# Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the National Credit Act (part 1)

R BRITS*
AJ VAN DER WALT**

## 1 *Introduction*

Direct execution of a judgment debt against immovable property – including those burdened with mortgage bonds – is permissible in the high court on the condition 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."[1]

The amended rule is a result of section 26 of the Constitution of the Republic of South Africa, 1996 and reflects the principle that was established earlier in *Jaftha v Schoeman; Van Rooyen v Stoltz* with regard to the magistrates' courts' execution process.[2] The housing clause 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.
> (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."

To give effect to debtors' rights under section 26(1), the constitutional court held in the *Jaftha* case that a clerk of the court may no longer grant judgments by default against primary residences. Rather, a magistrate must grant the order and may do so only after all the relevant circumstances have been considered. The case involved insignificant, unsecured debts that were enforced against vulnerable debtors' state-subsidised houses. It was therefore not immediately apparent that section 26 would apply also in the general context of mortgage bonds being enforced in the high courts.[3]

The supreme court of appeal initially accepted in *Standard Bank of South Africa Ltd v Saunderson* that registrars of the high courts could still grant execution orders by default, unless there were allegations regarding the infringement of section 26(1)

* Postdoctoral Fellow at the South African Research Chair in Property Law, Stellenbosch University.
** Professor of Law and holder of the South African Research Chair in Property Law, Stellenbosch University.

1 High Court Rule 46(1)(a)(ii), effective from 24-12-2010; see *GG* 33689, GN R981 (19-11-2010). Direct execution refers to the situation where execution against movables (the normal rule) is bypassed in favour of execution against immovable property, as is typical with mortgage foreclosures. See High Court Rule 45(1) and s 66(1)(*a*) of the Magistrates' Courts Act 32 of 1944.

2 2005 2 SA 140 (CC).

3 It was argued in Van der Walt "Property, social justice and citizenship: property law in post-apartheid South Africa" 2008 *Stell LR* 325 331-332 that the effect of the *Jaftha* case on "normal" mortgage cases should not be "played down".

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rights, in which case the matter had to be referred to a judge.[4] Despite acknowledging that section 26(1) could be implicated, the court found it unlikely that the clause could ever defeat a mortgagee's claim.[5] Yet, some subsequent cases showed that, even in mortgage cases, it sometimes might be necessary to deny the application for direct enforcement of creditors' rights because granting those applications would result in the unjustified limitation of debtors' constitutional rights.[6]

Despite the *Saunderson* decision, the High Court Rules were eventually amended to ensure judicial oversight over *all* sale-in-execution cases where judgment debtors' homes are at stake, also if the property was mortgaged.[7] Moreover, in *Gundwana v Steko Development* the constitutional court confirmed the constitutional necessity for judicial scrutiny of all residential foreclosures in the high courts.[8]

Based on these developments,[9] the question that this article addresses is: what does section 26 of the constitution require, on a substantive level, for the valid sale in execution of mortgaged homes?[10] High Court Rule 46 requires that all the relevant circumstances must be considered before an execution order is granted, implying that the court must exercise a discretion. Given that the rule was directly inspired by the housing clause, the substantive requirements of section 26 must necessarily be the basis for the discretion.[11]

After establishing the constitutional yardstick for a valid sale in execution, it is furthermore necessary to evaluate how this new paradigm affects the traditional common law of mortgage. Applying section 26 might show that certain forced sales that would have been valid under the common law are no longer legitimate under the constitution. These instances might be thought to require development of the common law so as to bring it into conformity with the spirit, purport and objects of the bill of rights.[12] However, based on the subsidiarity principles, we argue that because there is legislation in place that already gives effect to debtors' constitutional rights, a constitutionally inspired development of the common law is inappropriate in these instances. The primary legislative measure that protects and provides relief for debtors who are in default due to their over-indebtedness is the National Credit Act 34 of 2005.

After extrapolating the scope of section 26 for mortgage foreclosure purposes,[13] we analyse the proportionality test that the clause requires on the basis of case law.[14] We subsequently evaluate the effect of section 26's proportionality standard on

4 2006 2 SA 264 (SCA).

5 the *Saunderson* case (n 4) par 19.

6 Examples are *ABSA Bank Ltd v Ntsane* 2007 3 SA 554 (T) and *Firstrand Bank Ltd v Maleke* 2010 1 SA 143 (GSJ), discussed in sections 3.3 and 4.3 below.

7 See n 1 above.

8 2011 3 SA 608 (CC). For a discussion of the implications of the case, see Van der Walt and Brits "The purpose of judicial oversight over the sale in execution of mortgaged property" 2012 *THRHR* 322. However, for criticism, see Juma "Mortgage bonds and the right of access to adequate housing in South Africa" 2012 *JJS* 1.

9 For a summary of how the debate surrounding the impact of s 26 progressed through the cases, see Van Heerden "The impact of the right of access to adequate housing on the enforcement of mortgage agreements and other credit agreements" 2012 *THRHR* 632; Du Plessis "Judicial oversight for sales in execution of residential property and the National Credit Act" 2012 *De Jure* 532 and Steyn "'Safe as houses'? – balancing a mortgagee's security interest with a homeowner's security of tenure" 2007 *Law Democracy and Development Journal* 101.

10 The article does not discuss procedural details.

11 See *Standard Bank of South Africa Ltd v Bekker* 2011 6 SA 111 (WCC) par 30.

12 s 39(2) of the constitution.

13 See section 2 below.

14 See section 3 below.

mortgage foreclosure principles and describe how the common law might not live up to the constitution.[15] Furthermore, after explaining the subsidiarity principles and their application to the National Credit Act,[16] we provide an example from case law that illustrates the (in our view) correct way of applying the housing principles in mortgage foreclosure disputes, namely by exploiting the act's debt relief mechanisms.[17] Our goal is to argue that debtors' section 26 rights should be given effect to, not by developing the common law, but by invoking the National Credit Act. The act should be viewed as parliament's primary measure to address the negative consequences, including foreclosure and sale in execution of debtors' homes, of over-indebtedness. A development of the common law that duplicates the protection already extended by the National Credit Act should not be permissible, and therefore debtors (and courts) should not be allowed to bypass the National Credit Act and directly rely on the constitutional housing principles. However, as will become clear, we argue that the interpretation of the act should be strongly informed by the principles and values of the housing clause.

## 2 *Scope of section 26 in mortgage cases*

### 2.1 Section 26(3)

The amended court processes reflect the wording and principle enunciated in section 26(3) of the constitution: "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."[18] On face value, section 26(3) only applies to *eviction* and *demolition*, but it makes no reference to *sale in execution*. Initially, some courts relied on this fact as the reason why section 26(3) does not require judicial oversight in execution cases.[19] However, it is now generally accepted that the provision should be interpreted broadly so as to require judicial scrutiny also at the earlier stage when an execution order is granted.

[15] See section 4 1 below.
[16] See section 4.2 below.
[17] See section 4.3 below.
[18] Similar wording appears in s 66(1)(*a*) of the Magistrates' Courts Act 32 of 1944, as amended by the *Jaftha* case (n 2), and High Court Rule 46(1)(a)(ii).
[19] *Jaftha v Schoeman; Van Rooyen v Stoltz* 2003 BCLR 1149 (C) 40-46 (the *a quo* judgment) held that evictions and executions are conceptually distinct procedures. Moreover, the court found that the debtor's housing rights will only be limited at the point of eviction, when the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE) provides sufficient protection. For this reason the court held that s 26(3) does not apply to execution cases. The constitutional court rejected the high court's decision. However, it did not base its judgment expressly on s 26(3) but on the fact that the lack of judicial oversight could lead to an unjustified limitation of s 26(1) rights. For this reason (the lack of reference to s 26(3) in the *Jaftha* constitutional court case (n 2)), the supreme court of appeal found in the *Saunderson* case (n 4) par 13-15 that s 26(3) is solely applicable if there is an eviction subsequent to sale in execution. See also Kelly-Louw "The right of access to adequate housing" 2007 *JBL* 35 37-38. Nonetheless, the constitutional court's remedy (reading words into the Magistrates' Courts Act) clearly reflected the wording of s 26(3): see the *Bekker* case (n 11) par 8. Further, as Van Heerden and Boraine "Reading procedure and substance into the basic right to security of tenure" 2006 *De Jure* 319 320-321 comment, the *Jaftha a quo* court's distinction between eviction and sale in execution was artificial. See also the criticism by Davis and Klare "Transformative constitutionalism and the common and customary law" 2010 *SAJHR* 403 458-460. We agree that it would be incorrect to ignore the possibility of eventual eviction when having to decide whether to grant the execution order.

Especially the constitutional court judgment in the *Gundwana* case had the effect that "the execution process is equated with eviction" for section 26(3) purposes.[20]

We contend that section 26(3) applies to all procedures that may in the normal course of events result in an eviction from a home, even though the order applied for is itself not for an eviction.[21] Therefore, because an execution order will lead to an eviction in the event that the debtor refuses to vacate, section 26(3) must be satisfied when an execution order is granted.[22] Judicial discretion in deciding an application for an execution order will prevent abuses and unjustified violations of debtors' section 26 rights from occurring during this stage already, before a purchaser in good faith seeks an eviction order.[23] It is clear that the discretion conferred on courts by High Court Rule 46(1)(a)(ii) is underscored by the constitutional principle in section 26(3) of the constitution.[24] Therefore, any order that will likely lead to an eviction from a home (like an execution order) should only be granted after all the relevant circumstances have been considered.[25]

## 2.2 Sections 26(1)

Section 26(3) – and by implication High Court Rule 46 – provides procedural safeguards against eviction but does not explain the circumstances that are relevant or what the substantive standards are. Hence, one must resort to section 26(1), which entails the right that section 26 as a whole is aimed at upholding, namely "[e]veryone['s] … right to have access to adequate housing". The primary purpose of section 26(1), read with section 26(2), is to place 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 section 26(1) also involves a negative duty on all persons not to limit someone's existing access to adequate housing.[26]

Bill of rights litigation involves a two-step approach, according to which the claimant must first prove that he is a beneficiary of the right and that it was violated.

[20] See *Nedbank Ltd v Fraser* 2011 4 SA 363 (GSJ) par 9, with reference to the *Gundwana* case (n 8) par 41. See also *Standard Bank of SA Ltd v Snyders* 2005 5 SA 610 (C) par 7, 22 and 29 and the *Bekker* case (n 11) par 8.

[21] According to s 1 (*sv* "evict") of PIE "'evict' means to deprive a person of occupation of a building or structure, or the land on which such building or structure is erected, against his or her will, and 'eviction' has a corresponding meaning". Because sale in execution does not deprive a person of occupation, it is not an "eviction" for PIE purposes.

[22] See also Brits *Mortgage Foreclosure under the Constitution Property, Housing and the National Credit Act* (2012 thesis Stellenbosch) par 3.3.2.

[23] the *Fraser* case (n 20) par 9 and *Changing Tides 17 (Pty) Ltd NO v Erasmus; Changing Tides 17 (Pty) Ltd NO v Cleophas; Changing Tides 17 (Pty) Ltd NO v Frederick* 12-11-2009 (WCC) (unreported) par 7-8.

[24] the *Bekker* case (n 11) par 12-13 and *FirstRand Bank Ltd v Folscher* 2011 4 SA 314 (GNP) par 34.

[25] the *Erasmus* case (n 23) par 8.

[26] *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) par 32; the *Jaftha* case (n 2) par 34; *Minister of Health v Treatment Action Campaign (No 2)* 2002 5 SA 721 (CC) par 46; *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) par 34 and *Ex parte Chairperson of the Constitutional Assembly In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) par 78. See also Liebenberg "The application of socio-economic rights to private law" 2008 *TSAR* 464.

The defendant may then secondly prove that this violation is justifiable.[27] For a debtor to rely on section 26, it should consequently first be established that the subsection indeed applies to his situation. The creditor must then show why it is justified to violate the debtor's section 26 rights through foreclosure. Before High Court Rule 46(1)(a)(ii) was amended, many courts placed significant weight on the requirement that debtors should prove a deprivation of their right of "access to adequate housing".[28]

However, this narrow approach to the ambit of section 26(1) suffers from several problems. First, it assumes that section 26(1) is limited only if, as a result of the sale, the debtor will have *no* access to adequate housing, which makes it almost impossible to prove a violation. The word "deprive" is sometimes used to describe the violation of a fundamental right.[29] However, in light of the terminology in the limitation clause (section 36), the word "limit" is preferable.[30] "Deprive" can lead one to assume incorrectly that a right is limited only when the right is taken away completely. However, this is not the case, since a right is limited even at the slightest interference. "Limit" does not mean that the right is taken away totally, as appears from the fact that section 36(1) provides as one if its factors that "the nature and extent of the limitation" should be considered – recognition of degrees of limitation is implied.[31] Therefore, "limit" does not mean a complete removal or eradication of a right, although it includes that. Outside of the *de minimis* principle, any legally relevant restriction, violation or interference, no matter its size or extent, in principle qualifies as a limitation that must be justified.

In addition, section 26(1) does not provide a right to "adequate housing". Instead, it affords a "right to have *access* to adequate housing".[32] Consequently, the section emphasises the *access* and not the type of housing. "Access" can be defined as "the means or opportunity to approach or enter a place" or "the right or opportunity to use something or see someone".[33] Using these definitions, the right in section 26(1) can be defined as *to have the means, opportunity or right to approach, use or enter* adequate housing.

[27] *S v Makwanyane* 1995 3 SA 391 (CC) par 100-102 and *S v Zuma* 1995 2 SA 642 (CC) 660. This approach comes from Canadian law: see Roux and Davis "Property" in Cheadle, Davis and Haysom (eds) *South African Constitutional Law The Bill of Rights* (re 10, 2011) 20-26, citing the Canadian case of *R v Oakes* (1986) 26 DLR (4th) 200 223-224. In general, see also Woolman and Botha "Limitations" in Woolman, Roux and Bishop (eds) II *Constitutional Law of South Africa* (2006) 34-18 – 34-29 and Currie and De Waal *The Bill of Rights Handbook* (2005) 26 and 165-168.

[28] In the *Saunderson* case (n 4) par 15-20 the supreme court of appeal held that "adequate housing" is a fact-based, relative concept. The court introduced a rule of practice that creditors must henceforth inform debtors of their rights under s 26(1) and must invite them to present information regarding the violation (if any) of these rights. Creditors would therefore not have to justify an execution order in advance, but would only have to do so if the debtor can convincingly show that his right to "adequate housing" was infringed. See Kelly-Louw "Protection of homeowners against various interest rate hikes" 2010 *SA Merc LJ* 27 44. See also *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Ltd (No 2)* 2010 1 SA 634 (WCC) par 29-30; *FirstRand Bank Ltd v Meyer* 17-02-2011 (ECP) (unreported) par 25; *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D) par 25; *Changing Tides 17 (Pty) Ltd NO v Scholtz* 02-02-2010 (ECP) (unreported) par 22-23; *First National Bank Ltd v Rossouw* 06-08-2009 (GNP) (unreported) par 20; *ABSA Bank Ltd v Noniki Trading CC, ABSA Bank Ltd v Ikroza Enterprise Solutions CC, ABSA Bank Ltd v Hqubela Trading CC* 07-04-2011 (ECG) (unreported) par 55 and *Firstrand Bank Limited v Swarts* 01-03-2010 (WCC) (unreported) par 2-3.

[29] For example, see the *Jaftha* case (n 2) par 34 and Van Heerden (n 9) 634, 652 and 653.

[30] See also Woolman and Botha (n 27) 34-3 - 34-4.

[31] s 36(1)(*c*).

[32] s 26(1) (emphasis added).

[33] Soanes and Stevenson *Concise Oxford English Dictionary* (2006) *sv* "access".

Hence, if the debtor experiences *any* restriction (or limitation) of his ability, means, opportunity or right once again to approach, use or enter (or have *access* to) adequate housing, section 26(1) has been limited. In terms of this wide interpretation of section 26(1), the subsection will be infringed whenever an existing home (regardless of the type) is lost as a consequence of any legal procedure.[34] However, during the section 36(1) justification stage the debtor must still provide information concerning the *extent* of the violation. The reason for this is that, because there is a mortgage registered over the property, the general justification of the sale can be accepted *prima facie*. Regardless of the fact that section 26(1) is assumed to be limited, in the absence of special circumstances, courts will generally be entitled to assume that the limitation of the section 26(1) right is justified under the limitation clause. As the court in *Standard Bank of South Africa Ltd v Bekker* explained:

> "[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."[35]

The purpose of the discretion under High Court Rule 46 is thus to evaluate whether the violation of section 26(1) is justifiable in terms of the principles in section 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 section 36(1), which provides that a right in the Bill 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".[36]

Regarding the nature of the right, few will deny that section 26 contains a right "vital to our constitutional democracy",[37] also because the home is intricately linked to occupiers' dignity.[38] In essence, section 36 requires that the impact of the infringement must be proportionate to the purpose thereof, hence requiring a

[34] Conversely, see Van Heerden (n 9) 653-654.

[35] the *Bekker* case (n 11) par 17 (original italics). See also par 13. The court relied on the endorsement by the *Gundwana* case (n 8) par 47 of the *Jaftha* case (n 2) par 58. In *Absa Bank Ltd v Petersen* 2013 1 SA 481 (WCC) par 37 the court held that, in the mortgage context, the debtor's "right to ownership of his or her home must, in general, yield to the mortgagee's right to realise its security". The only exception to this premise is when "the exercise of the mortgagee's right is in bad faith". If the creditor claims execution under circumstances where it is clear that the judgment debt can be satisfied in another reasonable manner (one that does not involve the loss of the home), this would be an indication of bad faith. In view of the importance of mortgage finance for the acquisition of homes, the court confirmed that public policy dictates the enforcement of mortgages, unless such enforcement is sought in bad faith. See also the *Fraser* case (n 20) discussed in section 3.4 below.

[36] s 36(1)(*a*)-(*e*) of the constitution. For an analysis of the five factors, see Woolman and Botha (n 27) 34-70 – 34-92 and Currie and De Waal (n 27) 176-185.

[37] Woolman and Botha (n 27) 34-72.

[38] s 10 of the constitution. See the *Ntsane* case (n 6) par 83; the *Jaftha* case (n 2) par 21 and *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) par 10, 12, 15, 17, 18, 29, 41 and 42. See also Liebenberg "The value of human dignity in interpreting socio-economic rights" 2005 *SAJHR* 1 and Chaskalson "Human dignity as a foundational value of our constitutional order" 2000 *SAJHR* 193.

strict proportionality test.[39] Therefore, in view of the importance of the right, the test requires a proportionate relationship between factors (b) and (c), in other words, between the purpose of the violation[40] and the impact it has on the individual homeowner.[41] Factor (d) requires that the means used to achieve the objective must be rationally connected to or reasonably capable of achieving that purpose.[42] The relationship should also display proportionality and causality.[43]

Factor (e) indicates that a limitation should probably not be allowed if there are alternative measures available that will be less invasive but will still achieve the same purpose.[44] This is probably the central element of the proportionality test, the one on which most limitations will stand or fall.[45] If there is another reasonable way to achieve the creditor's purpose without having to sell the home, selling the home would not be a justifiable solution. Below we discuss some of the most important cases that developed the principles surrounding the proportionality test in sale-in-execution cases. It is henceforth no longer necessary to debate whether section 26(1) and (3) are implicated, but it is preferable to assume that foreclosure and sale in execution result in a limitation of the right of "access to adequate housing" and subsequently focus on the proportionality of this limitation in individual cases.[46]

## 3 *The proportionality test applied in case law*

### 3.1 General

The abuse-of-process qualification has become one of the main principles that section 26 has brought about in the mortgage context. However, this principle not

[39] For authority that a proportionality test is required, see the *Makwanyane* case (n 27) par 149; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) par 33; *S v Manamela (Director-General of Justice Intervening)* 2000 3 SA 1 (CC) par 32; *S v Bhulwana* 1996 1 SA 388 (CC) par 18; and *S v Mbatha* 1996 2 SA 464 (CC) par 14. See also Woolman and Botha (n 27) 34-69 – 34-70; Currie and De Waal (n 27) 176-178. In the current context, the strongest authority is the *Gundwana* case (n 8) par 54 and the *Jaftha* case (n 2) par 36 and 40-42.

[40] The 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. See the *Gundwana* case (n 8) par 53-54.

[41] It would be helpful to find guidelines that will indicate the degree to which the s 26(1) right is limited. Before the court delivered its decision in the *Saunderson* case (n 4) and in a response to the constitutional court decision in the *Jaftha* case (n 2), Van Heerden and Boraine (n 19) 345 suggested that one should ask, "to what extent will execution render them homeless and without the possibility of obtaining a house/shelter again?" We support this submission because it simplifies the matter to the basic problem, namely homelessness. Whether alternative accommodation is readily available will indicate the extent to which the debtor will or will not have access to new adequate housing. For example, in the *Noniki* case (n 28) par 57-59, the court granted the execution order because the debtor did not allege that he had no ability to find substitute adequate housing. Neither did he explain why other adequate housing could not replace his current residence. Also, in *First Rand Bank Ltd v Noroodien* 14-11-2011 (WCC) (unreported) par 19 the court considered the fact that there would be enough of a surplus available to the debtors (after the proceeds of the auction had been used to settle the debt) with which they could acquire accommodation elsewhere.

[42] Woolman and Botha (n 27) 34-84.

[43] Currie and De Waal (n 27) 183.

[44] See also *Standard Bank of South Africa v Molwantwa* 05-05-2011 (GNP) (unreported) par 12.

[45] Currie and De Waal (n 27) 183-184. Bilchitz "How should rights be limited" 2011 *TSAR* 568 575 argues that "[b]y not considering properly the availability of less restrictive means … [one] … ultimately fails to apply a real proportionality test".

[46] For example, in the *Noniki* case (n 28) par 57 the court assumed that the sale in execution limits s 26(1) rights and based its decision on whether such a limitation was justifiable in the case at hand.

only entails a prohibition against procedural abuses, irregularities and ulterior motives. Rather, as the court explained in *FirstRand Bank Ltd v Folscher*,

> "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 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."[47]

The court also held that a comparison must be drawn between 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".[48]

In 2011 the constitutional court confirmed in the *Gundwana* case that a mortgage bond – although agreed upon and registered against the mortgagor's immovable property (the "voluntary placing-at-risk argument") – does not entitle the creditor to enforce execution in bad faith. A mortgage agreement does not entail a waiver of the debtor's rights under section 26(1) and (3) either.[49] The constitutional court reiterated that courts should guard against disproportionality and that "due regard should be taken" of how sale in execution will affect the poor and those facing homelessness.[50] Courts should be particularly attentive 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".[51] The court also focused on the availability of reasonable alternatives, which should be considered before an execution order is granted against a home.[52] Except for these cautions, the court emphasised that execution against homes is generally acceptable and a normal feature of economic life.[53]

In what follows we discuss three decisions that applied the housing clause in sale-in-execution disputes. The case discussions are not comprehensive but focus on the courts' definition and application of the proportionality test and the abuse-of-process qualification under the respective circumstances of each case.

### 3.2 The *Jaftha* case

After accepting that sale in execution is a measure that can limit a debtor's existing access to adequate housing,[54] the constitutional court held that the fact that a judgment debt was very small ("trifling") is a relevant consideration when doing the justification test.[55] The two homeowners involved in the case had concluded unsecured loans of only R50 and R190 respectively.[56] Therefore, the case concerned the constitutionality of the subsequent sale of their homes to execute these insignificant, unsecured debts. Judicial oversight was introduced to prevent the abuse of process that is inherent in these kinds of situations.

47 (n 24) par 40.
48 the *Folscher* case (n 24) par 41.
49 the *Gundwana* case (n 8) par 44 and 47-48.
50 the *Gundwana* case (n 8) par 53.
51 the *Gundwana* case (n 8) par 54.
52 the *Gundwana* case (n 8) par 53.
53 the *Gundwana* case (n 8) par 53.
54 the *Jaftha* case (n 2) par 34.
55 the *Jaftha* case (n 2) par 35.
56 For the facts, see the *Jaftha a quo* case (n 19) par 2-10, 15 and 23-25 and the *Jaftha* constitutional court case (n 2) par 2-5.

The court found that, as part of its duty to test the limitation of their section 26(1) rights, "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".[57] The court acknowledged the importance of the purpose of the limitation that the execution imposes on debtors' rights, but 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."[58] The court qualified this statement by highlighting that it will not always be unjustifiable to satisfy a trifling debt through sale in execution, since "trifling debt" cannot easily be defined in the abstract.[59] There may also be other factors indicating that a particular sale will be justifiable.[60] 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".[61]

On the other hand, there could be instances where a sale will be unjustifiable "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".[62] Moreover, as the procedure stood, unscrupulous creditors could abuse the system by taking advantage of the lack of knowledge and information of vulnerable debtors, knowing that there was no judicial oversight to check their actions.[63] They could go ahead with their actions despite knowing that the result would be disproportionate.

The constitutional court held that any remedy should be flexible enough to take account of varying circumstances.[64] Courts should accordingly take "cognisance of the plight of a debtor who stands to lose his or her security of tenure".[65] However, there must also be sensitivity towards the interests of creditors and appreciation for the "need for poor communities to take financial responsibility for owning a home".[66] The court agreed that introducing judicial oversight was the appropriate way to prevent the unjustified infringements of debtors' rights. To assist courts in exercising their discretion, the constitutional court gave some guidelines.[67] First, if the debt can be paid in other reasonable ways, a sale of the home will normally not be desirable. However, if there are no alternatives, execution should be allowed unless a sale would 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".[68] Therefore, the size of the debt will be relevant and it might be unjustifiable to limit

[57] the *Jaftha* case (n 2) par 36.
[58] the *Jaftha* case (n 2) par 40. For a summary of the purpose, namely the efficient enforcement of debt as well as facilitating home loans, see par 37-38.
[59] the *Jaftha* case (n 2) par 38.
[60] the *Jaftha* case (n 2) par 41.
[61] the *Jaftha* case (n 2) par 42.
[62] the *Jaftha* case (n 2) par 43.
[63] the *Jaftha* case (n 2) par 43.
[64] the *Jaftha* case (n 2) par 53.
[65] the *Jaftha* case (n 2) par 53.
[66] the *Jaftha* case (n 2) par 53. There is also "a widely recognised legal and social value … in debtors meeting the debts that they incur" (par 57).
[67] the *Jaftha* case (n 2) par 56.
[68] the *Jaftha* case (n 2) par 56.

a person's section 26(1) rights if the debt is "trifling in amount and significance" to the creditor.[69] Much will depend on the circumstances of each case.[70]

Although the *Jaftha* case did not concern debts that were secured by mortgage bonds, the court emphasised the necessity to take account of "the circumstances in which the debt arose".[71] The constitutional court held that if the house was burdened as security for the debt, execution should normally be allowed, with the exception that abuses of the procedure must not be tolerated.[72] Consequently, the court acknowledged the "need to ensure that homes may be used by people to raise capital" but confirmed an abuse-of-process qualification on mortgagees' rights.[73] Furthermore, courts should consider whether there are alternatives available that might lead to debt recovery while at the same time not requiring the loss of a home.[74]

With regard to finding the correct balance, the constitutional court commented that it "should not be seen as an all or nothing process".[75] 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 is used only as a last resort.[76]

The *Jaftha* case is a ground-breaking decision and it is still the leading case when dealing with sale 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. This case-by-case scrutiny can only be conducted by a judicial officer who has all the relevant circumstances before him. However, the full impact of the *Jaftha* case and section 26 was not immediately appreciated.

Although the position that was taken in the *Jaftha* case only had direct application in the magistrates' courts process with reference to unsecured debts, the question soon arose whether the *Jaftha* case had implications for "normal" mortgage cases before the high courts. In the *Saunderson* case the supreme court of appeal accepted the constitutional court's comments with regard to not allowing execution where there is abuse of process.[77] However, the facts did not seem to reflect the kind of abusive behaviour that occurred in the *Jaftha* case seeing as the case concerned a typical mortgage foreclosure. The supreme court of appeal regarded it as unlikely that section 26(1) will ever lead to a mortgagee not being able to execute against the hypothecated property.[78] Therefore, even though the court recognised that, in principle, the abuse-of-process qualification could avert execution, it did not perceive a strong possibility of finding disproportionality on a substantive level – not of the kind that would amount to an unjustifiable limitation of section 26(1).[79]

69 the *Jaftha* case (n 2) par 57.
70 the *Jaftha* case (n 2) par 57.
71 the *Jaftha* case (n 2) par 58.
72 the *Jaftha* case (n 2) par 57.
73 the *Jaftha* case (n 2) par 57.
74 the *Jaftha* case (n 2) par 59.
75 the *Jaftha* case (n 2) par 59.
76 the *Jaftha* case (n 2) par 59.
77 the *Saunderson* case (n 4) par 19.
78 the *Saunderson* case (n 4) par 19.
79 The supreme court of appeal did introduce a new rule of practice that obliges mortgagees to include in their summons a warning that foreclosure might lead to a violation of the debtor's s 26(1) rights, inviting the debtor to present information in this regard to the court. Nonetheless, the creditor would not have to justify execution in advance. See the *Saunderson* case (n 4) par 24-25.

However, it soon became apparent that some mortgage cases would not be as simple as the supreme court of appeal assumed they would be.

### 3.3 The *Ntsane* case

What distinguishes *ABSA Bank Ltd v Ntsane*[80] from the *Jaftha* case is that the former concerned a debt secured by a mortgage. The case showed that the supreme court of appeal's assumption in *Saunderson* regarding section 26(1)'s limited influence was over optimistic and that, even in mortgage cases, facts can arise that may indicate abuse of process and/or disproportionality worthy of court intervention.[81] Significantly, the court also had to face the implications of section 26 for the enforcement of acceleration clauses, which neither the *Jaftha* nor the *Saunderson* case addressed.

Over the years, the debtors in the *Ntsane* case had often fallen into arrears with their monthly mortgage payments and had made several arrangements with the bank.[82] They continuously struggled to keep up with instalments but periodically brought the arrears up to date, after which they would default again.[83] After being repeatedly warned that the bank would take legal action and after summons had eventually been issued, they brought the arrears down to R18.46 – the amount on the day of the foreclosure application.[84] The bank had applied for default judgment to the value of R62 042.43, which was the outstanding principal sum under the mortgage loan.[85] The bank's claim was based on the debtors' default, which triggered the bank's rights under the acceleration clause.[86]

It was clear to the court that the bank wanted to deprive the debtors of their home under circumstances where the amount in arrears was "piffling" in comparison to the status of the bank.[87] However, the court gave the bank the benefit of the doubt and supposed that it would not have foreclosed the bond if the sum in arrears at the time was only R18.46.[88] The amount on that date was not provided but it seemed that the debtors had gone to immense effort to bring down the arrears.[89] The bank did not explain why it insisted on continuing to exercise its rights under the bond.[90]

The court's first impression was that the bank's decision to foreclose was "morally and ethically questionable".[91] It was disquieted by the "irreversible prejudice" that the debtors would experience as a result of the bank's reliance on "the non-payment of a minute amount to enforce its claim".[92] The crux of the bank's case was its rights in terms of the mortgage bond, as affirmed in the *Saunderson* case.[93] However, the court's intuition was that, under the circumstances, "it would be unfair and a striking injustice to deprive apparently poor persons of their only dwelling".[94] The

[80] (n 6).
[81] See Steyn (n 9) 112.
[82] the *Ntsane* case (n 6) par 39.
[83] the *Ntsane* case (n 6) par 42.
[84] the *Ntsane* case (n 6) par 12, 14 and 39-40.
[85] the *Ntsane* case (n 6) par 6 and 15.
[86] the *Ntsane* case (n 6) par 8.
[87] the *Ntsane* case (n 6) par 18.
[88] the *Ntsane* case (n 6) par 19.
[89] the *Ntsane* case (n 6) par 19-20.
[90] the *Ntsane* case (n 6) par 21.
[91] the *Ntsane* case (n 6) par 22.
[92] the *Ntsane* case (n 6) par 22.
[93] the *Ntsane* case (n 6) par 23.
[94] the *Ntsane* case (n 6) par 24.

court accordingly "found the apparent hard-heartedness … difficult to accept" and reserved judgment.[95] It was the court's instinct that it could not allow foreclosure, but the exact basis upon which the creditor's claim could be denied had to be established.

Despite the debtors' recurring default, the bank could not prove that it had suffered any loss on the transaction.[96] The bank's attorney nevertheless argued that, after doing everything possible to accommodate the debtors, foreclosure was the bank's last resort and therefore justifiable.[97] The court in the *Ntsane* case commented that the courts in neither the *Jaftha* nor *Saunderson* case had to address the question as to "whether the [bank's] decision to accelerate the repayment of the full amount of the outstanding liability under the bond upon default of payment of one or more instalments could be set aside or reviewed".[98] The court acknowledged that there could hardly be a ground upon which the bank's decision to accelerate repayment can be held to be unlawful.[99] At most, it could postpone execution so that alternative ways of paying the debt could be sought.[100] However, cases like these require a weighing up of the bank's "right to commercial activity and the right to enforce agreements lawfully entered into" and the debtors' "right to adequate housing".[101] Regarding the test, the court held that "the proportionality of the harm must be considered that may befall the defendants if judgment is granted. It must be weighed against the harm plaintiff may suffer if the agreement underlying the registration of the mortgage bond is rendered commercially ineffective."[102]

Furthermore, the court held that it should ask the creditor why the amount in arrears cannot be enforced against other assets, and with respect to the abuse-of-process notion, the court stated the following:

> "Even if the bond provides for acceleration of the bond upon non-payment, the Court is entitled to refuse to grant execution against an immovable property where the result is so seemingly iniquitous or unfair to the house owner that the enforcement of the full rights to execution would amount to an abuse of the system."[103]

Furthermore, under the circumstances it would violate section 26 to terminate the debtors' right to adequate housing by enforcing the bank's right to execute against their home.[104] It was seen as a "gross unfairness" to allow a sale that would obtain a price lower than the market value, whereas a private sale could obtain a price that might leave them with some money after the bank's claim had been settled.[105] Hence, where there are "easier ways to obtain payment of the arrears without any prejudice to the [bank's] rights", it would amount to an "abuse of the system and the processes" if the court were to enforce the bank's right to execute against the

[95] the *Ntsane* case (n 6) par 25.
[96] the *Ntsane* case (n 6) par 44.
[97] the *Ntsane* case (n 6) par 47.
[98] the *Ntsane* case (n 6) par 67.
[99] the *Ntsane* case (n 6) par 68.
[100] the *Ntsane* case (n 6) par 69.
[101] the *Ntsane* case (n 6) par 71.
[102] the *Ntsane* case (n 6) par 72.
[103] the *Ntsane* case (n 6) par 79.
[104] the *Ntsane* case (n 6) par 82.
[105] the *Ntsane* case (n 6) par 84. Conversely, see the *Petersen* case (n 35) par 38, where the court did not deem it to be relevant that the forced sale would realise a price lower than a private sale would.

immovable property.[106] Pertaining to the violation of section 26, the court provided the following guideline:

> "[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."[107]

Based on this principle the court felt compelled to deny the bank's application until it could persuade the court that there was no reasonable alternative.[108] Moreover, even if it was mistaken in regarding the bank's action as an infringement of the debtors' rights under section 26(1), the court could still not grant default judgment. The reason for this was that execution against immovable property would have amounted to "a prima facie abuse of the right to claim an outstanding amount that can be easily obtained by way of execution against movable assets".[109] Consequently, instead of granting an order for the full amount claimed, the court issued a judgment for the arrears of R18.46 together with interest.[110]

The *Ntsane* case opened a new avenue for courts when analysing the proportionality of foreclosure cases. Courts should ask whether the enforcement of the acceleration clause can be upheld in view of the size of the amount upon which such decision to accelerate repayment of the full outstanding balance is based. Accordingly, in addition to the size of the full outstanding debt, the court may also look at the size of the actual amount in arrears when determining whether the impact of foreclosure would be proportionate.[111] However, this focus of the court on the actual arrears (and interference with the enforcement of the acceleration clause) has been criticised on the basis of the traditional principles of acceleration and foreclosure. After describing the general observations in *Nedbank Ltd v Fraser* regarding the impact of section 26,[112] we explain the *Fraser* court's criticism of the *Ntsane* approach and subsequently we comment on the debate.

[106] the *Ntsane* case (n 6) par 85.
[107] the *Ntsane* case (n 6) par 86.
[108] the *Ntsane* case (n 6) par 87-88.
[109] the *Ntsane* case (n 6) par 91.
[110] the *Ntsane* case (n 6) par 94.
[111] As appears from the quotes in the main text, the court emphasised the need for banks first to try to collect the arrears by having the debtors' movable assets sold in execution. If this approach is accepted as a general principle, it would amount to a development of the common law of mortgage, which traditionally entails a right of direct execution against the hypothecated home in the case of foreclosure. As we explain in section 4.1 below, in view of the housing clause, this development of the common law seems necessary. However, as we argue in section 4.2 below, the National Credit Act's debt relief measures render development of the common law not only unnecessary but also inappropriate in light of the subsidiarity principles. Although we agree with the general approach in the *Ntsane* case, namely that foreclosure should not go ahead if the arrears can be rectified in alternative ways, we suggest that these alternatives should be found in the National Credit Act and not in a separate development of the common law that would seek the same goal but bypass the act.
[112] (n 20).

### 3.4 The *Fraser* case

#### 3.4.1 Social values

The *Fraser* case concerned the circumstances that ought to be considered before a court can declare mortgaged homes executable.[113] The court sought to give content to the requirements of the amended High Court Rule 46 and its endorsement in the *Gundwana* case.[114] It emphasised the importance of considering the "context and purpose" of the judicial oversight that section 26(3) requires, since this would be "a useful lens" through which to analyse the circumstances that are relevant in individual cases.[115] The court described the context of judicial oversight as "an apparent tension between two competing social values".[116] The one value relates to the "need for people to be housed and the value of having a home".[117] People's security of tenure and homes must be protected to give effect to this value, which finds expression in section 26 of the constitution.[118]

The other social value, which is equally compelling, is that of enforcing contracts and discharging debts.[119] This value is promoted by court structures that provide persons with ways to enforce valid contracts and execute debts. However, the right to execute debts is not absolute and has its limitations.[120] Certain assets are, for example, already excluded from the execution process.[121] Nonetheless, residential properties are not exempt.[122] The court held that, on an individual level, the creditor's right to execute its judgment "will enjoy relative primacy" above the debtor's housing interests.[123] Otherwise, legitimate claims for the repayment of debts would be defeated by debtors who rely on section 26.[124]

The court also found that "the two social values are not so much juxtaposed as symbiotic"[125] – they are not complete opposites but exist together and complement each other. Protecting the social value of execution promotes the social value of housing instead of diminishing it, although it may not appear so in individual cases.[126] Therefore, the argument goes, allowing creditors to execute their debts against houses facilitates credit and promotes home ownership.[127]

However, the court also emphasised that abuse of the execution process "is offensive to the attainment of one or both of the social values".[128] For example, there is a strong possibility of abuse if execution is sought for a relatively trifling judgment debt,[129] because

[113] the *Fraser* case (n 20) par 1.
[114] the *Fraser* case (n 20) par 2.
[115] the *Fraser* case (n 20) par 16.
[116] the *Fraser* case (n 20) par 17.
[117] the *Fraser* case (n 20) par 17.
[118] the *Fraser* case (n 20) par 17.
[119] the *Fraser* case (n 20) par 17.
[120] the *Fraser* case (n 20) par 18.
[121] *ibid*. For instance, see s 39 of the Supreme Court Act 59 of 1959; s 37 of the Magistrates' Courts Act 32 of 1944 and s 86(2) of the Insolvency Act 24 of 1936.
[122] the *Fraser* case (n 20) par 19, with reference to the *Jaftha* case (n 2) par 51.
[123] the *Fraser* case (n 20) par 20.
[124] the *Fraser* case (n 20) par 20.
[125] the *Fraser* case (n 20) par 21.
[126] the *Fraser* case (n 20) par 21.
[127] the *Fraser* case (n 20) par 22.
[128] the *Fraser* case (n 20) par 22.
[129] *ibid*, with reference to the *Jaftha* case (n 2).

> "[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 dispossession of the judgment debtor of the residential property. In such a case, the execution against the immovable property would be unjustifiable …"[130]

Consequently, the purpose of judicial oversight is to "act as a filter or check on execution that does not serve the social interests and which is an abuse" and courts must "safeguard against abuse of the execution process".[131] The court placed the abuse-of-process guideline at the centre when determining whether declaring a home executable is constitutionally justifiable.[132] However, it cannot normally be said that there is abuse just because a creditor seeks to execute against the debtor's hypothecated home.[133] Accordingly, if there is no indication of abuse, the court will have no reason to be more vigilant and execution will be allowed.[134]

### 3.4.2 Criticism by the *Fraser* court against the *Ntsane* decision

According to the *Fraser* case, when deciding whether execution is justified, the court must consider the size of the full outstanding debt, since this is the amount that the debtor owes when the creditor invokes the acceleration clause.[135] The full outstanding balance is therefore more important than the size of the actual sum in arrears, which triggered the creditor's right to accelerate repayment of the balance.[136] Because the two amounts are conceptually different, they must not be confused.[137] The court criticised the *Ntsane* case's focus on the arrears, which in that case was only R18.46 but which resulted in the acceleration of the full balance of R62 042.43.[138] The *Fraser* court accepted that selling immovable property in execution of a "paltry" judgment debt of R18.46 is not justifiable,[139] but whether it is justifiable to execute against the same property for a debt of R62 042.43 is not an "easy, clear or straightforward" matter.[140]

The court distinguished between two rights that mortgage bonds grant. First, upon default the creditor can accelerate repayment of the full outstanding debt. Secondly, the creditor has a procedural right to execute this claim against the mortgaged property.[141] The court held that section 26(3) applies to the execution stage and not to the acceleration stage.[142] The *Fraser* case acknowledged the court's discretion to refuse to declare a house executable if enforcement thereof would culminate in an abuse of the process.[143] Notwithstanding, the court rejected the approach that was taken in the *Ntsane* case to deny the creditor's contractual claim to payment

[130] the *Fraser* case (n 20) par 22.
[131] the *Fraser* case (n 20) par 24.
[132] the *Fraser* case (n 20) par 24.
[133] the *Fraser* case (n 20) par 27.
[134] *ibid*, with reference to the *Jaftha* case (n 2) par 58.
[135] the *Fraser* case (n 20) par 28.
[136] the *Fraser* case (n 20) par 28.
[137] the *Fraser* case (n 20) par 28.
[138] the *Fraser* case (n 20) par 29.
[139] the *Fraser* case (n 20) par 31.
[140] the *Fraser* case (n 20) par 31.
[141] the *Fraser* case (n 20) par 32.
[142] the *Fraser* case (n 20) par 32.
[143] the *Fraser* case (n 20) par 33.

of the outstanding balance.[144] Therefore, the *Fraser* court could not accept that the constitutional principle of judicial oversight (and its goal to prevent abuses) grants courts the power to redefine the creditor's contractual entitlement to obtain a judgment order for the accelerated outstanding debt, and where execution of this redefined debt against the immovable property would be seen as unconscionable abuse.[145]

According to the *Fraser* case, the *Ntsane* case approach was based on a "first premise", namely that the arrears is relatively insignificant and therefore in itself this amount does not justify execution against immovable property.[146] The "second premise" is that acceleration leads to a claim for an outstanding balance that is a significantly larger amount – large enough to justify execution against the house, rendering enforcement not abusive.[147] The *Fraser* case considered the "first premise" to be incorrect because to do the section 26(3) enquiry, the creditor's lawful right of acceleration is ignored.[148]

The correct approach, in the *Fraser* court's view, is to separate the matter into two enquiries. First, the court must determine the amount to which the creditor is entitled in terms of the contract.[149] This investigation into contractual rights is independent of the second question, namely whether execution against the home is justifiable.[150] The court understood the common law principle to be that a creditor can enforce its right of acceleration even if the amount of the actual default is relatively small or subsequently purged.[151]

Therefore, the court held that when a creditor seeks a judgment order as well as an execution order and if the accelerated balance is substantial enough to justify an execution order against the home, there is no scope to deny the creditor's right of acceleration just because the actual sum in arrears is relatively small.[152] More specifically, the court found that, in view of the purpose of judicial oversight, it cannot interfere with a creditor's contractual right of acceleration but only with the right to execute the accelerated debt against the immovable property.[153]

The court concluded that although intervention regarding the enforcement of acceleration clauses might be called for, it is the function of the legislature and not the court.[154] In this respect the court commented that the National Credit Act now provides a solution that was not available when the *Ntsane* case was decided,[155] implying that courts would not have to make decisions like the *Ntsane* case again.[156]

[144] the *Fraser* case (n 20) par 34.
[145] the *Fraser* case (n 20) par 35.
[146] the *Fraser* case (n 20) par 35.
[147] the *Fraser* case (n 20) par 35.
[148] *ibid*. Van Heerden (n 9) 655 seems to favour this approach and agrees that the focus on the amount in arrears is incorrect because it ignores the importance of acceleration clauses.
[149] the *Fraser* case (n 20) par 36.
[150] This manner of reasoning reminds one of the formalistic distinction that the high court made in the *Jaftha a quo* case (n 19) between sale in execution and eviction. See n 19 above.
[151] the *Fraser* case (n 20) par 36.
[152] the *Fraser* case (n 20) par 36.
[153] the *Fraser* case (n 20) par 37.
[154] the *Fraser* case (n 20) par 38.
[155] the *Fraser* case (n 20) par 39.
[156] In this respect the court was correct, as we extrapolate in section 4.2 below.

### 3.4.3 Remarks

The result in the *Ntsane* case was that the court found that the creditor's exercise of its contractual right to accelerate payment of the outstanding balance was abusive, since it would culminate in an unconstitutional limitation of the debtors' section 26(1) rights. Therefore, the court overturned the bank's decision to foreclose. Although the court initially stated that the election to accelerate cannot easily be regarded as unlawful, it appears that even though the acceleration clause remains lawful, the decision to make use of the right can be condemned as unlawful if the result would be disproportionate, abusive and/or unconstitutional.

Conversely, the *Fraser* case followed the position that the exercise of the valid contractual right to accelerate repayment should not be interfered with, although the procedural right of execution against property may be checked in terms of constitutional housing principles. Therefore, a creditor can be accused of abusing the execution process, but it cannot be accused of abusing the contractual right of acceleration. Its election to accelerate repayment of the debt is absolute and will go unchecked, despite the disproportionate results it may have.

However, we do not believe that the *Fraser* court's stance in this regard is constitutionally sustainable. A formalistic division between the granting of the judgment order and the granting of an execution order will defeat the purposes of the housing clause. Furthermore, *Fraser*'s view that the common law principles of acceleration cannot be developed by a court is incorrect, since the constitution commands courts to develop the common law so as to promote the spirit, purport and objects of the bill of rights.[157] The enforcement of an acceleration clause simply cannot be upheld if, under the circumstances, it results in an unjustifiable violation of section 26(1) rights. As the constitutional court held in the *Gundwana* case, by agreeing to the registration of a mortgage bond the debtor does not waive the protection he enjoys under the housing clause.[158] Therefore, it is not valid to argue that the proportionality test does not apply if the debtor *agreed* to subject his home to the possibility of execution. The *Gundwana* case has the effect that such a possibility of foreclosure, which would lead to the sale of the home, is qualified by the proportionality standard as required by sections 26(1) and 36(1). Also, despite the voluntary burdening of the home, execution may still only occur after all relevant circumstances have been considered (section 26(3)), and it would be hard to argue that the size of the actual amount in arrears is not relevant to this enquiry.

If the *Ntsane* case had followed the approach that the *Fraser* case supported, it would have granted judgment for the balance of the outstanding debt and issued an execution order. The result would have been a limitation of the debtors' right of "access to adequate housing" that does not satisfy the justification test under section 36(1). Not considering the arrears of R18.46 cannot be a sustainable position, since it would imply disregarding a relevant circumstantial factor in contravention of section 26(3). One cannot call it a legitimate exercise of the rights under the acceleration clause if the creditor were to accelerate repayment (or persist with the claim) if the arrears is (or is brought down to) an amount that is disproportionate to the effect that execution would have on the debtors.

This is not to say that courts should always review and overturn creditors' election to accelerate repayment, since it is possible still to grant judgment for the accelerated

[157] s 39(2). See *Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 4 SA 938 (CC) par 36 and 39.

[158] the *Gundwana* case (n 8) par 44 and 47-48.

outstanding debt but, because of the small size of the arrears, not to grant a direct execution order against the house. Hence, the size of the arrears does not necessarily have to influence the lawfulness of acceleration but it can, notwithstanding valid acceleration, still determine the justification for granting a direct execution order. Much will depend on the facts of each case and the outcome of the proportionality test.

Therefore, we argue that a better approach lies somewhere between the ones taken in the *Ntsane* and *Fraser* cases, combined with the provisions of the National Credit Act. The Act and its debt relief mechanisms were not available when the *Ntsane* case was decided and the route that Bertelsmann J took in that case was, in our view, the correct one. However, in view of the National Credit Act, we would now support – in cases like the *Ntsane* case – granting of judgment for the accelerated outstanding debt, but postponing the execution order to allow the debtor to make use of the right to reinstate the mortgage agreement by getting the arrears up to date.[159] If the sum in arrears is "trifling", reinstating the agreement should generally not be difficult. Nevertheless, this approach should only be followed if debt review and debt rearrangement are no longer options. Under the National Credit Act, the perfect solution for situations like the *Ntsane* case would be to refer the matter for debt counselling.[160] If the sum in arrears is "trifling", there is a strong likelihood that rearranging the debtor's obligations will be feasible. These National Credit Act options are available despite the fact that the creditor relies on a valid acceleration clause. Therefore, it is not necessary to develop the common law on this point, since the National Credit Act already introduces exceptions to the principles surrounding acceleration clauses, which – if properly applied – will avoid the unconstitutional effects that would have ensued otherwise. In the next section of the article we elaborate on the subsidiarity relationship between the common law, the proportionality standard of section 26 and the National Credit Act.

[to be concluded]

**WILFUL BLINDNESS MAY CONSTITUTE RECKLESSNESS AND MAY THUS SUPPLY THE NECESSARY ELEMENT OF MORAL FAULT**

"The trial judge concluded that Violet's actions in processing the loan in the knowledge of the various factors to which his Honour had referred were deliberate and were attended by moral fault and lack of moral responsibility. Violet had turned a 'blind eye' to the irregularities in the loan application and the income declaration and had ensured that the supplementary information was massaged. The appeal judges said that given that wilful blindness may constitute recklessness and may thus supply the necessary element of moral fault in cases of this kind, they saw no error in his Honour's approach" Young's discussion of *Violet Home Loans Pty Ltd v Perpetual Trustees Australia Ltd* 2013 VSCA 56 in 2013 *ALJ* 381 382.

[159] s 129(3)-(4) of the National Credit Act .
[160] s 85 of the National Credit Act. See section 4.3 below – to published in 2014:3 *TSAR*.