PROTECTION FOR HOMES DURING MORTGAGE ENFORCEMENT: HUMAN-RIGHTS APPROACHES IN SOUTH AFRICAN AND ENGLISH LAW

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This article investigates the enforcement of mortgages in South Africa and England. It specifically focuses on the influence of human-rights housing principles in so far as they may require courts to conduct a proportionality enquiry whenever a legal process leads to the loss of a home. It appears that art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms — essentially the United Kingdom's housing clause — is conceptually similar to s 26(1) of the South African Constitution. The underlying idea is that, when a home is violated, justification must be provided as regards the proportionate relationship between the purpose of the violation and the impact of the violation on the occupier. English law already accepts that this principle applies when local authorities seek to evict unlawful occupiers, but this approach has not yet been extended to mortgage repossessions. Conversely, South African law already acknowledges that the housing clause must be applied in mortgage cases. After investigating developments in both jurisdictions, the article concludes that a proportionality test is workable in mortgage cases. Furthermore, the traditional assumption that 'creditors must win', although still relatively strong, is in the process of being replaced by a more contextual approach.

I INTRODUCTION

Mortgage financing is a vital aspect of the housing market in many countries, including the countries which form the subject of this article, namely the United Kingdom and South Africa. The downside occurs when the debtor, who has obtained a loan to finance the purchase of his or her home and has granted the creditor a mortgage as security, defaults and the creditor's right to enforce the mortgage so as to settle the outstanding capital debt is triggered. When this happens, the debtor/occupier invariably faces eviction — that is, the loss of his or her home. While the necessity of enforcement is recognised as it encourages credit provision for the acquisition of homes and gives effect to creditors' valid contractual and proprietary rights, there is also a growing unease about the reality that a home is lost.

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Finding a balance between the creditor's interests in enforcing the mortgage and the debtor's interests in his or her home has been the subject of controversy in both jurisdictions. Particularly in the United Kingdom, arguments have been put forward in support of greater recognition of occupiers' home interests, independent of financial factors. In this regard one need only mention the work of the likes of Lorna Fox O'Mahony. This author points out that, even though home interests are increasingly present in legal discourse, the creditor's interests almost always automatically win.[1] Accordingly, there is a 'cycle of reasoning' that prevents home interests from receiving more attention in the balancing process.[2] She explains this 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.'[3]

Fox's writings relate to the position in England; but her conclusions also represent the traditional position (and broadly held assumption) in South African law, although there have been developments which have seriously undermined this assumption.

Fox argues that the importance of a home (and the effects of losing it) should enjoy more explicit attention when the interests of debtors and creditors are being balanced.[4] She insists that the 'creditors must win' presumption — as a starting point for deciding possession cases — is flawed.[5] At a conceptual level, the difficulty is that the creditor's interest is of an economic nature and therefore easy to quantify and give effect to. By contrast, home interests include financial and non-financial aspects. Especially the non-financial elements 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 in the mortgaged home. Nor does she argue that home interests should always prevail against creditors' rights.[6] Instead, she proposes the possibility of striking a different balance between the conflicting rights.[7]

This article focuses on one factor that could open the door to lending greater weight to the 'home' as a legally recognised consideration in mortgage cases, namely the influence of human-rights norms as regards housing. The reason for this focus is that South African law has been strongly

[1] Lorna Fox *Conceptualising Home: Theories, Laws and Policies* (2007) 79; Lorna Fox 'The meaning of home: A chimerical concept or a legal challenge?' (2002) 29 *Journal of Law and Society* 580 at 585.

[2] Fox *Conceptualising Home* op cit note 1 at 79.

[3] Ibid at 80.

[4] Ibid.

[5] Ibid at 12. See also at 122–8, where the author makes a case for reconsidering the pro-creditor presumption in mortgage law.

[6] Fox *Conceptualising Home* op cit note 1 at 28; Fox 2002 *Journal of Law and Society* op cit note 1 at 587.

[7] Fox *Conceptualising Home* op cit note 1 at 29.

influenced by human rights in recent years — not only generally, but also in the private-law mortgage enforcement context. The tricky issue is that of allowing a human-rights-based defence even though the party claiming possession of the house has an apparently unqualified right to such possession under domestic law. English case law has accepted (albeit reluctantly) the possibility that possessory actions by local authorities against unlawful occupiers of rented property may be scrutinised on the basis of art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 ('the Convention'). However, the courts have yet expressly to recognise the influence of art 8 in mortgage repossession cases. Conversely, South African law has taken this leap as a result of the housing clause in s 26 of the Constitution of the Republic of South Africa, 1996.

Accordingly, this article indicates that the 'creditors must win' assumption has to a large degree been undermined in South Africa. Developments in South Africa might show English lawyers what to expect when the same starts happening in the United Kingdom. Indeed, comparing developments may be valuable for jurists in both countries. The enduring question is how this human-rights notion functions in a traditional private-law relationship such as the one between a home-owning debtor and a secured creditor. Interestingly, both legal systems are faced with the traditional private-law status quo being challenged on the basis of 'external' human-rights norms — in South African private law, the Bill of Rights (enforced by the country's Constitutional Court) and in English domestic law, the European Convention (enforced by the European Court of Human Rights).

I contend in this article, following the South African example, that it is workable to require human rights-based proportionality enquiries even in mortgage cases, but I also acknowledge that practical difficulties arise as a result of this approach. It is difficult to balance the competing interests in such cases, and it is only in exceptional cases that mortgage enforcement will not go ahead because of the occupiers' housing rights. Yet, I argue that giving full recognition to and affording an opportunity for implementation of a proportionality test is a step in the right direction. This approach seeks to ensure that homes are protected as much as possible while it simultaneously continues to recognise the legitimate interests of individual creditors and the systemic and economic importance of allowing the enforcement of creditors' security rights. Undoubtedly, further details would have to be worked out as cases come before the court.

It must be emphasised that the article cannot include a discussion of each and every detail; the idea is to highlight the salient points without necessarily delving into how the theory translates into concrete legal structures and procedures. Hence, the emphasis is not on technical or procedural matters, but solely on the proportionality standard required by art 8 of the Convention and s 26 of the South African Constitution. The article discusses the developments in England and South Africa in separate sections. Each section includes an explanation of the human-rights instrument applicable and a discussion of important case law. Even though the structure and wording of

the two human-rights provisions differ, the underlying concepts are quite similar — a proportionality test is required whenever a home is lost by virtue of any legal process.

II ENGLISH LAW

(a) Introduction

English mortgage doctrine is based on the creditor's right to take immediate possession of the debtor's property.[8] The assertion of this right is one of the main remedies at the creditor's disposal, which is usually only resorted to as a precursor to realisation of the security right by means of a sale with vacant possession. Section 36 of the Administration of Justice Act, 1970 has proven to be a way, under appropriate circumstances, in which courts can protect debtors against possessory actions.[9] The court has a discretion to stay possession so as to grant relief to those finding themselves in temporary financial difficulties.[10] The question is whether art 8 of the Convention can have any impact on the exercise of this discretion,[11] or can provide a different, broader principle upon which creditors' claims can be defended from a housing-rights perspective. As yet, this principle has not been expressly recognised in mortgage cases. Consequently, reference must be made to an analogous context, namely possession proceedings instituted by local authority landlords against unlawful occupiers of rental property. Although I sometimes refer to the United Kingdom, I specifically limit this discussion to the law of England and Wales — hence English law.

(b) Article 8 of the European Convention

Even though the United Kingdom does not have a Bill of Rights, English law is subject to a human-rights instrument by virtue of the Human Rights Act, 1998, which subjects domestic law to the Convention.[12] The Act requires that, as far as possible, legislation should be read and given effect to in a way that is compatible with the Convention.[13] Moreover, no public

[8] See *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch 317 (ChD) at 320; *Ropaigealach v Barclays Bank plc* [2000] QB 263 at 284. See further Richard Calnan *Taking Security: Law and Practice* 2 ed (2011) 286–7; Kevin Gray & Susan Francis Gray *Elements of Land Law* 5 ed (2009) 755–61 and 768–72; Roger J Smith *Property Law* 6 ed (2009) 570; Mark Wonnacott *Possession of Land* (2006) 74–90 and other cases cited by these authors.

[9] See Gray & Gray op cit note 8 at 773–80; Ben McFarlane *The Structure of Property Law* (2008) 830–2; Smith op cit note 8 at 573–9; Wonnacott op cit note 8 at 81.

[10] See *Bank of Scotland v Grimes* [1985] QB 1179 at 1190; Calnan op cit note 8 at 301.

[11] See James Hurford 'Does article 8 broaden the court's powers under section 36 of the Administration of Justice Act 1970?' (2014) 17 *Journal of Housing Law* 9–15. I thank Sue Bright for bringing this article to my attention.

[12] For a discussion of the impact of human rights on English property law in general, see Gray & Gray op cit note 8 at 115–31.

[13] Section 3(1) of the Human Rights Act.

authority may act in a way that is incompatible with the Convention.[14] Since courts are regarded as public authorities, their orders (including possession orders) must be in line with the Convention.[15]

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. People do not have a positive right to be provided with a home, but they are protected against unlawful interference with their existing homes.[16] Whether a property is a 'home' does not depend on whether the occupier has any proprietary interests in the land[17] or whether his or her occupation is lawful.[18] In essence, whether a building is a home is a factual test, and to succeed the claimant must show sufficient and continuous links with the place.[19]

Article 8(2) sets out the reasons which may justify interferences with the right to respect for the home. Three pre-conditions must be met before the right may be infringed: the interference must be prescribed by law; it must be directed at one of the aims specified in art 8(2); and the interference must be necessary in a democratic society.[20] One of the valid aims, 'the protection of the rights and freedoms of others', will probably include the rights of lenders in terms of a mortgage agreement.[21] However, this consideration is insufficient to justify interference with the debtor's art 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',[22] which is essentially a proportionality test. Therefore, a court has

[14] Section 6(1) of the Human Rights Act.

[15] Section 6(3)*(a)* of the Human Rights Act. See also Timothy Powell *Mortgage Possession Proceedings* (2012) 158.

[16] *X v Germany* (1956) Yearbook ECtHR 202; *Chapman v United Kingdom* (2001) 33 EHRR 399 at 427. See Fox *Conceptualising Home* op cit note 1 at 460.

[17] *London Borough of Harrow v Qazi* [2003] UKHL 43 para 97 ('*Qazi*'). See also Gray & Gray op cit note 8 at 117.

[18] *Buckley v United Kingdom* (1997) 23 EHRR 101 para 63; *Qazi* supra note 17 para 11. See also Gray & Gray op cit note 8 at 117.

[19] *Gillow v United Kingdom* (1986) Series A No 109 para 46; *Qazi* supra note 17 para 68.

[20] *R (Countryside Alliance) v Attorney General* [2007] 3 WLR 922 paras 43–5. See also Gray & Gray op cit note 8 at 116.

[21] Powell op cit note 15 at 159.

[22] *R (Countryside Alliance) v Attorney General* supra note 20 para 45. See also Gray & Gray op cit note 8 at 116.

to examine whether the granting of a possession order would be necessary, based on the impact the possession order would have on the individual occupiers.[23]

As to what impact art 8 would have on the outcome of repossession cases, one court has asked 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'.[24] In other words, do English courts now have another layer of discretion based on the personal, contextual and/or social merits of each individual case? Moreover, may courts use this discretion to refuse to enforce rights and obligations that, save for the Human Rights Act, are clear under domestic law?[25] Initially it seemed as if the Act might have brought about 'a new species of property right in a "home"'.[26] The counter-argument was that the recognition of a proportionality-based judicial discretion to refuse to enforce orthodox property rights would create 'novel rights to security of tenure in derogation of the existing proprietary rights of others'.[27] The fear was expressed that such an approach would fundamentally transform the legal principles that regulate the enforcement of property rights.[28]

Therefore, despite some earlier willingness to embrace what was seen as the wide scope of the Human Rights Act,[29] courts have since 2003 tried to curb the argument that art 8 of the Convention creates parallel property rights which can derogate from traditional property rights.[30] Irrespective of the courts' rejection of the prospect that parallel property rights might be based on art 8, the article does seem to require a proportionality test to determine whether interferences with the home are justified.

The potential implication of art 8 in the mortgage context is that a creditor's inherent right to take possession may be judicially reviewed in light of the Convention,[31] since repossession almost always involves the eviction of a family.[32] Hence, art 8 might provide a foundation (or a trump card)[33]

[23] Powell op cit note 15 at 159.

[24] *Patel v Pirabakaran* [2006] 1 WLR 3112 para 41. See also Gray & Gray op cit note 8 at 124; Amy Goymour 'Proprietary claims and human rights — a "reservoir of entitlement"?' (2006) 65 *Cambridge LJ* 696.

[25] Gray & Gray op cit note 8 at 124.

[26] *Newham LBC v Kibata* [2003] 3 FCR 724 para 2. See also Gray & Gray op cit note 8 at 124–5.

[27] Gray & Gray op cit note 8 at 124.

[28] *R (Gangera) v Hounslow LBC* [2003] HLR 1028 para 49; *Qazi* supra note 17 para 109. See also Gray & Gray op cit note 8 at 124.

[29] See eg *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2002] Ch 51 para 51.

[30] Gray & Gray op cit note 8 at 125.

[31] Sarah Nield 'Charges, possession and human rights: A reappraisal of s 87(1) of the Law of Property Act 1925' in Elizabeth Cooke (ed) *Modern Studies in Property Law* vol 3 (2005) 155 at 155.

[32] Gray & Gray op cit note 8 at 771.

from which to advance home arguments in domestic English law.[34] For instance, it has been argued that courts should 'strike a balance between the lender's right to possession and the borrower's fundamental Convention rights'.[35] With respect to applying art 8 to the mortgage context, Fox speculates that

> 'the court would be required to consider whether any interference with the occupier's right to respect for home (i e, 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'.[36]

This justification test can be divided into a number of questions the court should ask.[37] 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 less restrictive means are available to achieve that goal.[38] 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 . . .'.[39]

What is more, the possibility that postponement of the creditor's rights might provide a more proportionate response than immediate repossession has not been considered in the art 8 framework.[40] Most art 8 cases have related to local authority landlords who evict unlawful occupiers or those whose tenancies have been lawfully terminated. Consequently, one has to draw upon principles that have been established in this analogous context to investigate the possible impact of art 8 on mortgage possession cases. Despite Fox's argument that art 8 might contribute to a more coherent conceptualisation of home interests,[41] courts seem to restrict the application of respect for the home. However, as is illustrated by developments in case law, the door is opening for the courts to apply a proportionality test in cases where people face the possibility of losing their homes. The question is whether this opening door is also changing the foundation upon which mortgage doctrine is built, namely the creditor's unqualified right to immediate possession.

[33] Susan Bright 'Dispossession for arrears: The weight of home in English law' in Lorna Fox O'Mahony & James A Sweeney (eds) *The Idea of Home in Law — Displacement and Dispossession* (2011) 14 at 18–20.

[34] Fox *Conceptualising Home* op cit note 1 at 453.

[35] Powell op cit note 15 at 162.

[36] Fox *Conceptualising Home* op cit note 1 at 455.

[37] Ibid at 455–6.

[38] Ibid at 480.

[39] Ibid.

[40] Ibid.

[41] Ibid at 456–8.

(c) Developments in case law

For purposes of this article, it is unnecessary to provide an in-depth discussion of the relevant cases.[42] The major point I want to highlight is how the courts' willingness to apply a proportionality test in repossession cases has progressed from *London Borough of Harrow v Qazi*[43] ('*Qazi*') to the more recent decisions in *Manchester City Council v Pinnock*[44] ('*Pinnock*') and *London Borough of Hounslow v Powell; Leeds City Council v Hall; Birmingham City Council v Frisby*[45] ('*Powell*'). Furthermore, I wish to underline the general principles regarding proportionality in possession cases so as to expose the potential for applying these principles in the mortgage context as well.

(i) *Qazi*

The decision of the Judicial Committee of the House of Lords (now the Supreme Court of the United Kingdom) in *Qazi*[46] came as a blow to those hoping to employ art 8 of the Convention as a defence for occupiers against possessory actions by landlords and creditors. Indeed, the court appeared to have eliminated completely the possibility of such a defence,[47] which would have infused a proportionality enquiry into possessory proceedings and would potentially have opened up a greater scope for protecting occupiers' home interests.

In an eviction application by a local authority, it was argued that the Human Rights Act requires the court to investigate the proportionality of the eviction in light of the tenant's right under art 8 to respect for his or her home. However, the court held that art 8 provides no basis upon which to defend actions brought by parties that are entitled to obtain possession under domestic law, such as landlords and mortgage creditors. In fact, the court explained that there will be no interference under art 8 if the party who seeks possession of a home is merely doing so as a result of enforcing existing proprietary and/or contractual rights under domestic law. In other words, the court held that there was no discretion based on 'the degree of impact on the tenant's home life'.[48] Article 8 rights can never defeat contractual and proprietary rights that have crystallised under domestic law.[49] Moreover,

[42] In the footnotes accompanying the discussion of case law below, I provide references to further literature which can be consulted for more details. For an analysis of the cases, see also Lord Walker of Gestingthorpe 'The saga of Strasbourg and social housing' in Nicholas Hopkins (ed) *Modern Studies in Property Law* vol 7 (2013) at 3–14.

[43] Supra note 17.

[44] [2010] UKSC 45.

[45] [2011] UKSC 8.

[46] Supra note 17. My summary of the court's conclusions is partially based on Fox *Conceptualising Home* op cit note 1 at 482. See also Gray & Gray op cit note 8 at 125–7; AJ van der Walt *Property in the Margins* (2009) 50–1.

[47] See Fox *Conceptualising Home* op cit note 1 at 482–3.

[48] *Qazi* supra note 17 para 146.

[49] Ibid paras 84, 108–9, 125, 149 and 151–2.

art 8 does not confer on occupiers 'some countervailing property rights'.[50] The effect is that the home interest is 'automatically defeated', since one cannot argue a violation of art 8.[51]

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 to disputes between *creditors* and occupiers.[52] For example, the court relied on *Wood v United Kingdom*,[53] where a mortgagor challenged the repossession of her home (due to default) under art 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, because 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 art 8(2) of the Convention. It was 'necessary for the protection of the rights and freedoms of others', namely the mortgage lender.[54]

Therefore, the court in *Qazi* 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.[55]

(ii) *Connors*

It was not long before the European Court of Human Rights in Strasbourg had its say on the matter of art 8 and its effect on possessory actions in domestic English law. *Connors v United Kingdom*[56] ('*Connors*') concerned 'gypsies' (Travellers) living on local authority land without any contractual or proprietary rights to occupy. In other words, the local authority was entitled to possession. The dispute in the case was not whether there was interference under art 8; the parties agreed to this fact. They also accepted that the infringement was in keeping with the law and that it pursued a legitimate

[50] Ibid para 127.

[51] Fox *Conceptualising Home* op cit note 1 at 483–4, with reference to *Qazi* supra note 17 paras 77, 103 and 149.

[52] Fox *Conceptualising Home* op cit note 1 at 486.

[53] (1997) 24 EHRR CD 69. See also Fox *Conceptualising Home* op cit note 1 at 477–8.

[54] *Wood* supra note 53 at 70–1. See also Fox *Conceptualising Home* op cit note 1 at 478; Gray & Gray op cit note 8 at 771; Sarah Nield 'Clash of the titans: Article 8, occupiers and their home' in Susan Bright (ed) *Modern Studies in Property Law* vol 6 (2011) 101 at 106. The application of art 8 to creditor–occupier disputes was also rejected in e g *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (1999) 90 P&CR 256; *Ebert v Venvil* [2000] Ch 484 (CA) paras 16–18; *Karia v Franses & another* [2001] All ER (D) 161. This rejection is despite earlier indications that courts might acknowledge the relevance of art 8: see e g *Albany Home Loans v Massey* [1997] 2 All ER 609 at 612.

[55] *Qazi* supra note 17 para 103; Goymour op cit note 24 at 700.

[56] [2005] 40 EHRR 9. For a summary of the case, see Gray & Gray op cit note 8 at 127–8; Goymour op cit note 24 at 700.

aim. Instead, the court was asked to assess whether, under art 8(2), the eviction was justified as 'necessary in the interests of a democratic society'. Therefore, in contrast to the majority's decision in *Qazi*, the European Court of Human Rights was willing to apply a proportionality test.[57] The court also emphasised the importance of procedural safeguards, without which the proportionality test is bound to fail.[58] Hence, *Connors* seemed to imply that the decision in *Qazi* was wrong and that the art 8 proportionality test remained available.[59]

(iii) *Kay* and *Price*

The inconsistencies between the approaches adopted in *Connors* (European Court of Human Rights) and *Qazi* (House of Lords) became evident in *Price v Leeds City Council*,[60] a case decided by the Court of Appeal. The court recognised that *Connors* was clearly in conflict with the approach adopted in *Qazi*. On the authority of *Connors*, the Court of Appeal was bound to accept that the issues of justification and proportionality had to be considered under art 8. This would be the case even if the party seeking possession had an absolute right to obtain such possession under domestic law.[61] Even though the court in theory approved the approach of the European Court of Human Rights, it nevertheless followed the approach taken in *Qazi* because of the precedent that decision had set. Yet, the court granted leave to appeal so that the House of Lords could reconsider the matter and either accept or reject the approach in *Connors*. The Court of Appeal also heard a second case in this regard, *Kay v London Borough of Lambeth*,[62] where it again elected not to follow the European Court of Human Rights because it deemed *Connors* to apply only in the context of Travellers.

The debate again reached the House of Lords in the conjoined appeals of *Kay v London Borough of Lambeth; Leeds City Council v Price*[63] ('*Kay and Price*'). Although the case dealt with repossession of properties belonging to local authorities, the court mentioned that its decision as to the influence of art 8 would probably have a broader impact on all recovery-of-possession cases.[64] The House of Lords partially approved the approach of the European Court of Human Rights by accepting that a possession order constituted a violation of an occupier's rights under art 8. Nevertheless, the majority of the court held that a court would have the power to assume, for purposes of art 8(2),

[57] See Fox *Conceptualising Home* op cit note 1 at 503–4.

[58] *Connors* supra note 56 para 92.

[59] See Gray & Gray op cit note 8 at 128.

[60] [2005] EWCA Civ 289.

[61] *Price v Leeds City Council* [2005] EWCA Civ 289 para 29. See also Fox *Conceptualising Home* op cit note 1 at 504–5.

[62] [2004] EWCA Civ 926.

[63] [2006] UKHL 10. For discussions, see Fox *Conceptualising Home* op cit note 1 at 505–18; Gray & Gray op cit note 8 at 128–31; Goymour op cit note 24 at 698–708.

[64] *Kay and Price* supra note 63 para 64. This summary of the court's decision is based on discussions by Fox *Conceptualising Home* op cit note 1 at 506–9 and Goymour op cit note 24 at 701–3.

that domestic law has already struck the correct proportionate balance between the competing interests. In fact, in most cases the claimant's entitlement to possession in terms of domestic law would automatically provide the justification required by art 8(2).[65]

However, the court was split on whether the occupier should be afforded a fair opportunity to argue that the requirements in art 8(2) had not been met on the facts of the case. The minority favoured such an opportunity,[66] while the majority deemed the opportunity to be unnecessary in each individual case. The majority held that a defence based on nothing more than the occupier's personal circumstances could not succeed.[67] It would only be in highly exceptional circumstances that art 8 could provide occupiers with a defence. The court would only consider art 8 and conduct a proportionality test if an art 8 violation was 'seriously arguable'.[68] Therefore, the majority decided that the legal rules could be challenged by arguing that they violated art 8, but that art 8 could not be used to dispute the outcome of individual cases based on the particular circumstances of those cases. It was argued that if the rules conformed to art 8, their application to individual cases would by necessary implication also comply with art 8.[69]

Even though the court's interpretation of art 8 was still quite restrictive and the defences based on it failed in *Kay and Price*, the court modified its approach in *Qazi* to a certain extent by taking another step closer to allowing the proportionality standard in English law. According to Bright,[70] the decision in *Kay and Price* makes it clear that a possessory action involves interference with the right to respect for one's home, even when there is no lawful right to occupy. However, the claimant's lawful right to recover possession will usually justify any interference with art 8. Fox explains the progress made in this case as follows:

> 'Even 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.'[71]

Therefore, although a proportionality enquiry would probably not be possible in most individual cases, occupiers would have be able to challenge the legal provisions themselves if it could be proven that such provisions did not strike the acceptable balance.

As regards the impact of art 8 in mortgage cases, some authors have expressed scepticism as to whether the case would make any real difference.

[65] *Kay and Price* supra note 63 para 29.
[66] Ibid para 29.
[67] Ibid para 172.
[68] Ibid paras 39, 56 and 110.
[69] Goymour op cit note 24 at 703.
[70] Bright op cit note 33 at 18.
[71] Fox *Conceptualising Home* op cit note 1 at 509, with reference to *Kay and Price* supra note 63 paras 110, 185 and 198.

For example, Gray & Gray[72] doubted whether the decision in *Kay and Price* would improve the legal position adopted in *Qazi*. Nevertheless, the authors also doubted whether English law would be able to continue to resist 'the rejuvenating force of "new equity" based on Convention standards'.[73]

(iv) *McCann* and *Doherty*

In a case subsequent to *Kay and Price*, the European Court of Human Rights in *McCann v United Kingdom*[74] ('*McCann*') again emphasised the need for balancing to take place before a home is lost.[75] The court explained 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 . . .'.[76]

Despite the insistence of the European Court of Human Rights 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.[77] For example, in *Doherty v Birmingham City Council*[78] ('*Doherty*') the House of Lords displayed 'judicial discomfort' with the stance taken in *McCann*.[79] In fact, the court in *Doherty* effectively ignored the approach followed in *McCann*,[80] probably because *McCann* was delivered between the hearing and delivery of judgment in *Doherty*. The court sidestepped the problems raised by the approach in *McCann* by stating that the European Court of Human Rights did not fully understand English domestic conditions, and did not provide proper guidelines as to which procedural safeguards would be adequate.[81] The matter was referred back to the county court, where a judicial review of the local authority's decision had to be conducted.

(v) *Pinnock* and *Powell*

Despite initial resistance the United Kingdom Supreme Court decided in 2011 to allow more scope for art 8 in the context of evictions by local authorities. In *Pinnock*[82] the court recognised the need for English courts to

[72] Gray & Gray op cit note 8 at 771.
[73] Ibid at 131.
[74] [2008] LGR 474.
[75] See Bright op cit note 33 at 18–19.
[76] *McCann* supra note 74 para 50, as quoted by Bright op cit note 33 at 18–19.
[77] Bright op cit note 33 at 19.
[78] [2008] UKHL 57.
[79] Bright op cit note 33 at 19.
[80] Nield in Bright (ed) op cit note 54 at 116.
[81] *Doherty* supra note 78 paras 20–2; Nield in Bright (ed) op cit note 56 at 116.
[82] Supra note 44. This discussion of the case is largely based on the summary by Amy Goymour 'Possession proceedings and human rights — The final word?' (2011) 70 *Cambridge LJ* 9. See also Powell op cit note 15 at 161–4.

stop resisting the clear stance adopted by the European Court of Human Rights.[83] The effect of this decision was that English courts would now have the power to review the decisions of local authorities to evict in violation of art 8 and to make their own assessment as to the proportionality of the eviction.[84] In addition, the court held that art 8 should no longer be confined to exceptional cases; instead, courts should test the proportionality of the eviction whenever the occupier raised the issue.[85]

In view of persistent uncertainty as to how art 8 would be applied in individual cases, the court gave some much-needed guidance. The court dispelled some fears by stating that 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 weighed heavily in favour of the local authority.[86] Hence, repossessions by local authorities would almost always comply with art 8.[87] However, 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.[88]

The fact that courts should consider art 8 in eviction cases could create practical risks. First, this approach may unduly burden county courts which hear possession cases and, secondly, existing property rights may be destabilised if occupiers rely on art 8. These considerations may have been among the reasons why the courts had previously resisted the influence of art 8. However, the court addressed both these risks in *Pinnock*. Concerning the first risk, the court held that art 8 should be considered only if the occupier raised it. Therefore, the court would not have to automatically consider it in each case. The second risk was addressed by the court's affirmation that property rights would carry significant weight during the proportionality test. In effect, art 8 would 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'.[89] However, it is important to consider that the court expressly limited its decision to possession proceedings brought by local authorities.[90]

[83] *Pinnock* supra note 44 para 48.
[84] Goymour op cit note 82 at 10.
[85] *Pinnock* supra note 44 para 51.
[86] Ibid para 54. The second factor, namely the local authority's obligations regarding the provision of housing, is arguably not directly relevant when comparing their role to that of mortgage creditors. Banks are not obliged to grant loans or to provide housing. Instead, they have an obligation towards their shareholders to manage the bank's affairs in a profitable manner. Therefore, one must recognise that the financial well-being of creditors is a general consideration when finding a balance between the interests of all parties concerned.
[87] Goymour op cit note 82 at 11.
[88] *Pinnock* supra note 44 para 53.
[89] Goymour op cit note 82 at 11.
[90] *Pinnock* supra note 44 para 50.

Moreover, in this case the court held that the particular eviction was in fact proportionate. It remains to be seen whether the court will eventually expand this approach to possession disputes between private parties. At least this judgment introduced the possibility of presenting similar arguments in creditor–occupier disputes. As Nield comments:

> '*Pinnock* may have resolved the clash [between the House of Lords and the European Court of Human Rights] 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.'[91]

Even so, despite the progressive step taken in *Pinnock*, the court seems to have retracted the practical application of this position somewhat in *Powell*.[92] Cowan & Hunter contrast the two decisions, stating that *Pinnock* was framed in positive terms, whereas *Powell* was framed in negative terms.[93] 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'.[94]

In *Powell*, the court expressed the opinion that it would have to be a 'very highly exceptional' case before a court would even consider a proportionality argument[95] — this despite the fact that the court in *Pinnock* had earlier held that exceptionality is not a proper test.[96] In neither of the cases could the court provide examples of circumstances which would lead to an eviction being regarded as disproportionate.[97] 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.[98] Hence, the fact that occupiers are vulnerable seems to be the only clear guiding factor that may lead a court to consider proportionality.[99]

Therefore, although *Pinnock* opened the door to considering proportionality,[100] *Powell* restricted its ambit when faced with the practical implications of this test.[101] The latter case illustrates the practical difficulties of trying to identify personal circumstances which might outweigh the absolute proprietary rights (and obligations) of parties like local authorities. Exceptional vulnerability seems to be the only possible factor which might cause courts to consider the proportionality aspect.[102]

[91] Nield op cit note 56 at 129. See also Powell op cit note 15 at 161.
[92] Supra note 45.
[93] Dave Cowan & Caroline Hunter ' "Yeah but, no but" — *Pinnock* and *Powell* in the Supreme Court' (2012) 75 *Modern LR* 78 at 78–9.
[94] Ibid.
[95] *Powell* supra note 45 paras 35 and 92.
[96] *Pinnock* supra note 44 para 51.
[97] Cowan & Hunter op cit note 93 at 83.
[98] *Powell* supra note 45 para 66.
[99] Cowan & Hunter op cit note 93 at 84.
[100] Powell op cit note 15 at 164.
[101] Cowan & Hunter op cit note 93 at 84.
[102] Powell op cit note 15 at 163.

(d) Remarks

The foregoing discussion of United Kingdom and European Court of Human Rights cases shows that '[t]he state of the Article 8 jurisprudence is unclear'[103] and that these cases 'are by no means the last word on the subject'.[104] In fact, art 8 has had relatively little impact on the actual outcome of possession cases.[105] Despite the more accommodating stance adopted by the European Court of Human Rights in *McCann*, it seems that, in the words of Bright, 'a direct human rights challenge to possession is unlikely to succeed in English law'.[106] As Nield explains,

> '[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'.[107]

Even in *Pinnock*, where the United Kingdom Supreme Court aligned its approach more closely with that of the European Court of Human Rights, it was held that the particular eviction was proportionate and consequently complied with art 8. Moreover, the emphasis on existing property rights as a factor that weighs heavily in favour of claimants (such as local authorities) remains.

Although, in principle, personal circumstances can, since *Pinnock*, play a greater role, to my knowledge we are yet to see instances where such circumstances actually outweigh existing property rights, or at least result in a different balance being struck. As *Powell* illustrates, the proportionality test approved in *Pinnock* will have an impact only in highly exceptional circumstances. The facts of the case would have to show severe vulnerability and it would have to be proved that the claimant's insistence on repossession was aimed at exploiting the situation. The same would probably apply in mortgage cases, as my explanation of the South African experience below shows.

It is pertinent to consider that none of the cases discussed above (except *Wood*, referred to in the discussion on *Qazi*) involved a mortgage. Consequently, it may still seem unlikely that an art 8 defence would render much assistance to English mortgagors. Nevertheless, in principle, the proportionality test should be available in cases where debtors raise arguments in this 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 vulnerable in some way or another.

These cases are also interesting because of the analogies which can be drawn between landlord–tenant evictions and mortgage repossessions. In both situations the claimants are relying on their proprietary and contractual

[103] Bright op cit note 33 at 20.
[104] Cowan & Hunter op cit note 93 at 79.
[105] Bright op cit note 33 at 20.
[106] Ibid at 18.
[107] Nield in Bright (ed) op cit note 54 at 118.

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 to respect for their home. At a general level, both instances 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 question is whether a distinction will ultimately be drawn between two possible approaches to this kind of tension, depending on whether it is a landlord–tenant or a mortgage case. What would the basis be for the difference in approach (if any) and could the distinction be justified? For example, would the type of creditor/landlord (private versus public) be enough to justify a different approach? In my view this factor would probably influence the details of the test in the particular case (as one of many factors), but not the very approach that should be followed. It is my view that the South African position (discussed below) could be read to support this view.

A potentially valuable example for English lawyers is the decision of the European Court of Human Rights in *Zehentner v Austria*,[108] a case dealing with debt enforcement in Austria. The facts concerned a vulnerable woman who suffered from mental incapacity and lost her apartment as a result of recovery of a relatively small, unsecured debt. The European Court of Human Rights found that the Austrian process for recovering relatively small debts was incompatible with art 8. The court especially emphasised the importance of procedural safeguards, which were lacking in this case.

Nield argues that this case is significant for English law for a number of reasons.[109] First, art 8 was applied to a dispute between private parties — a debtor and her creditors, who used the judgment execution process against her home. Secondly, the European Court of Human Rights acknowledged that 'the protection of creditors through the enforcement of judgment debts was a legitimate aim which could be justified under Article 8'.[110] 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 frail) the state has a positive duty to provide specific protection for them. Even though the case was decided with reference to the Austrian context rather than English law, it illustrates the willingness of the European Court of Human Rights to apply art 8 and its proportionality test to disputes between debtors and creditors.

[108] (2011) 52 EHRR 22. My summary of this case is based on Nield in Bright (ed) op cit note 54 at 112–13.

[109] Nield in Bright (ed) op cit note 54 at 113, with reference to *Zehentner* supra note 108 paras 61–5.

[110] Ibid.

The question then is whether the line of reasoning in the English cases as enunciated in the latest decisions of *Pinnock* and *Powell* will eventually spill over into appropriate mortgage cases. Most academics seem to support and expect such a result. For instance, Nield & Hopkins[111] recently applied the art 8 test to the interests of children in mortgage repossession cases. The authors accept that

> '[i]t is now clear that the exercise of a legal right to possession of an individual's home is one of the most serious interferences with the respect due to the home under Art 8(1) and must be justified by the qualifications found in Art 8(2)'.[112]

Regardless of general academic support, courts are still to endorse such arguments in mortgage cases. Moreover, even if courts were expressly to require a proportionality test in mortgage repossession cases, the next question would be how this enquiry should be applied in the present legal regime. The purpose of the next section is to discuss the developments regarding this question in South Africa.

III SOUTH AFRICAN LAW

(a) Introduction

South African mortgage doctrine is based on a system of real and limited real rights in property. By means of a mortgage agreement and a registered mortgage bond, a creditor obtains a limited real right of security in a debtor's property. This right entitles the creditor to 'call up the bond' when the debtor defaults — often loosely referred to as 'foreclosure'. This remedy involves a procedure which culminates in a court order allowing the creditor to have the property attached and sold in execution at a public auction. Unlike the position in English law, the debtor is not evicted before the sale takes place, since the creditor's remedy is not based on a right to take possession. Eviction takes place after the property has been sold and at the instance of the new owner of the property.[113]

In this section, I focus on the impact s 26 of the South African Constitution has had on enforcement of the creditor's remedy in so far as the debtor's home is concerned. I commence with an analysis of the housing clause itself, after which I place the theory in context with reference to case law.

[111] Sarah Nield & Nicholas Hopkins 'Human rights and mortgage repossession: Beyond property law using Article 8' (2013) 33 *Legal Studies* 431.

[112] Ibid at 442.

[113] For more on the law of real security in South Africa, see standard works such as P J Badenhorst, Juanita M Pienaar & Hanri Mostert *Silberberg and Schoeman's The Law of Property* 5 ed (2006) ch 16; G F Lubbe 'Mortgage and pledge' revised by T J Scott in W A Joubert & J A Faris (eds) *The Law of South Africa* vol 17 Part 2 2 ed (2008); T J Scott & Susan Scott *Wille's Law of Mortgage and Pledge in South Africa* 3 ed (1987); C G van der Merwe *Sakereg* 2 ed (1989) ch 14. See also Reghard Brits *Mortgage Foreclosure under the Constitution: Property, Housing and National Credit Act* (unpublished LLD dissertation, Stellenbosch University, 2012) ch 2.

(b) Section 26 of the Constitution

The South African housing clause states the following:

> '(1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.'

The structure, interpretation and application of s 26 in various contexts are complicated matters. Here, I simplify the principles as much as possible in view of how they appear to be crystallising in mortgage enforcement cases.

Section 26(3) requires that evictions from homes must be authorised by a court order, which may only be granted after the court has taken all the relevant circumstances into consideration, and that no legislation may permit arbitrary evictions. As a whole, the section provides procedural protection and ensures that occupiers' circumstances are judicially considered before an eviction from a home takes place. Evictions are permissible, but arbitrary results must be avoided. In this regard the court has a discretion based on all the relevant circumstances.[114]

Although in South African law a sale in execution of mortgage property technically does not qualify as an 'eviction', courts have applied the principle in s 26(3) to mortgage cases.[115] The reasoning has been that, because a sale in execution is likely to lead to eviction proceedings in the normal course of events, the enquiry required by the Bill of Rights should not be postponed until the eviction. Therefore, at the earliest moment possible, a court should review the debtor's relevant circumstances so as to prevent the sale (if appropriate on the facts) rather than only considering the issue during the later eviction proceedings, after the debtor has already lost ownership. The benefit of this reading is that a judicial discretion in deciding an application for an execution order prevents abuses and unjustified violations of debtors' rights from occurring during this early stage already, before a purchaser in

[114] For authoritative comments on s 26(3), see e g *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 22. On the interpretation and application of the housing clause in general, see further Sandra Liebenberg *Socio-Economic Rights: Adjudication under a Transformative Constitution* (2010) 317–58; Sandra Liebenberg 'The interpretation of socio-economic rights' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* vol 2 2 ed (OS 2003) ch 33; Kirsty McLean 'Housing' in Stuart Woolman & Michael Bishop (eds) *Constitutional Law of South Africa* vol 4 2 ed (OS 2006) ch 55; Geraldine van Bueren 'Housing' in M Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law — The Bill of Rights* 2 ed (2005) ch 21.

[115] For more detailed justification of this broader interpretation, see Brits op cit note 113 para 3.3.2; R Brits & A J van der Walt 'Application of the housing clause during mortgage foreclosure: A subsidiarity approach to the role of the National Credit Act (part 1)' 2014 *TSAR* 288.

good faith seeks an eviction order.[116] As one court put it, 'the execution process is equated with eviction' for s 26(3) purposes.[117]

Therefore, s 26(3) provides procedural protection and ensures that a judicial officer exercises a discretion based on the facts of each case before any order is granted which may involve eviction from a home. However, the questions arise of which circumstances are relevant and what the test is to decide whether or not a home can be sold. To answer these questions one must rely on the principles surrounding s 26(1), since they convey what the section as a whole aims to protect at a substantive level, namely everyone's 'right to have access to adequate housing'. Although the terminology differs, this notion is similar to the European Convention's respect for the home (art 8(1)).

The primary purpose of s 26(1), read with s 26(2), is to impose a positive duty on the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. However, it is accepted that s 26(1) also imposes a negative duty on all persons not to limit someone's existing access to adequate housing.[118] The key to how this provision applies in mortgage cases lies in the nature of Bill of Rights litigation, which involves a two-step approach. The aggrieved party must first prove that he or she is a beneficiary of the right and that this right has been violated. Then, the defendant must prove that this infringement is justifiable under s 36 of the Constitution.[119]

Since the terminology of the section is not perfectly suited to a negative duty, it is not entirely clear when someone's 'right to have access to adequate housing' will be limited. An overly technical and restrictive reading of the section may relegate the application of the right to a very limited category of

[116] See *Nedbank Ltd v Fraser & another & Four other Cases* 2011 (4) SA 363 (GSJ) para 9; *Changing Tides 17 (Pty) Ltd NO v Erasmus & another; Changing Tides 17 (Pty) Ltd NO v Cleophas & another; Changing Tides 17 (Pty) Ltd NO v Frederick & another* [2009] ZAWCHC 175 paras 7–8.

[117] *Nedbank Ltd v Fraser & another & Four other Cases* supra note 116 para 9, with reference to *Gundwana v Steko Development* 2011 (3) SA 608 (CC) para 41. See also *Standard Bank of SA Ltd v Snyders* 2005 (5) SA 610 (C) paras 7, 22 and 29; *Standard Bank of South Africa Ltd v Bekker* 2011 (6) SA 111 (WCC) para 8.

[118] *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; *Government of the Republic of South Africa & others v Grootboom* 2001 (1) SA 46 (CC) para 34; *Minister of Health & others v Treatment Action Campaign (No 2)* 2002 (5) SA 721 (CC) para 46; *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) para 34; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) para 32.

[119] *S v Zuma* 1995 (2) SA 642 (CC) paras 41–4; *S v Makwanyane* 1995 (3) SA 391 (CC) paras 100–2. This approach originates from Canadian law: see Theunis Roux & Dennis Davis 'Property' in M Cheadle, D Davis & N Haysom (eds) *South African Constitutional Law: The Bill of Rights* 2 ed (Service 10, 2011) ch 20 at 6, citing the Canadian case of *R v Oakes* (1986) 26 DLR (4th) 200 at 223–4. In general, see also Iain Currie & Johan de Waal *The Bill of Rights Handbook* 6 ed (2013) at 26 and 152–5; Stu Woolman & Henk Botha 'Limitations' in Woolman & Bishop (eds) op cit note 114 vol 2 ch 34 at 18–29.

homes. However, the general way in which most courts have interpreted and applied the section indicates that the provision should enjoy a broader, more purposive reading.[120] Therefore, one can accept that *any* violation of a home will implicate the provision. Courts tend to focus not on whether s 26(1) has been violated, but rather on the justification test.

This interpretation of the circumstances in which s 26(1) is violated accords with the view of the European Court of Human Rights and later English judgments as regards violation of art 8(1) of the Convention. However, as with art 8, in South African law it is insufficient to show a violation of the right, since the right to have access to adequate housing is not absolute. A limitation can be justified in accordance with s 36(1) of the Constitution, which entails a similar notion to the one embodied in art 8(2) of the Convention. It is worth mentioning that South African courts appear to support a similar stance to their English counterparts: although a violation might be easily assumed, the justification will often also be presumed, save for exceptional circumstances. Although a limitation of the debtor's rights under s 26(1) could be accepted, the extent of the limitation and its effects would have to be proved and supported by special facts.

Therefore, the purpose of the discretion afforded to courts by s 26(3) is to evaluate whether the substantive right protected under s 26(1) will experience a *justifiable* violation in terms of the principles set out in s 36(1) of the Constitution. The degree to which the debtor's access to adequate housing is limited will then influence the justification enquiry under s 36(1), which provides that a right in the Bill of Rights 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'. The clause lists five non-exhaustive 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.'[121]

In essence, s 36 requires a strict proportionality test.[122] Hence, in view of the importance of the right, the test requires a proportionate relationship

[120] See e g the cases discussed below. For a more detailed explanation of this broader interpretation, see also Brits op cit note 113 para 3.3.3; Brits & Van der Walt op cit note 115 at 291–4.

[121] Section 36(1)*(a)–(e)* of the Constitution. For an analysis of the five factors, see Currie & De Waal op cit note 119 at 162–72; Woolman & Botha op cit note 119 at 70–92.

[122] See *Makwanyane* supra note 119 para 149; *S v Bhulwana* 1996 (1) SA 388 (CC) para 18; *S v Mbatha* 1996 (2) SA 464 (CC) para 14; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) para 33; *S v Manamela (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) para 32. In the current context, the strongest authority is *Gundwana* supra note 117 para 54; *Jaftha* supra note 118 paras 36 and 40–2.

between the purpose of the violation and the impact of the violation on the individual homeowner. As the case law discussed below shows, enforcement of valid contractual debts, even against residential property, is a legitimate public purpose. However, although it is rational to enforce validly registered mortgage bonds, the proportionality test requires that this purpose must be measured against the impact of the violation in individual cases.

To highlight one of the factors listed above, s 36(1)*(e)* indicates that a limitation should probably not be allowed if alternative measures which will be less invasive but will still achieve the same purpose are available. This is probably the central element of the proportionality test — the one on which most limitations will stand or fall.[123] Consequently, in mortgage cases the principle is that, if there is another reasonable way to achieve the creditor's purpose without having to sell the home, selling the home will not be a justifiable solution. As case law shows, South African law accepts, in principle, that enforcement of a mortgage bond registered over a home must have a proportionate outcome. More particularly, there has to be a proportionate relationship between the purpose of mortgage proceedings and their ultimate effect on the debtor. As can be expected, application of the test is a complicated matter and it is hard to give concrete guidelines in respect of non-concrete matters. Case law nevertheless provides general principles which can serve as a starting point in adjudicating new instances.

(c) Developments in case law

In this section I discuss some of the important cases concerning the housing clause and the relationship between debtors and creditors. The two most significant cases were decided by the Constitutional Court, the second endorsing and building upon the first. Other noteworthy cases were decided by the Supreme Court of Appeal and various divisions of the high court. Unlike the English cases discussed above, where the facts related to possessory actions by local authorities in the tenancy context, the South African cases discussed below all related to debt enforcement and the impact of debt enforcement on debtors' homes.

(i) *Jaftha*

To simplify the facts, *Jaftha v Schoeman; Van Rooyen v Stoltz*[124] ('*Jaftha*') concerned two separate but similar situations where the debtors' homes were sold in execution of very small unsecured debts — R50 and R190, respectively. The situations did not relate to mortgage bonds, and the debts were not related to the properties themselves. Moreover, the debtors were poor and poorly educated, and their homes had been acquired through state subsidies. The case actually turned on a procedural point. The law as it stood allowed for an execution order to be granted by a clerk of the magistrates' court in instances where the debtor did not appear before the court to defend

[123] See Currie & De Waal op cit note 119 at 170–1.
[124] Supra note 118.

the matter.[125] The result was that a home could be sold in execution without a judicial officer having had an opportunity to consider the facts of the case. Based on the fact that a court would have to consider the debtor's rights under the housing clause, the Constitutional Court corrected the procedure by requiring sufficient judicial oversight. However, what is of more interest in the present context is the manner in which the court applied the principles in s 26(1) to this debt enforcement case. It also commented on how the principles would operate in mortgage cases.

The court accepted that a sale in execution is a measure which may limit a debtor's existing access to adequate housing (s 26(1)).[126] Therefore, the violation would have to be justified in terms of s 36(1) of the Constitution. In this regard the court found that, as part of the justification test, 'the nature of the right and the nature and extent of the limitation are of great importance when weighed against the importance of the purpose of the limitation'.[127] There is no doubt that the purpose of the limitation of a debtor's 'access to housing' is important in the case of debt enforcement. Yet, the court held that this importance is diminished in comparison to the nature of the debt:

> 'It is difficult to see how the collection of trifling debts in this case can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated, possibly permanently, especially where other methods exist to enable recovery of the debt.'[128]

Nevertheless, the court stated that it would not always be unjustifiable to satisfy a trifling debt through sale in execution, because the notion of a 'trifling debt' cannot easily be defined out of context.[129] Because creditors' interests should not be ignored, there may be cases where, regardless of the small amount being claimed, 'the creditor's advantage in execution outweighs the harm caused to the debtor'.[130] Yet, there may be instances of unjustifiable executions, 'because the advantage that attaches to a creditor who seeks execution will be far outweighed by the immense prejudice and hardship caused to the debtor'.[131]

The court further explained that any remedy should be flexible enough to take account of varying circumstances.[132] Courts should accordingly take 'cognisance of the plight of a debtor who stands to lose his or her security of tenure', but they must also be sensitive towards the interests of creditors.[133] The court provided a few guidelines for the exercise of this discretion.[134] First, if the debt can be paid in other reasonable ways, a sale of the home will

[125] Section 66(1)*(a)* of the Magistrates' Courts Act 32 of 1944.
[126] *Jaftha* supra note 118 para 34.
[127] Ibid para 36.
[128] Ibid para 40.
[129] Ibid.
[130] Ibid para 42.
[131] Ibid para 43.
[132] Ibid para 53.
[133] Ibid.
[134] Ibid para 56.

normally not be desirable. However, if there are no alternatives, execution should be allowed unless a sale will be grossly disproportionate under the circumstances. This kind of disproportionality will exist if

> 'the interests of the judgment creditor in obtaining payment are significantly less than the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless'.[135]

Therefore, the size of the debt will be relevant and it may be unjustifiable to limit a person's s 26(1) rights if the debt is 'trifling in amount and significance' to the creditor.[136] Much will depend on the circumstances of each case.[137]

Although *Jaftha* did not deal specifically with a mortgage, the court made some comments as to how these principles would apply in the case of a mortgage. It held that if the house was burdened as security for the debt, execution should normally be allowed, but that abuses of procedure should not be tolerated.[138] Furthermore, even though a mortgage creditor is technically entitled to unqualified and direct execution against the home, courts should consider whether there are alternatives which might lead to debt recovery while at the same time avoiding the loss of a home.[139] With regard to finding the correct balance, the court commented that it 'should not be seen as an all or nothing process'.[140] It is not a case of execution either going ahead or the creditor not being allowed to claim repayment. Instead, 'creative alternatives' should be sought so that the debt can be recovered but execution against the home is used only as a last resort.[141]

Jaftha is a ground-breaking decision and is still the leading case when dealing with sales in execution of homes. The Constitutional Court firmly established that solutions should be context sensitive and that court oversight must entail a strict proportionality test that balances the legitimate purpose of execution with the social and economic effects on homeowners. However, the full impact of *Jaftha* and s 26 was not immediately appreciated.

(ii) Developments after *Jaftha*

Not long after *Jaftha*, the Supreme Court of Appeal was faced with the question whether the principles enunciated in *Jaftha* apply to 'normal' mortgage cases. Earlier, in *Standard Bank of South Africa Ltd v Saunderson*,[142] the Supreme Court of Appeal had accepted (albeit reluctantly) the principle that s 26(1) could be relevant in appropriate mortgage cases. A rule of court was introduced in terms of which the creditor would have to inform the debtor of his or her opportunity to argue a violation of his or her rights under

[135] Ibid.
[136] Ibid para 57.
[137] Ibid.
[138] Ibid.
[139] Ibid para 59.
[140] Ibid.
[141] Ibid.
[142] 2006 (2) SA 264 (SCA).

the clause. However, the court was not optimistic as to the possibility of there ever being instances where a s 26(1) defence would defeat a mortgage creditor's claim. It appeared to largely relegate the principles of *Jaftha* to the type of extreme facts of that case.

Even though it did not seem as if a s 26(1) proportionality test would ever make a difference in mortgage cases (except for heightened procedural protection), some subsequent cases showed that a proportionality test could indeed change the outcome of a particular case. The application of the test turned on instances where the size of the debtors' default was too small to justify the loss of their homes. The normal rule is that a creditor can enforce his or her rights regardless of how small the default is, but the requirements of the housing clause have changed this doctrinal point of departure.

For example, on the date of the hearing, the mortgage debtors in *ABSA Bank Ltd v Ntsane*[143] ('*Ntsane*') were in arrears in an amount of R18.46. The default triggered the creditor's right to claim the full outstanding debt of R62 042.43 and to execute this claim against the debtors' home. Based on the housing clause, the court recognised that, if the creditor succeeded, the result would clearly be disproportionate. The court went as far as categorising the creditor's decision to enforce the mortgage as abusive and disgraceful. Of course, it has to be emphasised that instances where mortgagees enforce their rights due to extremely small arrears — as in the *Ntsane* case — are very exceptional and that mortgagees will seldom institute enforcement proceedings under such circumstances. Therefore, the case might appear not to be all that helpful when analysing 'normal' mortgage cases. However, even though the facts of this case are quite extreme and unlikely to occur often, the decision illustrates the general principle regarding proportionate outcomes in mortgage cases. It also demonstrates the courts' willingness to forsake formalistic adherence to doctrine when the facts call upon them to do so. Moreover, there may also be instances where the arrears seem reasonable from the creditor's perspective but, in view of all the circumstances (including those of the debtor), the arrears might be small enough to indicate the kind of disproportionality to which s 26(1), read with s 36(1), is opposed.

Firstrand Bank Ltd v Maleke[144] ('*Maleke*') is an example of this possibility. The facts were not as extreme as in some of the other cases, since the arrears in the four instances under consideration ranged between R2000 and R5000. Although not trivial, the court regarded these arrears as relatively minor, particularly in comparison to the effect that mortgage enforcement would have on the debtors. The housing clause played a big role in the court's analysis. The court applied a proportionality test in denying the creditor's claim, because (as I explain below) an alternative to all-out debt enforcement and execution was available.

What these two examples illustrate is that, in 'normal' mortgage cases, there may be instances where the size of the arrears would be too small — in

[143] 2007 (3) SA 554 (T).
[144] 2010 (1) SA 143 (GSJ).

view of all the circumstances — to justify loss of the debtor's home. It will no doubt depend on the facts of each case and it is hard to determine, in an abstract manner, which arrears would be too small. Contextual sensitivity is unavoidably the nature of the proportionality test, and the challenge is to decide whether normal procedures and requirements sufficiently provide for the prevention of disproportionate outcomes in individual cases.

Something to consider too is that in 2007 (in between the decisions in *Ntsane* and *Maleke*) new consumer legislation came into force in South Africa, namely the National Credit Act 34 of 2005. Among other innovations, the Act provides various debt-relief mechanisms for over-indebted credit consumers, including mortgage debtors.[145] In terms of the debt review procedure, a debtor can obtain relief in the form of a court order which rearranges the debt repayment plan. Elsewhere I have argued extensively that the protection for debtors' homes in South Africa should primarily be channelled through this piece of consumer legislation.[146] A major reason is that this Act and its mechanisms embody the way the legislature has chosen to address problems resulting from over-indebtedness, which (although not expressly stated in the Act) invariably include home repossessions in the mortgage context. As a matter of fact, in the *Maleke* case referred to above,[147] the court refused to uphold the creditor's rights largely because the Act's debt review process could have provided a solution to the debtors' default, and this solution would have rendered the loss of their homes unnecessary. The contention therefore is that the proportionality test may often be satisfied by virtue of the fact that certain debt-relief measures are available for debtors who find themselves in a situation where their homes are at risk. The point is not that the Act is perfectly effective as is, but that measures focused on relieving over-indebtedness are theoretically capable of giving effect to s 26 in the debt-enforcement context. Whether the Act can live up to this ideal will be discovered as cases are heard.

Another important development took place with regard to the high court procedural rules for execution against homes. Late in 2010, the Uniform Rules of Court were amended to the effect that, when direct execution of a judgment debt is sought against immovable property (including immovable property subject to a mortgage bond), the court may grant the order only on the condition that,

> 'where the property sought to be attached is the primary residence of the judgment debtor, no writ [warrant of execution] shall be issued unless the

[145] For more on the Act, see standard works such as Michelle Kelly-Louw *Consumer Credit Regulation in South Africa* (2012); J M Otto & R-L Otto *The National Credit Act Explained* 3 ed (2013); J W Scholtz (ed) *Guide to the National Credit Act* (Service 4, 2012).

[146] This argument was one of the main conclusions of my doctoral research. See Brits op cit note 113. See also Brits & Van der Walt op cit note 115; R Brits & A J van der Walt 'Application of the housing clause during mortgage foreclosure: A subsidiarity approach to the role of the National Credit Act (part 2)' 2014 *TSAR* 508.

[147] Supra note 144.

court, having considered all the relevant circumstances, orders execution against such property'.[148]

The amended rule was clearly inspired by the housing clause and its application in *Jaftha*, and confers on courts a discretion based on all the relevant circumstances. However, the rule does not provide any guidance of substance as to how this discretion should be exercised, which factors are relevant, and which circumstances would justify a court's refusal to allow a sale in execution. In this regard one must refer to the constitutional principles themselves (as explained above)[149] and to the case law preceding and following the introduction of this procedural protection for homeowners.

(iii) *Gundwana*

The second important Constitutional Court case is *Gundwana v Steko Development*[150] ('*Gundwana*'). Unlike *Jaftha*, *Gundwana* was decided in the mortgage context. After years of speculation as to *Jaftha*'s application in 'normal' mortgage cases, the country's highest court finally confirmed that the same principles apply to mortgage cases. As with *Jaftha*, the problem in *Gundwana* was one of procedure, namely whether the rule that allowed the Registrar of the High Court to grant execution orders if the debtor failed to defend his or her case was unconstitutional for the same reason that the court had decided in *Jaftha* that a similar rule in the magistrates' courts was invalid.

As in *Jaftha*, the procedural point was not the most interesting one, also because the high court rules had in the meantime already been amended (as I have pointed out above).[151] The real question was whether a substantive defence based on the proportionality test under s 26(1), read with s 36(1), of the Constitution is available in mortgage cases before the High Court. One contention was that the principle in *Jaftha* ought only to apply in exceptional cases similar to the factual scenario in that case, and that it is not necessary always to conduct a proportionality test in 'normal' mortgage cases.[152]

The court held that, even though a mortgage bond is agreed to and is registered against the debtor's house, this does not entitle the creditor to enforce execution in bad faith. Furthermore, a mortgage agreement does not entail a waiver of the debtor's rights under s 26.[153] Courts should guard against disproportionality, and they should consider how sale in execution will affect the poor and those facing homelessness.[154] The court explained that one should especially be attentive when there is 'disproportionality

[148] Rule 46(1)*(a)*(ii) of the Uniform Rules of Court, effective from 24 December 2010: see GN R981 *GG* 33689 of 19 November 2010.

[149] See part III(b).

[150] Supra note 117.

[151] See part III(c)(ii) above.

[152] For a discussion of the case, see A J van der Walt & R Brits 'The purpose of judicial oversight over the sale in execution of mortgaged property' (2012) 75 *THRHR* 322.

[153] *Gundwana* supra note 117 paras 44 and 47–48.

[154] Ibid para 53.

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'.[155]

The court also focused on the availability of reasonable alternatives, which should be considered before an execution order is granted against a home.[156] Apart from these cautions, the court emphasised that execution against homes is generally acceptable and a normal feature of economic life.[157]

What is significant about this decision is that the court did away with the line of argument that a proportionality test does not apply because the debtor *agreed* to subject his or her home to a mortgage. Of course, the fact that there is a mortgagee agreement, freely entered into, is a relevant consideration. However, this factor does not override the court's obligation to ensure that the creditor's actions (as lawful as they may be) do not have an effect on the debtor that is disproportionate to the creditor's debt enforcement purpose.

(iv) Some cases that applied *Gundwana*

After *Gundwana* and the amendment of rule 46 of the Uniform Rules of Court, it was accepted that all mortgage cases which involve a home would require a judge to exercise a discretion before granting an execution order. Although it was also clear that proportionality would play a role, the practical applications in individual cases still had to be worked out, in keeping with the guidance provided by previous judgments. The major victory was that home-owning debtors were now free to make arguments based on the proportionality of the effects that sale in execution would have on their home circumstances. It is impossible to discuss all the cases that have come before the courts, but it is useful to refer to some of the important comments judges have made as to how courts could approach these cases. What is important is that the outcome of each case will depend on its own facts.

The first example is *Nedbank Ltd v Fraser & another & Four other Cases*,[158] where the court explained that its enquiry must be framed by the context and purpose of the required judicial discretion. This it described as 'an apparent tension between two competing social values' — on the one hand the importance of housing, and on the other the importance of enforcing contracts and discharging debts.[159] Although the court expected creditors' rights to enjoy relative primacy, it acknowledged that social values are offended when the execution process is abused.[160] The court mentioned the example of a relatively minor debt, because the social value of ensuring that

[155] Ibid para 54.
[156] Ibid para 53.
[157] Ibid.
[158] Supra note 116.
[159] Ibid paras 16–17.
[160] Ibid paras 20–2.

debts are discharged could easily be attained in a less invasive manner which would save the home.[161]

Another example is that of *FirstRand Bank Ltd v Folscher*.[162] Again with reference to its obligation to ensure that the execution process is not abused, the court explained that this notion of abuse is not limited to 'wilfully dishonest or vexatious' conduct. Instead, the consequences of an execution may be iniquitous simply because the debtor will lose his or her home despite alternative ways of satisfying the creditor's claim being available.[163] The court confirmed that it must compare the 'proportionality of prejudice that the creditor might suffer if execution were to be refused' and the 'prejudice the debtor would suffer if execution went ahead and he lost his home'.[164]

Furthermore, if comments in the case of *Standard Bank of South Africa Ltd v Bekker*[165] are anything to go by, it appears that courts will assume that a sale in execution will violate s 26(1). However, courts will often also adhere to the following assumption:

> '[I]n the absence of unusual circumstances, or an abuse of process, execution against hypothecated property which is the home of the mortgagor is *prima facie* constitutionally justifiable, even if its effect would be to infringe the judgment debtor's section 26 rights.'[166]

(d) Remarks

The general line of reasoning described above as regards application of the housing clause to mortgage cases does not differ much from the United Kingdom Supreme Court's current position regarding the application of art 8 and its proportionality test to possessory actions brought by local authorities. Even though the person seeking possession (or enforcing his or her security) has an unqualified substantive right in domestic private law, enforcement of the right is assumed to violate the fundamental rights the occupier (or debtor) has as regards the home. This development is radical and in effect changes the traditionally unqualified right of the claimant (local authority landlord or mortgage creditor) into one that is qualified by a human-rights norm that is external to the agreement between the parties and the private-law rules governing their relationship. Commenting on advances in English law, Nield & Hopkins describe a similar shift 'from a positive assertion of property rights to a prima facie breach of human rights that requires vindication'.[167]

However, this radical shift in doctrine is countered by a similar assumption in favour of the claimant — the violation will usually be assumed to be

[161] Ibid para 22. See also *Standard Bank of South Africa v Molwantwa & another* [2011] ZAGPPHC 108 para 12.
[162] 2011 (4) SA 314 (GNP).
[163] Ibid para 40.
[164] Ibid para 41.
[165] Supra note 117.
[166] Ibid para 14 (original italics). See also *Absa Bank Ltd v Petersen* 2013 (1) SA 481 (WCC) para 37.
[167] Nield & Hopkins op cit note 111 at 442.

justified unless special circumstances exist or there is proof of abuse or disproportionality. It appears that English courts will view the matter in the same way. In other words, the full recognition of occupiers' housing rights in mortgage law does not defeat creditors' rights or upset enforcement procedures to such an extent that the mortgage market will suffer unduly. It is still accepted that satisfactory enforcement of creditors' rights is indeed required for the continued availability of loans in the housing market. At the same time, the enforcement of these rights must take account of the constitutional aspiration of proportionality in all areas of the law, even in areas of private law where such an ideal is largely foreign.

IV CONCLUSION

The purpose of this article is not to provide a detailed explanation of the mortgage enforcement systems in the United Kingdom and South Africa, or to analyse in detail how a proportionality test would apply. Instead, the article explains the general line of reasoning as regards the theory behind the operation of art 8 of the European Convention and s 26 of the South African Constitution. The general trend of developments in the two jurisdictions has been similar. The major difference is that English courts have yet expressly to apply the proportionality test required by art 8 of the European Convention to typical mortgage repossession cases, whereas South African courts have done so by virtue of s 26 of the Constitution. It appears that the 'creditors must win' assumption is still very strong in England, while South African law is moving away from this point of departure. For instance, by instinctively saying that direct execution against a home 'is not there for a take',[168] one court has succinctly expressed the view that the 'creditors must win' assumption is probably no longer a reality in South Africa. Indeed, as South African case law shows, this abstract assumption is in the process of being replaced by a more contextual approach.

The South African housing clause has led to comprehensive developments with respect to our understanding of mortgage enforcement. Because homes are so important, they should only be infringed upon in justifiable circumstances, namely when there is a proportionate relationship between the purpose of the limitation and the effect that the limitation would have on the individual's rights. This ambition requires a system which enables homeowners to argue the proportionality of their case and empowers courts seriously to consider all the circumstances of the matter — not only financial, but personal as well.

As is clear from experience in South Africa and England, it is one thing to acknowledge a proportionality test in principle, but another thing to apply it to the facts of cases. Although the proportionality test provides hope for saving more homes, one should not be overly optimistic in expecting homes

[168] *Changing Tides 17 (Pty) Ltd NO v McDonald & another* [2011] ZAGPPHC 106 para 10.

to be saved in instances where there are absolutely no financially viable alternatives to execution. The idea behind recognising housing rights in the mortgage context is by no means to upset the normal business of home loans and debt enforcement. Instead, the goal is to avoid situations where homes are lost unnecessarily (or worse) as a result of creditors' abuses.

In conclusion it must be emphasised that the purpose of incorporating a proportionality test into mortgage enforcement proceedings is not to create a bias in favour of debtors' housing rights at the expense of creditors' reasonable commercial expectations and security rights. Therefore, the important function that banks fulfil in providing financing for the acquisition of homes is fully recognised, and this factor will always play a part when courts make decisions in mortgage cases. At the same time, it should be noted that this factor, namely the importance of enforcing creditors' rights, is not enough to justify an abstract presumption in favour of creditors. Instead, the goal behind proportionality is to rid the system of any presumptions and to ensure that each case has an outcome that is fair in the context of the specific situation, taking the interests of all parties into consideration, but without starting from an abstract position that the 'creditor must win'. In essence, the proportionality test should facilitate a level playing field between the parties, one that avoids the scale being tipped unjustifiably in either direction.