

Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the National Credit Act (part 2)*

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4 Giving effect to the proportionality standard

4.1 Potential problems with the common law

The proportionality test to determine the justification of execution against a home revolves around various contextual considerations. Yet, it appears that the enquiry will largely centre on the size of the outstanding debt and – significantly – of the actual arrears, as compared to alternative ways that are available to satisfy the claim for either or both of these amounts. For mortgage law to comply with the proportionality standard, the process must include a way to have recourse to reasonable, creative alternatives before a home is sold in execution.

In terms of common law doctrine, a mortgage is a limited real right that the creditor holds in the debtor's hypothecated land.¹⁶¹ The most prominent element of this property right is the creditor's entitlement, when the debtor defaults, to call up the bond and insist on the sale of the burdened property to settle the debt.¹⁶² Because the mortgagee has a right to execute against that specific property on the basis of its limited real right in that property, it has no duty to first seek execution against other assets, such as movables or non-primary residences.

However, if courts give unqualified effect to this premise, homes will possibly be sold in execution despite the fact that there might have been other ways to settle the debt, which alternatives might not have required the violation of the debtor's section 26(1) right. Consequently, in some instances the effect of the common law would be an unjustified limitation of section 26(1) rights, since the loss of home might not have been the last resort. The question then is whether the common law should be developed (or might have been developed already) to place a duty on mortgage creditors, despite their limited real right, to first seek enforcement in less invasive

* See 2014 *TSAR* 288 for part 1.

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¹⁶¹ In general see Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's the Law of Property* (2006) 364 and 367-368; Van der Merwe *Sakereg* (1989) 625 and Scott and Scott *Wille's Law of Mortgage and Pledge in South Africa* (1987) 203 ff.

¹⁶² See especially the supreme court of appeal's summary in the *Saunderson* case (n 4) par 2.

ways.¹⁶³ In what follows, we explain that such a development of the common law is neither necessary nor permissible, not because there are no constitutional problems with it but because, in terms of the subsidiarity principles, there is legislation in place that already ensures constitutionally compliant outcomes in mortgage foreclosure cases.

4.2 Subsidiarity and the National Credit Act

The National Credit Act provides for various debt relief mechanisms to assist debtors who are (or are about to fall) in arrears as a result of their over-indebtedness. The main mechanism that the act makes available to struggling mortgagors is the opportunity to undergo debt counselling and, if they are found to be over-indebted,¹⁶⁴ to be placed under debt review.¹⁶⁵ The main benefit of debt review is the possibility of having one's obligations rearranged in a way that avoids the normal consequences of debt enforcement (which might include mortgage foreclosure). Moreover, while the review process is underway, the creditor is prevented from commencing normal debt enforcement.¹⁶⁶ This article does not discuss the act and its mechanisms in detail.¹⁶⁷ For current purposes we take for granted the detailed operation and requirements of debt review and rearrangement, and assume a simplistic functioning of the possibility to have debtors' obligations (including mortgage debt) restructured as an alternative to foreclosure and sale in execution. In what follows, we explain how

¹⁶³ For example, see the *Molwantwa* case (n 44), where the value of the property was alleged to be R4 000 000, whereas the amount owed was R130 540.86. The debtors also showed that they potentially had available to them an amount of R2 453 492.03 with which they could repay the capital debt (par 10). The court acknowledged that the creditor was "entitled to be paid what [was] due to it", but had the court declared the house executable, the debtors and their minor children would have "run the risk of [losing] a roof over their heads" (par 11). On the other hand, the court held that if it were to refuse such an order, the creditor would "not [have] suffer[ed] much prejudice", since it might have settled the amounts owed by having the debtors' movable property sold (par 11). Hence, the court found that the result of direct execution would not have satisfied the proportionality requirement and explained that, "where it is sought, an order that has the potential of encroaching drastically upon the fundamental rights of a person, the applicant who seeks such an order, must first exhaust other less invasive remedies before resorting to a cause that is much more invasive" (par 12). Therefore, if this position is followed, it seems that courts will expect mortgagees to first seek execution against movables, in other words in a way that would be "less invasive" of the debtor's housing rights. This approach might represent an amendment of the common-law principle that mortgagees can directly execute against hypothecated properties. As becomes clear below, we do not support the methodology of this decision, but would have supported an outcome where the court had granted relief under the National Credit Act. For another case that took a similarly unsatisfactory route, see *Changing Tides 17 (Pty) Ltd NO v McDonald* 05-05-2011 (GNP) (unreported) where the court granted summary judgment for the outstanding balance but refused to declare the property executable. The reason for this decision was that the creditor disclosed neither the value of the property nor information regarding the availability of other (movable) assets. The court held that direct execution of a judgment against immovable property (that is, before looking to movables) was "not there for a take" (par 10) because execution against movables might "substantially reduce the capital amount claimed" (par 10). If this decision is followed, courts will become increasingly "disinclined" (par 10) to declare immovable property directly executable (even under mortgage circumstances) if they are not presented with information concerning the possibility of execution against movables that could reduce the debt. Again, resorting to the National Credit Act would have been a better approach.

¹⁶⁴ Over-indebtedness is defined in s 79(1) of the National Credit Act.

¹⁶⁵ The debt counselling and -review process is regulated by s 86-88 of the National Credit Act.

¹⁶⁶ s 88(3) of the the National Credit Act . See also s 130(3)(c)(i) and s 130(4)(c).

¹⁶⁷ See standard works like Scholtz, Otto, Van Zyl, Van Heerden and Campbell (eds) *Guide to the National Credit Act* (re 3, 2011) and Otto and Otto *The National Credit Act Explained* (2010).

the application of the National Credit Act relates to the requirements of the housing clause.

A foundational principle of the constitutional dispensation is that there is a single system of law, which “derives its force from the Constitution and is subject to constitutional control”.¹⁶⁸ Therefore, there are not two systems of law, namely common law and statutory law, “each dealing with the same subject-matter, each having similar requirements, each operating in its own field with its own highest Court”.¹⁶⁹ This single-system-of-law principle is the foundation of the constitutional court’s subsidiarity principles.¹⁷⁰

Subsidiarity concerns the question whether someone can rely directly on a provision in the bill of rights to enforce or protect a right or whether legislation and the common law should be the first resort. Secondly, subsidiarity relates to the choice between legislation and the common law. The constitutional court has laid down certain guidelines regarding which source of law should be applicable in a particular instance. First, when someone argues that a constitutional right is infringed, he must rely on legislation that had been promulgated to give effect to that right.¹⁷¹ The claimant may not rely directly on the constitutional provision, although the validity or effectiveness of the legislation may be attacked on the basis of non-compliance with the underlying constitutional provision.¹⁷² The legislation must, as far as possible, also be interpreted with reference to the constitutional provision.¹⁷³ The second subsidiarity principle is that, if legislation had been promulgated to give effect to a constitutional provision, the litigant who argues that a constitutional right is infringed must rely on the legislation and not on the common law directly.¹⁷⁴ Accordingly, the common law should not be developed if legislation had already been enacted to protect the constitutional right or to promote the constitutionally desired

¹⁶⁸ *Pharmaceutical Manufacturers Association of SA in re ex parte President of the Republic of South Africa* 2000 2 SA 674 (CC) par 44 per Chaskalson P. See also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 4 SA 490 (CC) par 22; *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as Amici Curiae)* 2006 2 SA 311 (CC) par 436; *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) par 51.

¹⁶⁹ the *Pharmaceutical Manufacturers* case (n 168) par 44.

¹⁷⁰ On subsidiarity see Du Plessis “‘Subsidiarity’: What’s in the name for constitutional interpretation and adjudication?” 2006 *Stell LR* 207; Du Plessis “Interpretation” in Woolman, Bishop and Brickhill (eds) *Constitutional Law of South Africa* (original service, 2008) 32-142 – 32-158; Van der Walt “Normative pluralism and anarchy: reflections on the 2007 term” 2008 *CCR* 77. For criticism of especially Van der Walt’s notion of subsidiarity, see Klare “Legal subsidiarity & constitutional rights: a reply to AJ van der Walt” 2008 *CCR* 129. Van der Walt expands on his arguments and responds to Klare in Van der Walt *Property and Constitution* (2012) ch 2. See also Brits (n 22) par 3.5.

¹⁷¹ Van der Walt *Constitutional Property Law* (2011) 66; Van der Walt (n 170) 100-103, referring to the *South African National Defence Union* case (n 168) par 51-52; *MEC for Education KwaZulu-Natal v Pillay* 2008 1 SA 474 (CC) par 39-40; *Chirwa v Transnet Ltd* 2008 4 SA 367 (CC) par 59 and 69; *Walele v City of Cape Town* 2008 6 SA 129 (CC) par 29-30 and *Nokotyana v Ekurhuleni Metropolitan Municipality* 2010 4 BCLR 312 (CC) par 47-49.

¹⁷² Van der Walt (n 171) 66; Van der Walt (n 170) 101, 104 and 115, referring to the *South African National Defence Union* case (n 168) par 52; the *New Clicks* case (n 168) par 437; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) par 249 and *Engelbrecht v Road Accident Fund* 2007 6 SA 96 (CC) par 15.

¹⁷³ s 39(2) of the constitution.

¹⁷⁴ Van der Walt (n 171) 66-67; Van der Walt (n 170) 103-105, relying on the *Bato Star* case (n 168) par 25; the *New Clicks* case (n 168) par 96; the *Chirwa* case (n 171) par 23; *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province* 2007 6 SA 4 (CC) par 37 and the *Walele* case (n 171) par 15.

result. In the current context, if it is assumed that mortgage law is constitutionally non-compliant with the constitutional housing principles in certain instances, the subsidiarity question is whether the common law should be developed or whether there is legislation that already gives effect to debtors' constitutional rights.

Subsidiarity principles have to date only been applied with regard to legislation that was specifically enacted to give effect to a particular provision in the bill.¹⁷⁵ In other words, it would seem that legislation like the National Credit Act, which was not explicitly promulgated to give effect to, for instance, section 26 of the constitution, is not subject to the subsidiarity approach. However, this position would imply that debtors can bypass the National Credit Act when their homes are at stake due to debt enforcement, and rely directly on their section 26 rights or claim that the common law should be developed. We argue that such an approach is unsustainable in view of the constitutional goal to cultivate and promote a single system of law. It would undermine parliament's legitimate initiative to prevent and resolve over-indebtedness (which is the root cause of mortgage default) if courts were to extend protection to debtors outside the ambit of the act. Unless an argument is made that the act does not sufficiently protect the debtor's constitutional rights, courts must limit their intervention to that which the National Credit Act allows and interpret these measures as broadly or narrowly as is necessary to promote the spirit, purport and objects of the bill of rights.¹⁷⁶ Similarly, debtors who wish to save their homes from the execution process must make use of the protection measures in the act. If they fail to do so, they should afterwards not be allowed to rely on purely human-rights or common-law-based arguments.¹⁷⁷

Including the National Credit Act within the reach of the subsidiarity principles finds support in section 8(3)(a) of the constitution:

- “When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
- (a) in order to give effect to a right in the Bill, *must* apply, or if necessary develop, the common law *to the extent that legislation does not give effect to that right*”.¹⁷⁸

Hence, we argue that the common law may not be developed for the same purpose if there is legislation that already gives effect to the right in question. Section 8 does not say that the act must have been specifically enacted with that result in mind but only that it must have that effect. Therefore, if legislation is applicable, this provision

¹⁷⁵ Examples include the Promotion of Administrative Justice Act 3 of 2000, which purports to give effect to s 33 of the constitution (just administrative action): see the *Bato Star* case (n 168) par 35; the *New Clicks* case (n 168) par 95-97 and 434-437; the *Walele* case (n 171) par 29-30 and the *Nokotyana* case (n 171) par 47-49. See also Hoexter *Administrative Law in South Africa* (2012) 115-121. By analogy, subsidiarity was expanded to apply in contexts such as labour law (the relationship between s 23(5) of the constitution and ch 20 of the regulations under the Defence Act 44 of 1957: see the *South African National Defence Union* case (n 168) par 51-54), unfair discrimination law (the relationship between s 9 of the constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: see the *Pillay* case (n 171) par 39-40) and eviction law (the relationship between PIE and s 26(3) of the constitution: see the *Port Elizabeth Municipality* case (n 38) par 11-23 and *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) par 16. See also Van der Walt (n 171) 68 n 152).

¹⁷⁶ s 39(2) of the constitution.

¹⁷⁷ By means of s 85 the National Credit Act even provides a way to protect debtors who failed to make use of the debt review process before enforcement proceedings began. See the discussion of the *Maleke* case (n 6) in section 4.3 below.

¹⁷⁸ emphasis added. Roux “Continuity and change in a transforming legal order: the impact of section 26(3) of the Constitution on South African law” 2004 *SALJ* 466 487 n 102 also emphasises this part of the sentence.

requires that the common law should not be developed to achieve something that an act of parliament already does, even if (or perhaps specifically when) the legislation pertinently excludes the instance that is at stake in a particular dispute. Development of the common law should not be employed to duplicate or to create a parallel system when a statutory system of regulation already exists. Furthermore, if there is relevant legislation in existence, section 39(2) of the constitution requires that this legislation “must” be interpreted to “promote the spirit, purport and objects of the Bill of Rights”. However, if the act is not capable of constitutionally compliant interpretation, it must be declared unconstitutional to the extent that it does not comply with the constitution.¹⁷⁹ As a whole, therefore, the principle of subsidiarity emphasises the importance of legislation in situations where there is legislation in place to regulate certain matters.

Subsidiarity is related (but not identical) to what Currie and De Waal¹⁸⁰ call the “principle of avoidance”,¹⁸¹ which was first conceived in *S v Mhlungu*, where the constitutional court held that “where it is possible to decide any case ... without reaching a constitutional issue, that is the course which should be followed”.¹⁸² Accordingly, even though the bill is always relevant, it should not be applied directly unless it is necessary to do so. Currie and De Waal explain that

“a court must apply the provisions of ordinary law to resolve the dispute, especially in so far as the ordinary law is intended to give effect to the rights contained in the Bill of Rights ... They must first be applied, and if necessary interpreted generously to give effect to the Bill of Rights, before a direct application is considered.”¹⁸³

Both Currie and De Waal¹⁸⁴ and Hoexter¹⁸⁵ acknowledge that avoidance applies *especially* where there is legislation that gives specific effect to constitutional rights, but they do not deny that the effect can be broader. The way Du Plessis explains subsidiarity (based on the *Mhlungu* case) also accords with our argument that it applies to non-constitutional law like the National Credit Act:

“The authority of the Final Constitution is ... not to be overused to decide issues that can be disposed of by invoking specific, subordinate and non-constitutional legal norms, *on the crucial condition, of course, that the solution arrived at, as well as the norm putting it forward, can withstand constitutional scrutiny.*”¹⁸⁶

It is our argument that the National Credit Act (through its debt relief mechanisms) already qualifies the traditional principles of mortgage enforcement so as to sufficiently avoid constitutionally disproportionate outcomes and hence it already gives effect to the principles of section 26. That is, the act provides a reasonable and constitutionally compliant alternative to normal debt enforcement and sale in execution. Accordingly, it should not be permissible *in addition* to directly develop

¹⁷⁹ s 172(1) of the constitution.

¹⁸⁰ Currie and De Waal (n 27) 75.

¹⁸¹ See Hoexter (n 175) 119-120 and Du Plessis (n 170 (2008)) 32-143 and 32-150. The principle of avoidance is more restrictive in its effect than the subsidiarity principles.

¹⁸² 1995 3 SA 867 (CC) par 59, confirmed in *Zantsi v Council of State, Ciskei* 1995 4 SA 615 (CC) par 8 and *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC) par 21. See also Hoexter (n 175) 116; Du Plessis (n 170 (2008)) 32-142 – 32-143; Du Plessis (n 170 (2006)) 207 and Currie and De Waal (n 27) 75.

¹⁸³ Currie and De Waal (n 27) 77 (footnotes omitted).

¹⁸⁴ Currie and De Waal (n 27) 77

¹⁸⁵ Hoexter (n 175) 484.

¹⁸⁶ Du Plessis (n 170 (2008)) 32-150 (original emphasis).

the common law in terms of the housing clause. Because the act's relief measures are available to home-owning debtors, further case-by-case developments of the common law that place qualifications of mortgage creditors' foreclosure remedy would not be ideal. Such developments would undermine and bypass the relief that parliament has prescribed through legislation, which will be unjustifiable in view of the democratic nature of the constitutional system. Consequently, our interpretation of subsidiarity implies that debtors must rely on and that courts must apply the National Credit Act when adjudicating credit disputes – even those that may result in the forced sale of homes and consequent limitation of section 26(1) rights. The alternative – direct resort to the housing clause – would violate the single-system-of-law principle, since debtors would be able to choose between two parallel systems when seeking relief, namely the National Credit Act or the common law as qualified by section 26.

When applying the National Credit Act to these disputes, courts should still take account of the bill of rights and interpret the act accordingly. In this respect, Du Plessis's emphasised caveat in the above-quoted passage is important. Applying non-constitutional norms does not entail that constitutional norms are ignored. Indeed, the solution arrived at *must* be inspired by constitutional goals and *must* promote the spirit, purport and objects of the bill of rights. This should be the case even if the relevant constitutional provision is not applied directly. Therefore, subsidiarity does not involve a policy of deference or avoidance in the sense that the bill is ignored when there is legislation. Instead, the National Credit Act should be applied and interpreted as part of the “defined and carefully calibrated constitutional matrix” that regulates housing disputes.¹⁸⁷

Therefore, the National Credit Act is an integral part of the single system of law under the supreme constitution that regulates, among other things, the enforcement of credit agreements as well as providing debt relief. When the enforcement of these agreements has implications for debtors' constitutional housing rights, these rights must primarily be given effect through the legislative credit dispensation that is in place. If the act does not incorporate the proportionality requirement of a justifiable limitation of section 26(1) rights, the court should first employ the various interpretative techniques – for instance, reading in¹⁸⁸ – to try and read the act in line with the constitution.¹⁸⁹ However, if interpretive techniques like reading in are inappropriate or insufficient to live up to protection that would comply with section 26, a development of the common law or another constitutional remedy (including a declaration of invalidity) might be appropriate to deal with that particular instance that the National Credit Act does not provide for.

The point is that the National Credit Act was enacted by parliament with the express purpose of addressing the negative consequences of over-indebtedness, which include foreclosure and the sale in execution of homes. It currently appears that any foreclosure scenario that would result in a disproportionate violation of the debtor's “access to adequate housing” can be sufficiently prevented by the National

¹⁸⁷ the *Port Elizabeth Municipality* case (n 38) par 14.

¹⁸⁸ This is exactly what the constitutional court did in the *Jaftha* case (n 2). Even though the Magistrates' Courts Act was not specifically enacted to give effect to people's s 26 rights, the constitutional court applied subsidiarity (possibly without realising it) when it, instead of creating a separate constitutional defence or developing the common law, amended the act so as to render it constitutionally compliant.

¹⁸⁹ For example, see the discussion of the *Maleke* case (n 6) below, with reference to a loophole in s 85 of the National Credit Act. As we explain there, the simple reading-in of a *mero motu* power for courts will solve the constitutional deficiency displayed in that instance.

Credit Act. If the National Credit Act is interpreted and applied correctly – and, crucially, through a constitutional prism – the outcome should be proportionate. If it is found that the act does not live up to the standards of section 26, the common law could in suitable cases be developed (but only if that instance was not meant to fall within the act) or the validity of the act should be challenged (if that situation should have been dealt with by the act) – as long as the common law is not developed to do something that the National Credit Act already does or is supposed to do. Below, we discuss a case that illustrates our arguments.

4.3 The *Maleke* case

The facts of *Firststrand Bank Ltd v Maleke* clearly illustrate the disproportionality that would have resulted had the execution order been granted.¹⁹⁰ More significantly, the court held that the National Credit Act's debt review mechanism would have been the ideal solution and would have avoided the unjustified limitation of the debtors' rights. In view of the subsidiarity approach, the case is a good example of how the National Credit Act should be applied in mortgage cases to avoid disproportionate limitations of section 26(1) rights.

The case concerned four applications for default judgments and execution orders against individual mortgagors' homes.¹⁹¹ The debtors had been paying their instalments for between 13 and 19 years and it appeared that this was the first time they had fallen in arrears.¹⁹² Consequently, the debtors had "acquired a valuable equity in the increased market value of their properties", which they would have lost had judgment been granted.¹⁹³ The increased value of the properties must therefore have meant that the houses were "significantly more valuable than the outstanding balances".¹⁹⁴

Furthermore, the arrears were relatively minor, since all but one varied between R2 000 and R5 000.¹⁹⁵ Therefore, the court held that the arrears in at least three of the cases were "trifling in their amounts and significance" to the bank.¹⁹⁶ It seemed "blatantly unfair and unjust" that the creditors should enjoy the benefit of this capital growth if the arrears were relatively minor.¹⁹⁷ Because the values of the houses were much higher than the outstanding debt, the creditor would have gained a "manifest advantage" from sale in execution because the sale would have easily covered the debt.¹⁹⁸

The prejudice that the debtors would have suffered would have been "disproportionately large compared to the minor prejudice to the [bank] in being denied immediate payment of the outstanding balances".¹⁹⁹ In fact, delaying payment of the full outstanding debts would – in the court's view – not have harmed the bank in any way. In contrast, execution would have resulted in a "permanent setback" for the "relatively indigent and historically disadvantaged" debtors.²⁰⁰ Hence, the

¹⁹⁰ (n 6).

¹⁹¹ the *Maleke* case (n 6) par 2.

¹⁹² the *Maleke* case (n 6) par 5.2 and 8.

¹⁹³ the *Maleke* case (n 6) par 5.2.

¹⁹⁴ the *Maleke* case (n 6) par 5.3.

¹⁹⁵ the *Maleke* case (n 6) par 2 and 5.3-5.4.

¹⁹⁶ the *Maleke* case (n 6) par 5.4.

¹⁹⁷ the *Maleke* case (n 6) par 8.

¹⁹⁸ the *Maleke* case (n 6) par 8.

¹⁹⁹ the *Maleke* case (n 6) par 5.4.

²⁰⁰ the *Maleke* case (n 6) par 5.4.

court concluded that the sale of the debtors' houses would have "harm[ed] [them] in a very material and substantial way".²⁰¹ Concerning the proportionality of the case, the court held that "where the bond instalments had been paid over a long period of time and the arrears are relatively minor, the advantage to the credit provider is therefore substantial whereas the disadvantage to the consumer is disproportionately large".²⁰² Because of this disproportionality, the court exercised its discretion against the creditors by not declaring the properties executable.²⁰³ The court absolved the debtors from the instance, so that the creditors would have to begin again with debt enforcement proceedings in the magistrates' court. According to the judge, the facts in these cases would have been perfectly suited for a referral to a debt counsellor in terms of the National Credit Act, so that a review could be conducted and their obligations potentially rearranged. This mechanism would have been an appropriate alternative way to settle the debt – one that would have rendered execution unnecessary.²⁰⁴

Hence, a debt rearrangement in terms of the National Credit Act or a renegotiation could have "resulted in a satisfactory solution whereby the applicants ultimately receive full payment of the bonds and the defendants retain their homes".²⁰⁵ The problem was that section 85 allows the court to refer a case to a debt counsellor only if an allegation of over-indebtedness is made, which did not happen because the debtors did not appear in court.²⁰⁶ For debt review to assist them, the debtors would have to cooperate, which is what the court apparently hoped would happen in fresh, future proceedings.²⁰⁷

The decision demonstrates the importance of applying the National Credit Act to foreclosure cases. The disproportionality revealed by the case could easily have been avoided by making proper use of the debt review process. Had debt counselling taken place and had their obligations been restructured, the cases would probably not have appeared before a judge²⁰⁸ and execution would not have been an issue. However, if debt review and rearrangement was unsuccessful, the court could have assumed that execution was the last resort and therefore a justifiable infringement of their section 26 rights.

The only problem with debt review as an alternative to sale in execution, as displayed by the *Maleke* case, is that the court does not have the power *mero motu* to refer worthy cases for debt counselling.²⁰⁹ Instead, the court can only exercise the discretion in terms of section 85 if the debtor alleges his over-indebtedness, which cannot happen if he does not appear in court. However, to comply with section 26 of the constitution, a court must have the power to refer cases that would otherwise have disproportionate results to debt counsellors. The alternative would be that an execution order is granted despite other reasonable ways (like debt rearrangement) being potentially available, which sale in execution would not satisfy section 36(1)'s requirements. The *Maleke* case avoided this fate by being dismissed, with voluntary

²⁰¹ the *Maleke* case (n 6) par 8.

²⁰² the *Maleke* case (n 6) par 8.

²⁰³ the *Maleke* case (n 6) par 16.

²⁰⁴ the *Maleke* case (n 6) par 17.

²⁰⁵ the *Maleke* case (n 6) par 5.4.

²⁰⁶ the *Maleke* case (n 6) par 18.

²⁰⁷ the *Maleke* case (n 6) par 27.

²⁰⁸ A magistrate or the national consumer tribunal would have approved the rearranged payment plan.

²⁰⁹ This issue was first pointed out by Otto "Die oorbelaste skuldverbruiker: Die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399 406-407.

resort to debt counselling in future apparently being in view, which is not an optimal solution either, because it does not resolve the dispute.

We therefore propose that, if parliament does not amend the act to introduce a *mero motu* power despite no allegation of over-indebtedness,²¹⁰ such a power should be read into the act to render its effect compliant with the spirit, purport and objects of the bill of rights.²¹¹ In the exercise of its discretion, the court should then have the principles of section 26 in mind and it should be hesitant to declare residential properties executable without first considering the possibility of debt counselling.

Consequently, the way the *Maleke* case was decided should not indicate a development of the common law in terms of which courts can generally deny creditors' claims because there is disproportionality that can be addressed through debt review. Rather, within the framework of the act, courts should make use of their discretion under section 85, as interpreted to include the *mero motu* power – especially when it appears that the debtor did not have the legal and financial know-how to resort to the National Credit Act's mechanisms. Although courts have thus far been strict with regard to exercising their discretion in terms of section 85,²¹² we propose that courts should assume more leeway for themselves in cases where homes are at stake.²¹³ As a whole, a home should not be sold in execution unless the court is convinced that debt review cannot resolve the debtor's over-indebtedness. Moreover, courts should not be too quick to assume – based on a cursory assessment of the debtor's financial affairs – that debt rearrangement is not feasible.²¹⁴ To be absolutely sure that sale in execution is the last resort, courts should rather call upon the expertise of a debt counsellor.²¹⁵

5 Conclusion

Creditors need reasonable ways of knowing when the enforcement of their rights will violate the proportionality test and/or will amount to abuse of process. Where creditors behave in unscrupulous ways and with ulterior motives to exploit vulnerable debtors, it is not controversial for courts to intervene. Nevertheless, as the court commented in the *Folscher* case, a creditor does not have to act in a way that is “wilfully dishonest or vexatious” before a court will interfere.²¹⁶ The result of execution can be regarded as “iniquitous” simply because there are alternative ways available to settle the debt.²¹⁷

Disproportionality between the advantage enjoyed by the creditor and the prejudice suffered by the debtor will be a determining factor. Therefore, there might be abuse of process if the creditor insists on enforcing its right to execute,

²¹⁰ as Otto (n 209) 406-407 hopes.

²¹¹ See s 39 of the constitution. On the reading-in remedy see Currie and De Waal (n 27) 64-67 and 204-206.

²¹² For instance, see *FirstRand Bank Ltd v Mvelase* 2011 1 SA 470 (KZP); *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W); the *Hales* case (n 28); *FirstRand Bank Ltd v Olivier* 2009 3 SA 353 (SE). See also Kreuser “The application of section 85 of the National Credit Act in an application for summary judgment” 2012 *De Jure* 1; Brits (n 22) par 4.3.4.6; Van Heerden and Lötze 2010 *THRHR* 502; Otto (n 209) 402 ff; Otto and Otto (n 167) 59-61.

²¹³ See also Brits (n 22) par 4.3.4.6.

²¹⁴ See the criticism of the *Hales* case (n 28) by Kreuser (n 212) 14-16. The author warns (at 16) that courts “should thus be careful not to draw certain conclusions from the outset”.

²¹⁵ See Kreuser (n 212) 16.

²¹⁶ the *Folscher* case (n 24) par 40.

²¹⁷ the *Folscher* case (n 24) par 40.

knowing that the result for the debtor would be disproportionate in comparison to the creditor's benefit. However, it is likely that most foreclosures will indicate a degree of disproportionality. The amount in arrears is often much less than the full outstanding balance or the value of the property. The size of the arrears can therefore not be a conclusive indication of whether the sale would be justifiable. However, there will be cases (like the *Ntsane* and *Maleke* case) where the size of the arrears will be relevant. Much depends not only on the creditor's legitimate claim, but also on what the debtor's prejudice would be. The size of the arrears, the size of the full outstanding balance, and how these amounts compare to the value of the immovable property will not always by themselves be enough to indicate disproportionality. Instead, one must analyse the impact that foreclosure will have on the debtor (his home situation, dignity, family's interests, future access to housing, *et cetera*) and compare it to the creditor's benefit.

A case-by-case scrutiny of the facts and circumstances of each foreclosure case appears inevitable. For creditors, this state of affairs may not be satisfactory, because few of them will have access to the information necessary to determine the debtor's prejudice.²¹⁸ Creditors might not know in advance whether the arrears as well as the full outstanding debt claimed will be sufficient justification in that particular case. Sometimes a small amount would justify execution, sometimes not. By simply analysing the financial information at their disposal, creditors will often not know whether the decision to foreclose will result in an unjustified limitation of section 26(1).

The closest guideline is the one emphasised in the *Ntsane* case, namely that it would amount to an abuse of process to deprive someone of his home if the amount in arrears is capable of satisfaction in a way other than to have the property sold in execution.²¹⁹ But again, creditors will seldom know whether there are alternatives available. What is more, in terms of their common-law rights as mortgagees, creditors are under no obligation first to seek other ways of rectifying the arrears. In fact, the purpose of acceleration clauses is to allow the creditor the benefit of not having to enforce only the amount in arrears but to cancel the entire agreement and also claim future instalments that are not yet due.

However, one can argue, in view of the housing clause, that the mortgagee's rights of acceleration and direct execution are no longer absolute but that the right of acceleration and foreclosure is subject to the creditor making use of it only as a last resort. This would amount to a constitutionally inspired development of the common-law principles of foreclosure and acceleration, which probably seems necessary. However, without a legislative framework to properly regulate the matter, such case-by-case common law developments leave room for much uncertainty.²²⁰ In this respect the National Credit Act goes a long way to establish a framework for the enforcement of consumer debt. Although the act is not explicitly aimed at providing predictable protection for debtors' homes in terms of section 26, it has the desired effect of creating a constitutionally appropriate balance between the rights

²¹⁸ See the *Bekker* case (n 11) par 26 with reference to *Ndlovu v Ngcobo; Bekker v Jika* 2003 1 SA 113 (SCA) par 19.

²¹⁹ the *Ntsane* case (n 6) par 86.

²²⁰ See Steyn (n 9) 119 and the analysis in Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* (2012 thesis Pretoria), especially the discussion leading up to her proposal at 78-79 that "an argument may be made not only from a theoretical constitutional, but also from a practical, perspective for the enactment of appropriate legislation regulating the forced sale of a debtor's home, instead of it being left to the courts to develop the common law on a case-by-case basis" (footnote omitted).

of debtors and creditors, which is necessary to safeguard homes in a sustainable manner.

The principle underlying section 26 is that it will be justifiable to violate a mortgage debtor's right of "access to adequate housing" only if there is no alternative way to achieve the legitimate purpose of the violation, namely debt enforcement. By making such alternatives available, the act assumes that if its measures cannot be employed in a financially viable manner or if they had been used unsuccessfully already, the ensuing effects of normal debt enforcement (including sale in execution) are justifiable, since such enforcement is then the last resort.²²¹

To the degree that the National Credit Act's debt enforcement and debt relief procedures do not safeguard all debtors' homes (for instance, when the option is not viable), the act might violate the duty imposed by section 26(1). However, the fact that debt relief does not prevent the forced sale of every home can, all things considered, be regarded as a justifiable violation of those debtors' rights. In view of the subsidiarity approach, until an argument is made that the National Credit Act's mechanisms do not provide constitutionally sufficient alternatives to full debt enforcement, one must respect parliament's decision to address problems relating to over-indebtedness through these measures. Of course, the act must also be interpreted in view of constitutional values.

One of the act's most important debt relief initiatives is the court-authorized rearrangement of an over-indebted consumer's obligations. Within the limits of the act (which must not be interpreted restrictively) courts should be creative when granting relief and ensure that the rearrangement will be sufficient to remedy the situation, keeping in mind that the effects on creditors should also be reasonable.²²² Because all consumer foreclosure cases must be adjudicated under the National Credit Act, courts should not grant relief in ways that fall outside the ambit of the act's debt enforcement rules and debt relief mechanisms.²²³ A debtor should not be able to rely on a supposed disproportionality to defeat the creditor's claims if this situation can be (or could have been) avoided by making use of the National Credit Act.

For example, the fact that the debt was "by no means trifling" combined with the fact that the debt relief mechanisms were available (but not exploited), indicated to the court in *Standard Bank of South Africa Ltd v Hales* that there was no unjustifiable violation of section 26.²²⁴ In effect, the result satisfied the proportionality test because "the Act has ... given them the opportunity to utilise its provisions to avoid execution in suitable circumstances".²²⁵ Even if the sum in arrears is trifling, the fact that the National Credit Act was available but not taken advantage of, or the fact that debt relief could not rectify the default, indicates that execution should normally

²²¹ See also Kreuser (n 212) 17, who argues that the National Credit Act's debt review process serves as an alternative to sale in execution, as envisioned by the constitutional court in the *Jaftha* case (n 2).

²²² See Brits (n 22) par 6.4, who discusses the constitutional property law (s 25) implications with regard to the effect that the protection of debtors would have on creditors' rights. The National Credit Act may not permit the arbitrary deprivation (or regulation) of creditors' property rights.

²²³ There is also a possibility of obtaining an administration order in terms of s 74 of the Magistrates' Courts Act. Yet, we suggest that it is preferable to eventually do away with administration orders and rather include similar relief within the National Credit Act structures. For a comparison between debt review and administration see Boraine, Van Heerden and Roestoff "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (part 1)" 2012 *De Jure* 80 and Boraine, Van Heerden and Roestoff "A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (part 2)" 2012 *De Jure* 254.

²²⁴ the *Hales* case (n 28) par 25.

²²⁵ the *Hales* case (n 28) par 25.

go ahead. If the sale would have had disproportionate results – as concerning the size of the debt or arrears – debt relief would have been able to resolve the problem and prevent execution (or should have been interpreted broadly enough to have this effect). For instance, if the amount in arrears is relatively small, a rearrangement order should be an uncomplicated solution.

This article focused on providing the foundations for a subsidiarity-based approach to the application of the housing clause in mortgage foreclosure cases. Our emphasis was not on whether the National Credit Act currently functions perfectly or whether it goes far enough to protect debtors against unjustified infringements upon their section 26 rights in every instance. Rather, we argue that since the act was enacted to relieve over-indebtedness (the major cause of mortgage default), it should be the point of departure for all consumer mortgage foreclosures – whether or not the act’s detailed provisions are currently sufficient for this purpose. The National Credit Act will probably have to be amended to improve debt relief mechanisms and smooth out problems. Parties should be creative and investigate the different ways in which debt rearrangement can be used to avoid the cancellation of bonds, while at the same time giving effect to the policy of full repayment of the debt.²²⁶ If no reasonable rearrangement is possible and there is therefore no way to avoid sale in execution, having due regard for creditors’ rights means that the ensuing loss of home would not result in an unjustifiable limitation of the debtor’s “right to have access to adequate housing”. The most nuanced balancing of interests will therefore take place within a single system of debt enforcement law, which is currently regulated by the National Credit Act and which must be interpreted to give effect to constitutional values.

SAMEVATTING

TOEPASSING VAN DIE BEHUISINGSKLOUSULE BY DIE OPROEP VAN VERBANDE: ’N SUBSIDIËRITEITSBENADERING TOT DIE ROL VAN DIE NASIONALE KREDIETWET

Sedert Hooggereshofreël 46 gewysig is, mag primêre wonings slegs in eksekusie verkoop word indien ’n regter ’n eksekusiebevel toestaan en slegs nadat alle tersaaklike omstandighede in ag geneem is. Griffiers van die hooggereshof mag dus nie meer eksekusiebevele by verstek uitreik nie. Voordat verbandskuldenaars se wonings verkoopbaar verklaar mag word, moet ’n diskresie uitgeoefen word, welke besluit gegrand behoort te wees op die vereistes van artikel 26 van die grondwet – die behuisingsklausule.

Hierdie bydrae ondersoek die inhoud van die toets wat artikel 26 vereis vir die geldige verkoop in eksekusie van wonings wat met verbande beswaar is. Ingevolge artikel 36(1) van die grondwet behoort ’n proporsionaliteitstandaard te geld. Oor die algemeen kom dit daarop neer dat wonings slegs in eksekusie verkoop mag word indien daar geen redelike alternatiewe maatreëls beskikbaar is om die bank se sekerheidsregte te handhaaf nie.

Op grond van die saaklike sekerheidsreg in die skuldenaar se woning kan die skuldeiser direk en outomaties daarop aandring om sodanige woning te laat verkoop en in beginsel het die bank dus geen verpligting om eers minder beperkende alternatiewe te oorweeg nie. Die ongekwalifiseerde toepassing van hierdie reël kan egter onder sommige omstandighede nie aan die grondwetlike vereistes van artikel 26 voldoen nie. Dit mag lei tot die verlies van ’n woning ongeag die feit dat geen ondersoek ingestel is om uit te vind of daar redelike alternatiewe beskikbaar is nie. Dit kan dan voorkom asof die gemenerereg ontwikkel behoort te word om effek te gee aan die gees, strekking en oogmerke van die behuisingsklausule. Ons argumenteer egter op grond van die subsidiëriteitsbeginsels dat sodanige ontwikkeling van die gemenerereg beide onnodig en ontoelaatbaar is aangesien die Nasionale Kredietwet alreeds beskerming en skuldverligting aan huiseienaars beskikbaar stel. Die korrekte toepassing en interpretasie van die Kredietwet se skuldverligtingsmeganismes behoort daartoe te lei dat disproporsionele gevolge vermy sal word en dat skuldenaars se artikel 26-regte nie op onregverdigbare wyses beperk sal word nie.

²²⁶ It is one of the purposes of the act to provide “mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations” (s 3(g)).