of-proof benefit is, in my opinion, part and parcel of the creditor's property right (the mortgage), which entails a voluntary acceptance by the debtor of the risk that default may result in foreclosure. Of course, as I explain in 3 4 3 above, a general

[25] See 7 2 1 above.

[26] By way of contrast, the CC in both *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) paras 20 and 22 and *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 51 refrained from also looking at s 25 but came to its conclusions from a s 26 perspective. This was probably appropriate due to the lack of s 25 argument in the lower courts and the CC's hesitance to function as a court of first and last instance. Yet, even though the correct result was reached, this focus on one section does not paint the full picture.

justification might not be enough to satisfy the requirements of section 26(1); a narrower case-specific proportionality test might be required in certain factual scenarios. Yet, the debtor would have to provide information to show such unconstitutional effect.

I picture this balance as two puzzle pieces. The debtor's piece has a hole in it because of the limited real right that he or she granted to the creditor. This hole represents the possible limitation of the debtor's right of access to adequate housing that may befall him or her in the event of mortgage default. However, this hole is not left empty but is filled (and therefore justified, at least generally) by an extension of the creditor's puzzle piece, namely its property right of mortgage, which entitles it to execute its claim against that specific object. The mortgage is a general justification for the creditor's insistence on selling the debtor's property, even if this amounts to a violation of section 26, since such violation is *prima facie* justifiable. In the absence of any further allegations by the debtor, no further justification is necessary to have the property sold in execution. However, if the debtor alleges that the "hole" in his or her puzzle piece (the infringement of section 26) is not sufficiently "filled" by the creditor's mortgage right, he or she would have to point this out to the court and provide proof of such a deficiency. On the basis of these allegations, the creditor would then have to provide further explanation for its request to sell the property – in other words, it would have to fill the gap that was pointed out by the debtor.

Examples of such "holes" in the creditor's case would be proof of abusive practices or indications that the sale in execution of the home is not the last resort. Another example would be allegations that the amount in arrears is too small to justify the sale of the home. In other words, a disproportionate effect on the occupiers' of the home will amount to such a "hole". In this respect, it is necessary to add the NCA to the picture. As has become clear throughout this dissertation, the mortgage foreclosure dispute cannot be considered independent of the NCA. In fact, as I argue in chapter 4 above, the mechanisms of the NCA should fill any "gaps" between the debtor's and creditor's "puzzle pieces" that may otherwise have rendered the creditor's insistence of sale in execution unjustifiable.

Therefore, courts must take all the circumstances of each case into consideration and apply the common law principles of mortgage in combination with the enforcement and protection measures provided in the NCA. These legal principles must be interpreted and applied in such a way that they do not permit the arbitrary deprivation of either party's property or the arbitrary eviction of the debtor from his or her home. Even though I propose that courts use sections 25 and 26 cumulatively to find the correct balance in foreclosure cases, courts will

probably never use these tests directly. Rather, the principles underlying these provisions should be used to interpret and apply the rules and mechanisms in statutory and common law that govern the sale in execution of mortgaged homes.

7 2 4 The mortgaged home as property for personhood

The previous discussion concerned the balance between, on the one hand, the property right of the mortgage creditor and, on the other hand, the housing rights of the debtor/owner/occupier. In chapter 5 above, where I discuss mortgage repossession principles in English law, I also provide some academic comments on the role of "home" in law.[27] A particular conclusion that authors draw is that the current framework for deciding these cases does not sufficiently enable courts to compare the commercial interests of creditors with the personal circumstances and "home" interests of debtor/occupiers. The invariable result in most cases is that courts opt for giving effect to the easily definable and quantifiable rights of creditors. Arguably, the reason for this presupposition is that courts simply do not know how to do anything else; nor does the legal framework provide them with much room to do so. In the South African context I discuss a case that illustrates a similar problem concerning what the impact of debtors' personal circumstances can or should be in these cases.[28]

On a theoretical level one can compare this conflict with Margaret Radin's property-for-personhood theory, which she also refers to as the personhood perspective or the personality theory of property.[29] Relying on Hegel,[30] Radin argues that the personhood perspective can "help decide specific disputes between rival claimants".[31] Radin's central premise is "that to achieve proper self-development – to be a *person* – an individual needs some control over resources in the external environment".[32] As Radin puts it, most people possess certain objects that they feel are almost part of them. These objects are closely bound up with someone's personhood because they are part of the way people constitute themselves as

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[27] See especially 5 2 5 above.
[28] See *FirstRand Bank Ltd v Meyer and Another* (3483/10) [2011] ZAECPEHC 8 (17 March 2011), discussed in 4 4 5 above.
[29] The theory was developed in MJ Radin "Property and personhood" (1982) 34 *Stanford L Rev* 957-1015. See also MJ Radin *Reinterpreting property* (1993).
[30] GWF Hegel *Outlines of the Philosophy of right* (1821, S Houlgate ed 1952) 22-31. For a summary of Hegel's position (as it relates to Radin's theory), see L Fox *Conceptualising home: Theories, laws and policies* (2007) 289-292.
[31] MJ Radin "Property and personhood" (1982) 34 *Stanford L Rev* 957-1015 958.
[32] 957 (original emphasis). See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 287.

continuing personal entities.[33] As one example of such objects, the author points to "a house".[34]

The significance or strength of one's relationship with an object can, according to Radin, be measured by the kind of pain it would cause to lose that object. If the loss causes pain that cannot be relieved by simply replacing the object with something of equal monetary value, the property relationship is more closely related to one's personhood.[35] On the opposite side of the spectrum there are certain types of property one holds that are perfectly replaceable with another good of equal market value.[36] An example she mentions is an apartment in the hands of a commercial landlord. Therefore, Radin presents a dichotomy of theoretical opposites, namely personal and fungible property. Radin explains that there is a continuum between these two extremes. She argues that those rights that are nearer to the fungible end of the spectrum can be overridden in some cases, whereas those nearer to the personal end cannot.[37] Consequently, Radin proposes a range of entitlements in terms of which the entitlement would be stronger the more closely connected it is to one's personhood.

In her analysis of the creditor-occupier conflict, Fox relies on Radin's perspective.[38] More specifically, Fox claims that the property-for-personhood theory makes a valuable input in the loss-of-home analysis.[39] Fox argues that Radin's property-for-personhood theory supplies some weight to "the recognition of a person's *home* in law".[40] A person's home interest seems to be a quintessential example of personal property.[41] However, the values that spring from one's attachment to one's home "could be undermined in cases where occupiers

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33 MJ Radin "Property and personhood" (1982) 34 *Stanford L Rev* 957-1015 959.
34 959.
35 959. The author, for example, contrasts the examples of a wedding ring in the hands of a jeweller and of a wearer. An insurance payout would adequately compensate for a jeweller's loss, but not for a loving wearer's.
36 MJ Radin "Property and personhood" (1982) 34 *Stanford L Rev* 957-1015 960.
37 986.
38 For instance, see L Fox *Conceptualising home: Theories, laws and policies* (2007) 287ff.
39 287.
40 287.
41 MJ Radin "Property and personhood" (1982) 34 *Stanford L Rev* 957-1015 987:

> "[I]n our social context a house that is owned by someone who resides there is generally understood to be toward the personal end of the continuum. There is both a positive sense that people are bound up with their homes and a normative sense that this is not fetishistic" (footnotes omitted);

and at 1013:

> "Our reference for the sanctity of the home is rooted in the understanding that the home is inextricably part of the individual, the family, and the fabric of society."

At 991ff Radin discusses sanctity of the home from a personhood perspective, for example, in the landlord-tenant context. See also L Fox *Conceptualising home: Theories, laws and policies* (2007) 288.

defaulted on payment and therefore faced the risk of losing their homes in a creditor possession action".[42]

Fox states that the theory of property for personhood supports the idea that the meaning of *home* to occupiers and the impact of possession actions and the loss of home, are relevant factors that should be taken into account when determining the weight of home interests in creditor-occupier disputes.[43] Fox poses the question whether the application of the personhood perspective in relation to the *home* in property theory and law could provide a useful lens through which to view the meaning and value of home. Moreover, she asks whether this perspective could contribute to recognising the potential consequences for occupiers of the loss of their homes through possession actions.[44]

As Fox explains, the extreme sense of loss that is suffered when someone loses a home is clearly rooted in the person's attachment to that property.[45] Yet, the question is whether this feeling of attachment is enough justification for legal protection.[46] The author proposes that the creditor-occupier context is an effective paradigm to consider the conceptualisation of *home* in law. The reason for this argument is that the occupier's home interest is "brought into sharp relief" when it comes into conflict with the commercial claims of secured creditors.[47] From a conceptual point of view it is quite challenging to find a balance between the occupier's home interests and another valid competing claim.[48] Fox relies on Radin's point that the property-for-personhood theory is a useful tool through which to resolve competing claims to property, and she (Fox) emphasises the role of this tool in the creditor-occupier context.[49] One also has to acknowledge, as Fox does, that the personhood perspective clearly favours the home above the creditor's commercial claim.[50] The creditor's claim, being fungible, can – as Radin argues[51] – be overridden in some cases, whereas the personal property (home) cannot. Fox states that this proposition presents an interesting alternative perspective on the treatment of home interests in law.[52]

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42 L Fox *Conceptualising home: Theories, laws and policies* (2007) 287.
43 288.
44 288.
45 293.
46 294.
47 294.
48 294.
49 296.
50 296-297.
51 MJ Radin "Property and personhood" (1982) 34 *Stanford L Rev* 957-1015 986.
52 L Fox *Conceptualising home: Theories, laws and policies* (2007) 298.

In summary, Fox accentuates the home as a clear example of personal property, since the pain of losing it cannot be adequately restored by financial compensation.[53] On the other hand, the creditor's interest is fungible, since it can be exchanges for money without damage to personhood.[54] According to Fox, the property-for-personhood theory implies that the personal nature of the home interest means it should carry greater weight in legal analysis than the fungible interests of creditors.[55] However, she points out that this proposition is not currently the case in English law.[56] One of the reasons that the personhood perspective is not always reflected in law is, as Radin states (quoted by Fox):

> "Perhaps the personhood perspective is not strong enough to outweigh other concerns, especially the government's need to appear evenhanded and the lower administrative costs associated with simpler rules."[57]

Fox argues that this statement by Radin goes to the crux of the current balance between creditors' and occupiers' rights.[58] In other words, policy makers allow the more fungible property rights of creditors to prevail in mortgage cases, because the alternative would be more complicated and costly in an economic sense. Another argument that Fox perceives (with reference to Radin) against home-oriented protection is that it would demand a case-by-case investigation of persons' attachment to their properties, which will be an administrative "nightmare".[59] The English case law that I discuss in 5 3 2 above illustrates the hesitancy of courts when it comes to case-by-case proportionality tests.

Despite the current general allocation of protection, Fox explains that the property-for-personhood theory provides a basis for regarding an occupier's home as more worthy of protection than the creditor's fungible claim to the capital value of the property.[60] However, she also acknowledges that the idea that commercial claims should make way for home interests raises valid concerns about the consequences for creditors.[61] For example, the availability of credit to fund home ownership might be compromised. Moreover, banks have responsibilities to their shareholders and investors.[62] Therefore, Fox emphasises that any

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53 300.
54 300.
55 300-301.
56 301. For my analysis of the current position in English law, see ch 5 above.
57 MJ Radin *Reinterpreting property* (1993) 66, quoted by L Fox *Conceptualising home: Theories, laws and policies* (2007) 302.
58 L Fox *Conceptualising home: Theories, laws and policies* (2007) 302.
59 302, with reference to MJ Radin *Reinterpreting property* (1993) 66.
60 L Fox *Conceptualising home: Theories, laws and policies* (2007) 304.
61 304-305.
62 305.

protection measure to address the balance between the home and commercial interests would not be allowed to present the possibility that creditors might lose their proprietary security interests. Instead, she predicts that such protection would mostly amount to delaying creditors' claims.[63]

Fox's application of Radin's personhood perspective to the creditor/occupier context does not provide any conclusive answers as to how the appropriate balance should be struck. Nevertheless, it presents a different perspective that one can use to consider these matters. Of course, the property-for-personhood analysis is only a theoretical proposal and not an accepted general principle. The question, however, is whether this personal-fungible dichotomy can be perceived in current South African law or, more specifically, in the questions I address in this dissertation. Therefore, in light of the above discussion of Radin and Fox, it is necessary to investigate the implications of this perspective for the South African context.

The South African Constitution provides a greater degree of protection for homes than for non-residential property. In the first place, section 26(3) only requires judicial oversight before people are dispossessed of homes and not, for example, for evictions from commercial property. One can argue that other provisions in the Constitution (sections 34 and 25) can be construed so as to require judicial oversight also for non-residential property. Yet, this argument is not universally accepted,[64] in contrast to the settled principle that judicial oversight is now always a prerequisite before someone may lose a home. This position implies that a greater degree of scrutiny is required before a home is sold in execution than a non-home, a result that is founded on the guarantee of everyone to have access to adequate housing. Therefore, even though the Constitution certainly does not deny protection to non-residential property (section 25), it recognises the special importance of homes. Perhaps Radin's distinction between personal and fungible property is reflected in the Constitution's policy with regard to judicial oversight as an absolute rule before homes – but not other assets – are transferred by force.

On a more substantive level as well, it seems clear that residential property enjoys a greater degree of constitutional protection than non-residential property. The standard for someone being validly deprived of property in terms of section 25(1) is the non-arbitrariness

[63] 305.
[64] For example, see *Mkhize v Umvoti Municipality and Others* 2010 4 SA 509 (KZP); *Mkhize v Umvoti Municipality and Others* 2012 1 SA 1 (SCA).

test.[65] Although this test can be quite thick, it does not seem like it will ever be as strict as a full-blown proportionality test.[66] The thickness of the test will depend on the facts of each case, with reference to various relationships. On the other hand, sections 26(1) and 36(1) require that "access to adequate housing" may only be limited if the result is proportionate.[67] Hence, the test for losing a home will always be a proportionality test, whereas the test for losing other types of property will not always be this strict. Also, when considering the debtor/owner's rights from a section 25(1) point of view, one can argue that the non-arbitrariness test would be stricter – closer to full proportionality – when the property in question is a home. Therefore, both sections 25 and 26 would lend themselves to greater protection for homes than non-homes. This distinction in the level of substantive protection can be seen as a manifestation of Radin's distinction between personal and fungible property. It seems that the South African Constitution recognises this difference, at least in this context.

The difference between the justification tests under sections 25 and 26 implies that it would be somewhat easier to deny a creditor's rights (as protected under section 25) than to allow a violation of a debtor/occupier's rights (as protected under section 26). Yet, both interests are constitutionally protected. This subtle distinction in protection standards ensures, in my view, a sufficient and nuanced balance. In 7 2 3 above I present my argument with regard to this balance in light of how both sections 25 and 26 inform the correct and constitutionally compliant result of a foreclosure case.

The comparison between Radin's theory and the Constitution is of course not perfect, since homes are not the only objects that qualify as property for personhood. Hence, the Constitution's emphasis on homes is probably more related to the political and socio-economic importance of homes in South Africa as well as the historical context, where forced removals from homes were a common feature of apartheid law. Radin's personal-fungible dichotomy is not free of criticism either[68] and I, therefore, do not hold to it as an overarching theory to underscore my conclusions. Nevertheless, Radin's perspective sheds some light on

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[65] See 6 2 3 2 above.

[66] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 65.

[67] AJ van der Walt *Constitutional property law* (3rd ed 2011) 74:

> "The requirement that limitations should be reasonable and justifiable as described in section 36(1) amounts to a proportionality test that is similar in spirit but stronger in force that the (variable) non-arbitrariness test laid down in the *FNB* decision." (footnote omitted).

[68] See especially SJ Schnably "Property and pragmatism: A critique of Radin's theory of property and personhood" (1993) 45 *Stanford L Rev* 347-407.

reasons why homes seem to be more worthy of protection than non-homes. It also presents an interesting paradigm wherein one can – quite radically – contrast the various interests at stake in mortgage cases. Furthermore, the personhood perspective can contribute to arguments in favour of greater attention to debtors' home interests and a nuanced relationship between sections 25 and 26 in cases where both clauses are implicated. Therefore, the conclusion is not that home interests should necessarily be stronger than commercial or non-home interests but rather that home interests should enjoy more attention that they did in common law.[69] The idea is to move away from hierarchical thinking and not to create a new hierarchy.

7 3 Concluding remarks: Role of the National Credit Act

The NCA was enacted to regulate various aspects of the consumer credit market, one area being the enforcement of credit agreements. The central argument of this dissertation is that the loss-of-home controversy in the mortgage foreclosure context should be discussed from the vantage point that the NCA is the primary legislation applicable to such consumer debt cases. Sachs J in *PE Municipality* talked about a "defined and carefully calibrated constitutional matrix" within which section 26 should be interpreted and applied in the eviction context.[70] The same idea can apply in the foreclosure context, where sections 25 and 26, no doubt, play a role as a result of property and housing interests being compromised. This dissertation has illustrated the interplay between these two constitutional rights, especially in as far as they protect the countervailing interests of the debtor/homeowner and creditor. I further showed how the NCA is the embodiment of the structure within which this interplay functions.

The factor that triggers foreclosure – and, therefore, evokes the protection and/or limitation of section 25 and section 26 rights – is the debtor defaulting on the credit agreement. However, the cause of foreclosure is more deeply rooted, namely the fact that ongoing default is a direct symptom of what the NCA calls over-indebtedness. The remedy of debt rearrangement is geared at relieving this kind of situation, unless it would not be viable to resolve the over-indebtedness without also fully enforcing the debt and allowing the hypothecated property to be sold in execution. My argument is that debt rearrangement has the potential to ensure that foreclosures will not result in disproportionate violations of

[69] See my discussion in 7 2 3 above, with reference to *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).
[70] *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 14. See 7 2 3 above.

debtors' sections 26(1) and 25(1) rights. Full foreclosure should, then, only occur if there is no realistic other way to salvage the situation, for instance if there is no way to get the amounts in arrears up to date or to realistically rearrange the repayment plan in a way that also takes cognisance of creditors' rights.

Furthermore, when the homeowner's over-indebtedness is a result of reckless credit, the supposition is that his or her situation (as a result of default) is causally linked to a prohibited action by the creditor. Hence, the debtor should never have been in this situation and probably would not have been, had it not been for the creditor granting him or her a loan in this reckless fashion. It seems obviously iniquitous to permit debtors' homes to be sold in execution in these kinds of situations. Nevertheless, the NCA provides remedies in this regard as well, namely the setting-aside and suspension remedies. Both these innovations will, consequently, ensure that debtors will not lose their homes because of creditors' reckless lending practices. At the same time, these remedies are nuanced enough to ensure that they can be applied in a way that also takes account of creditors' constitutional rights.

The right of debtors in default to reinstate the credit agreement by getting the outstanding arrears up to date (along with some charges and costs) is another significant debt relief measure afforded by the NCA. This right is also a noteworthy development of the traditional common law principles pertaining to acceleration and foreclosure. Getting the arrears up to date will henceforth ensure that the credit relationship continues as if there had been no default and will, therefore, fully overturn the creditor's decision to foreclose. In instances where the amount in arrears seems too small and where it, hence, does not seem justifiable to allow a loss of home, the right of reinstatement supplies the perfect solution. If the debtor does not have the financial ability to reinstate the credit agreement, the assumption is that it would probably be justifiable to have the home sold, since there would arguably be no other way to satisfy the creditor's claim.

In terms of the subsidiarity principles, debtors who wish to prevent the sale in execution of their homes must make use of the NCA and courts must adjudicate these cases within the framework that the Act has set in place. My position is that the NCA provides extensive and innovative protection measures and remedies and that these are nuanced and narrow enough to ensure that there is a proper and justifiable balance between the section 25 and section 26 rights of the parties involved. Not only does this consideration ensure the general justification of the mortgage foreclosure remedy (especially against homes), but it also ensures that individual cases are treated in a context sensitive manner and that proportionate outcomes are

reached. The NCA must be interpreted to promote the values that underlie sections 25 and 26 of the Constitution. Where the Act provides sufficient compliance with and promotion of the Constitution, it is not justifiable to create independent constitutional defences or ones that imply a development of the common law.

Therefore, if the NCA's remedies do not provide a way to avoid sale in execution, the general assumption should be that any violation of sections 25 and 26 rights is justifiable. The reason for this is that the NCA provides reasonable and predictable mechanisms to ensure that disproportionality is circumvented in individual foreclosure cases. If these measures do not avail the debtor, the supposition is that the result is justifiable, even if his or her home is lost in the process. As long as an appropriate balance is struck between creditors' and debtors' rights under sections 25 and 26, the legislature's policy choices as regards the scope of consumer credit protection should be respected. Consequently, to grant more protection to debtors than what the Act envisions would disesteem the choices of Parliament. As long as these policy choices are proven to be constitutionally justifiable, which I argue they are, courts should uphold them and, therefore, limit their interventions to what the NCA allows.

Concerning the way forward, I suggest that courts, as well as all the parties who have interests in the credit industry, continue to explore the NCA and apply it to their situations. An increase in consumer credit education (something this dissertation took for granted and, therefore, did not address) will go a long way in ensuring that all the role players become well versed in what to do when foreclosure is on horizon. Courts and debt counsellors should also become more creative when it comes to the content of debt restructuring orders, so as to ensure that creditors get what they are entitled to, but in a way (oftentimes significantly postponed) that results in as few as possible homes being lost. To at the same time ensure that creditors' rights (contractual, proprietary and constitutional) are given proper effect to, courts should limit themselves to the carefully designed and predictable relief mechanisms that are found in the NCA.

To conclude this dissertation, it is perhaps appropriate to repeat Froneman J's comments in *Gundwana*, namely that section 26 of the Constitution does

> "not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of a judgment debt sounding in money. 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";[71]

and further,

> "[i]t 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 should start ringing. If there are no other proportionate means to attain the same end, execution may not be avoided."[72]

Therefore, the contribution of this dissertation is the observation that the NCA's debt relief mechanisms comprise the "proportionate means" and "alternative course" that the CC had in mind when it endorsed the general justification for the sale-in-execution process.[73] Mortgage foreclosure and the execution of judgment debts against residential property remain a justifiable part of the South African democratic order. However, the NCA should be construed in such a way that its remedies ensure that the entrenched rights to property and access to housing of all parties involved are respected and only limited in a justifiable and non-arbitrary manner.

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71 *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) para 53.
72 Para 54. I also quote these passages in 3 4 2 above.
73 Paras 53 and 54.

LIST OF ABBREVIATIONS

ASSAL	Annual Survey of South African Law
Cambridge LJ	Cambridge Law Journal
CCR	Constitutional Court Review
CILSA	The Comparative and International Law Journal of Southern Africa
Conn L Rev	Connecticut Law Review
ESR Review	Economic and Social Rights in South Africa
JBL	Juta's Business Law: The Quarterly Law Review for People in Business
JJS	Journal for Juridical Science
JQR	Juta's Quarterly Review
LAWSA	The Law of South Africa
LDD	Law, Democracy and Development
MLR	The Modern Law Review
PELJ	Potchefstroom Electronic Law Journal
Prop L Rev	Property Law Review
SA Merc LJ	South African Mercantile Law Journal
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	South African Public Law
Stanford L Rev	Stanford Law Review
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
WP	Without Prejudice

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