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Executed in Execution: Discussion and Suggestions  
Regarding the Immovable Property Foreclosure  
Process in South Africa



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Supervised by Lee Swales

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*For my mother.*



*If*

*If you can keep your head when all about you Are losing theirs and blaming it on you, If you can trust yourself when all men doubt you, But make allowance for their doubting too; If you can wait and not be tired by waiting, Or being lied about, don't deal in lies, Or being hated, don't give way to hating, And yet don't look too good, nor talk too wise:*

*If you can dream—and not make dreams your master; If you can think—and not make thoughts your aim; If you can meet with Triumph and Disaster And treat those two impostors just the same; If you can bear to hear the truth you've spoken Twisted by knaves to make a trap for fools, Or watch the things you gave your life to, broken, And stoop and build 'em up with worn-out tools:*

*If you can make one heap of all your winnings And risk it on one turn of pitch-and-toss, And lose, and start again at your beginnings, And never breathe a word about your loss; If you can force your heart and nerve and sinew To serve your turn long after they are gone, And so hold on when there is nothing in you Except the Will which says to them: 'Hold on!'*

*If you can talk with crowds and keep your virtue, Or walk with Kings—nor lose the common touch, If neither foes nor loving friends can hurt you, If all men count with you, but none too much; If you can fill the unforgiving minute With sixty seconds' worth of distance run, Yours is the Earth and everything that's in it, And—which is more—you'll be a Man, my son!*

- Rudyard Kipling

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Finally, to my boys Randhir and Shahir. I hope they both read this one day and recall their younger years where they bring light to us all.

## ABSTRACT

The right to housing is not only important because of its socio-economic role in society – also because of our racially and socio-economically divided past.

Despite the vital function housing plays, manifested in the constitutional aegis of Section 26, our legislature has failed to enact specific legislation that enunciates a tailor-made procedure and clarifies the substantive rights that homeowners should enjoy against their homes being sold in execution.

Consequently, this drastic procedure which deprives often the most vulnerable of society their shelter, has been left to be mainly regulated by court rules. These rules are outdated and I assert that it certainly does not reflect the full level of protection the Constitution intended to give home owners.

Due to the apparent failure of the legislature, the responsibility has fallen to the judiciary to prevent injustices from occurring. The Constitutional Court (hereinafter ‘the CC’) has had to significantly develop our law as evidenced in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140(CC) and *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC); however as the dates indicate – progress has been painstakingly incremental.

Taking the 10 year period between from 2006 to 2015 statistics show that 112,325 properties in South Africa were sold in execution - over 11 000 a year. This is exponentially higher than both the United States of America and the United Kingdom over the same period of time. To exacerbate the situation, the majority of these properties have been sold below market value – with many being sold for 30% or more below their market value.

Despite judicial progress being made in this field and the legislature putting forward a bill to amend the court rules progressively, reports persist of members of the public being short-changed by unscrupulous mortgagees.

This study will focus on the current judicial procedure that needs to be followed for immovable property<sup>1</sup> to be sold in execution of an outstanding and overdue debt. It will further critique the progress that has been made and suggest the progress that needs to be made. Particular attention will be paid to Section 26 of the Constitution and the way it has and should direct the realisation of the right of access to housing.

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<sup>1</sup> For purposes of this study the terms ‘immovable property’ and ‘property’ will be used interchangeably to mean immovable property – unless clearly indicated otherwise.

## **CHAPTER 1 – OVERVIEW**

### **(a) Introduction<sup>2</sup>**

The idea and law that a person's home can be sold to pay for outstanding debts, is one that South Africa has inherited from its common law, with the substantive aspect emanating from Roman Dutch Law, and the procedural aspect borrowed from English Law.<sup>3</sup> Constitutional, and consequently statutory law, has evolved this idea procedurally and substantively.<sup>4</sup> The alterations that have transpired since 1994 have been an attempt to balance economic and legal imperatives; with social and constitutional considerations. Evolution in the execution of immovable property has continued, with judicial intervention the most common mechanism to find a workable equilibrium.

To add to the already weighty subject, immovable property is usually the most valuable form of asset that an individual will accrue during their lifetime. Beyond its use as shelter, a home has shown to contribute significantly to the social, psychological, cultural and emotional state of its inhabitants.<sup>5</sup> Due to these extra-financial factors, among others, the true value of a home is unquantifiable – again increasing the need for the law governing such property to be certain and effective.

### **(b) Structure of this dissertation**

This dissertation will first give an overview of the constitutional foundation of the right to housing, and the subordinate legislation that limits that right with regards to mortgage bonds in Chapter 1.

A review of the substantive law behind mortgage bonds and its important place in our law and society will follow in the first part of Chapter 2. The practical application of the legislation referenced in Chapter 1, regarding the law governing the procedure of execution of realising immovable property through repossession,<sup>6</sup> will be enumerated and analysed in the second part of Chapter 2. The chapter will end with details on the rate of mortgage in South Africa compared to the United States and the United Kingdom. The object of this comparison is to buttress my conclusion that the procedure of execution must be reformed, with the aid of statistics. This

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<sup>2</sup> This dissertation expands on a research project by the author, submitted in partial fulfillment for his LLB during his 4<sup>th</sup> and final year in 2015. Both this dissertation and the abovementioned research project are original pieces of work. The research project is available from the University of KwaZulu-Natal library.

<sup>3</sup> Devenish "Constitutional Law" *LAWSA* 5(3) 15.

<sup>4</sup> Woolman and Swanepoel "Constitutional History" 2-48; Rautenbach and Malherbe *Constitutional law* 316.

<sup>5</sup> Fox *Conceptualising Home* vii-viii, 3ff. See, also, Fox 2002 *J L & Soc* 580.

<sup>6</sup> Hereinafter 'the procedure of execution'.



section will further provide insight into the current suitability of the procedure of execution in the context of Constitutional imperatives, practical considerations and modern-day South Africa's societal needs.

Chapter 3 will firstly examine the interpretation the judiciary has given the procedure of execution when considering the Constitution – the sufficiency of the progress made by judicial interpretation will be critiqued in order to illustrate the need for legislative intervention. It will then move on to explaining and analysing the proposed Bill that would reform the procedure of execution.

Finally, Chapter 4 will discuss my suggestions and conclusions on the procedure of execution after considering the information gathered and analysed in the 3 chapters above.

### **(c) Constitutional Foundation of the Right to Housing**

The South African Constitution<sup>7</sup> (hereafter 'the Constitution') makes the right of access to housing a constitutional one in Chapter 2 (the Bill of Rights) and specifically Section 26 (hereafter also the Housing Clause) of the sovereign document. The Housing Clause falls under the umbrella of what is known as a 'socio-economic right'.<sup>8</sup> Socio-economic provisions in our democratic constitutional dispensation attempt to address and ameliorate the past injustices our society was once subjected to.<sup>9</sup> The inclusion of these rights, when viewed through the lens of our divided past and our clear intention to mend such divisions,<sup>10</sup> already sketches an outline that is uncompromisingly biased in favour of the protection and advancement of citizens – perhaps even when objectivity would dictate otherwise.

It should be further noted that the justiciability of these socio-economic rights in the Constitution were questioned pre-certification.<sup>11</sup> Subsequently, however, our judiciary has consistently

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<sup>7</sup> The Constitution of the Republic of South Africa, 1996.

<sup>8</sup> In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (4) SA 744; 1996 (10) BCLR 1253 (CC) (herein after 'the Certification Judgement') at para 76 the CC broadly sounded out the definition of 'socio-economic rights' in relation to the Constitution. The CC stated that socio economic rights entails access to housing and health care, while guaranteeing sufficient food and water, social security and basic education for all. The subtle but important distinction between 'access' and 'sufficient' should be noted. The former merely denotes a progressive burden on the State to make these available, while the latter compels the State to ensure each and every person unconditionally obtains these.

<sup>9</sup> *Supra*, Preamble.

<sup>10</sup> In *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25 (Jaftha) at para 29 asserts that the Housing Clause 'must be seen as making a decisive break from the past'.

<sup>11</sup> See: Haysom "Constitutionalism, Majoritarian Democracy and Socio-Economic Rights" (1992) 8 SA Journal of Human Rights at 451; Davis "The Case Against the Inclusion of Socio-Economic Demands in a Bill of Rights Except as Directive Principles" (1992) 8 SA Journal of Human Rights at 475; Scott and Macklem "Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution" (1992) 141 University of Pennsylvania Law Review at 1.

upheld and developed these socio-economic rights to the benefit of countless citizens.<sup>12</sup> The Housing Clause reads as follows:

*'26 Housing:*

*(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'.<sup>13</sup>*

In the spirit of reconciling our socio-economic disparity, the Housing Clause is divided into positive<sup>14</sup> and negative rights.<sup>15</sup> The positive aspect creates the right to have access to adequate housing absolute;<sup>16</sup> while the positive portion also compels government to take steps pursuant to the realisation of this right – resources permitting.<sup>17</sup> It is termed a 'positive' right as it imposes a positive duty on the state to realise the right.<sup>18</sup> Completing and concretising the right to housing is the negative aspect of the right to housing.<sup>19</sup> The negative aspect of the right to housing ensures that people who have houses, are not deprived of such housing without the surrounding circumstances being taken into account, and a court ordering such deprivation.<sup>20</sup> It is termed a 'negative' right because it imposes a duty to refrain from depriving a person of such a right.<sup>21</sup> The subsection goes on to prohibit any legislation that permits arbitrary evictions.<sup>22</sup>

The focal point of this study details how the negative right embodied in the Housing Clause (Section 26(3)) manifests itself in both the branches of State and in society. This negative-right

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<sup>12</sup> See: *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; *Joseph and Others v City of Johannesburg and Others* (CCT 43/09) [2009] ZACC 30; *Mazibuko and Others v City of Johannesburg and Others* (CCT 39/09) [2009] ZACC 28; 2010 (3) BCLR 239 (CC); *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); *Gundwana v Steko Development CC and Others* (CCT 44/10) [2011] ZACC 14; 2011 (3) SA 608 (CC).

<sup>13</sup> Section 26 of the South African Constitution.

<sup>14</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19 at para 34.

<sup>15</sup> *Ibid.*

<sup>16</sup> Section 26(1) of the South African Constitution.

<sup>17</sup> Sections 26(1) & 26(2) of the South African Constitution.

<sup>18</sup> CM van Heerden & A Boraine 'Reading procedure and substance into the basic right to security of tenure' 2006 39 *De Jure* at 320.

<sup>19</sup> Section 26(3) of the South African Constitution.

<sup>20</sup> Brand and Heyns *Socio-Economic Rights in South Africa* 2005 (2<sup>nd</sup> Edition) at 10-11 and 98; Currie and De Waal *The Bill of Rights Handbook* 2005 (3<sup>rd</sup> Edition) at 586.

<sup>21</sup> CM van Heerden & A Boraine (note 18 above) at 320.

<sup>22</sup> Note 7 above, Section 26(3).

dimension of the Housing Clause is crucial, as enunciated in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (hereinafter '*Jaftha*').<sup>23</sup> It is the keystone on which the jurisprudence regarding immovable property being sold in execution has been built.<sup>24</sup> As enunciated above, the subsection requires a court to consider all relevant factors before an order granting an eviction or demolition of a house is granted. The effect is that, regardless of the legal or factual situation, a court must make its own determination before allowing such a deprivation to take place. It was accepted in *Jaftha* that the negative obligation in section 26(3) applies to both private and public bodies, not just the latter. As prescribed, a judicial body must ensure that no injustice is occurring – if the negative obligation is to be discharged.<sup>25</sup>

#### **(d) A Brief Overview of the Legislation Governing the Current Procedure**

The legislation that governs the limitation of the negative portion of the Housing Clause is briefly set out below. Together, these provisions make up the entirety of the procedural law that must be followed when immovable property is to be sold in execution of a mortgage bond.

Practically, immovable property can be sold in execution in two distinct but procedurally similar circumstances. The first and most common scenario is when the property is put up as security for a mortgage bond; the second is when it is the only asset valuable enough to satisfy a judgment debt. Regardless of which one of the abovementioned route is taken, the upshot of the procedural aspect is that immovable property is sold in execution.

In addition to the Constitution, the procedure of execution is governed primarily by four pieces of legislation.<sup>26</sup> The National Credit Act (hereinafter '*the NCA*'),<sup>27</sup> the Magistrates' Courts Act

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<sup>23</sup> *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC) at para 31. Regarding the negative right, the CC agreed that a violation of the negative right embodied in the Housing Clause must be judged by doing a limitation analysis as per Section 36 of the Constitution. In this matter it was found that the Applicants did have their negative right to housing violated. This case will be discussed fully below in Chapter III.

<sup>24</sup> The *ratio decidendi* in the cases to be discussed will illustrate this – they will be supported by the draft bill which proposes amendment in line with the jurisprudence built in these cases.

<sup>25</sup> In my opinion, this is the crux of my topic. If everything is distilled and the periphery pulled away; the simple (perhaps utopic) goal, is that a judicial body needs to ensure that no injustice is taking place when a person's immovable property is being sold in execution.

<sup>26</sup> Note that while Section 129 of the NCA always has to be complied with; depending on the value of the property, the relevant section in either the High Court Rules or the Magistrates' Courts Act will apply.

<sup>27</sup> Act 34 of 2005.

(herein after 'the MCA'),<sup>28</sup> the Magistrates' Courts Rules (hereinafter 'the MCR')<sup>29</sup> and the Uniform Rules of Court (hereinafter 'the HCR').<sup>30</sup>

Rule 46 of the HCR governs the procedure of execution in the High Court (hereinafter 'the HC'), while Section 66 of the MCA read with Rule 36 of the MCR sets out the Procedure of Execution in the Magistrates' Courts (hereinafter 'the MC'). Section 129, read with Section 130, of the NCA provides for certain steps to be taken before the above procedures can commence. In addition to this, the NCA contains other protections for a debtor which were previously not available to them.<sup>31</sup>

Together, these portions of legislation constitute the procedure of execution in its entirety. It is therefore crucial that they are compliant with the demands of the Housing Clause, and its limitation thereof.<sup>32</sup> The significance of these provisions is manifested not only in their content, but in their ability to be amended and interpreted.

The interpretation that these sections have been given after being passed through the constitutional filter<sup>33</sup> coupled with the amendments that have been,<sup>34</sup> and are yet to be made, suggests that these provisions not only dictates the procedure of execution currently – but will also dictate it in the future.<sup>35</sup>

#### **(e) Purpose of this study**

The purpose of this study is to critically examine the legal process regarding the repossession of immovable property that is subject to a mortgage bond; from the point of default to the sale in execution. The evaluation of the procedure of execution will then seek to discover whether or

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<sup>28</sup> Act 32 of 1944.

<sup>29</sup> These rules regulate the conduct of the proceedings in all the regional and district divisions of the Magistrates' Court of South Africa and are made in terms of Section 6 of the Rules Board for Courts of Law Act, 107 1985; read with Section 9(6)(a) of the Jurisdiction of Regional Courts Amendment Act, 31 2008.

<sup>30</sup> These rules regulate the conduct of the proceedings in all the provincial and local divisions of the High Court of South Africa and are made in terms of Section 43(2)(a) of the Supreme Court Act, 59 1959.

<sup>31</sup> In his LLD thesis, *R Brits Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act*, University of Stellenbosch (2012) (hereinafter 'Brits'), Brits asserts that the provisions of the NCA are sufficient to give effect to the Housing Clause.

<sup>32</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19 at para 34.

<sup>33</sup> This refers to the various occasions during which the judiciary has taken the Housing Clause, *inter alia*, into consideration when interpreting each one of these provisions. See generally *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC) (This deals with the provisions in the Magistrates' Court); *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC) (This case dealt with the provisions in the High Court); *Nkata v Firststrand Bank Limited and Others* 2016 (4) SA 257 (CC) (This deals with the reinstatement provisions of the NCA).

<sup>34</sup> The majority of these amendments have come from the judiciary's interpretation and adjustments of these provisions, the matters in note 27 above exemplify this.

<sup>35</sup> The proposed amendments are enumerated in the Amendment Bills.

not the process complies with constitutional socio-economic imperatives. This academic investigation will then suggest possible alterations to be made to the procedure of execution – if the current framework is incompliant with constitutional imperatives.

A secondary, but equally important purpose of this study, is to provide academics, legal professionals and layman alike, with a source that can educate them on this important issue. To my mind, the overarching issue is that the procedure of execution is being abused. This takes many forms, discussed below in this dissertation, which are often insidious due to their seemingly legally compliant nature. My opinion is that the seemingly compliant nature stems from the purely procedural nature of selling immovable property. To further extend the initial point, the secondary purpose of this study is to show the procedure of execution for what it really is, by taking the procedure of execution outside of the courtroom and looking at real life examples of its effects.

To extend the secondary purpose into a tertiary one, I additionally hope that by adding to the academic work on this topic, it will increase the pressure on legislatures to make the legislative changes proposed not only in this paper, but of other concerned academics as well.

In summation I would hope that this dissertation has more than just an academic effect. My intention is to structure and draft this study in a manner that makes it accessible for consumption by the public at large.

#### **(f) Reason for Undertaking the Study**

The law surrounding repossession in South Africa has been the subject of much academic, judicial and public debate in recent years.<sup>36</sup> The surrounding law has been changing at a rate of knots, with legislative intervention nearing completion.<sup>37</sup> Academic input has been plentiful with Doctorate level dissertations published by Brits,<sup>38</sup> Steyn<sup>39</sup> and Shaw;<sup>40</sup> who have all covered the proliferation of judicial development in this area.

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<sup>36</sup> See generally: <http://uncensoredopinion.co.za/human-rights-commission-right-housing-abused-banks/> (Accessed December 15<sup>th</sup> 2016); IOL news South Africa 'Banks to be sued over repossession' <http://www.iol.co.za/news/crime-courts/banks-to-be-sued-over-repossessions-1.1854341> (Accessed 12 October 2015); Sapa 'Pensioner's home confiscated, sold for profit' IOL news South Africa (26 December 2004) <http://www.iol.co.za/news/south-africa/pensioner-shome-confiscated-sold-for-profit-1.230318> (date of use 15 October 2015); Sapa 'Protest over pensioner's plight' News24 South Africa (6 January 2010) <http://www.news24.com/SouthAfrica/News/Protest-overpensioners-plight-20100106> (date of use 15 October 2015 2012).

<sup>37</sup> See The Amendment Bills, 2016.

<sup>38</sup> R Brits Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act, LLD Thesis, University of Stellenbosch 2012.

<sup>39</sup> Steyn, Statutory regulation of forced sale of a home in South Africa, LLD thesis, University of Pretoria, 2012.

<sup>40</sup> Shaw, As Yet Untitled and Unpublished, LLD thesis, University of Johannesburg, 2016.

The reasoning is to consolidate the plethora of information on this topic, to set out a clear understanding of the subject and a way forward. Despite the wealth of information and jurisprudence available on this topic, it appears South African repossession laws are still letting citizens down by allowing not only large volumes of sales in execution to take place; but also allowing injustices to take place<sup>41</sup> within the procedure of execution.

In addition to the above reasons, lurks a personal investment in this topic. I have personally been subject to the process and have personally uncovered instances where credit providers have acted unscrupulously. The stand-out memory from concluding that process (thankfully before sale in execution), is how banks do this to people who are in a far worse-off position, both financially and in terms of how they understand their legal position and rights.

Being cognisant of these factors, I hope to take this study further and convert it into an LLD, to further advance the proposed factors above.

### **(g) My Approach to this Study**

This study will inspect the root of repossession from the law of security, as well as its journey to the current place it holds in our law. The examination will consider the developments in the NCA on how owners of immovable property are offered protection; and the procedure of execution of realising the immovable property as contained in the MCA and HCR respectively. A discussion of judicial developments and their significance in arriving at our current position will conclude the summary of the current state of the South African law regarding the repossession of immovable property.

The discussion of the current state of our law will include insights on how it is failing the people that require its protection the most, as well as the crippling disparity between the letter and enforcement of the law, a realistic versus a theoretical balancing of housing rights and finally how we reason away walking beneath the high bar our Constitution has set to the peril of the people.

From my perspective, there are various issues that make the current Procedure problematic. These include, *inter alia*, houses being sold for below their market value; houses being sold without giving the owners proper notice; various administrative irregularities occurring during the procedure of execution and citizens not being fully aware of their rights.

The author will then put forward his proposal as to how we can ameliorate and even eradicate these issues. Ultimately, we need to move towards a reality where the interests of both the owner of a home and the creditor are balanced in line with our unique constitutional values; as

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<sup>41</sup> See Chapter 5 below.

opposed to a theoretical sphere that produces undesirable results for the people it was largely designed to protect.

In concluding this paper, the author will offer his thoughts on the importance of shifting our attitude in addition to changing the law to maximise the potential for positive changes within the vital and inextricable nexus that our law shares with our society. This is in light of our current mercurial socio-political climate that seems to finally be producing the overdue results that our Constitution has long promised; a light that could perhaps be used to illuminate similar essentials namely housing.

#### **(h) Literature Review**

##### ***Jaftha v Schoeman 2005 (2) SA 140 (CC) & Gundwana v Steko Development CC and others 2011 (8) BCLR 792 (CC)***

These are the leading cases regarding the sale of a home in execution of a debt. The main differences in both cases were that in *Jaftha*, the debt was unsecured so the property was initially declared executable in the Magistrates' Court; while in *Gundwana* the debt was secured by a mortgage bond and declared executable in the High Court.

These cases dealt with two important factors, firstly the power of the clerk and registrar respectively to declare immovable property executable; and the factors that need to be taken into account before declaring property to be executable. The crux of both argument which reached the Constitutional Court, revolved around the multi-dimensional right of access to adequate housing in section 26 of the Constitution.

In terms of this dissertation and research topic, what these cases did, at different judicial levels, was to stimulate the judicial debate regarding the constitutional right to adequate housing. It further gave an insight into the increased weight a right has when it is already in existence, and the need to guard against removing such a fundamental human right – particularly in an arbitrary or systematic manner. The opening up of this debate gives me space to assert my thoughts and ideas on how the procedure of execution leading to the limiting of an existing fundamental right needs to be regulated and protected than a far more rigorous manner than is currently the case.

These two cases facilitate the basic premise of this dissertation that South Africa can make its law regarding the execution of immovable property more stringent.



### ***Nkata v Firststrand Bank Limited and Others 2016 (4) SA 257 (CC)***

The judgment in this matter added important direction to the jurisprudence on the topic of sales of immovable property in execution. In this matter the Constitutional Court again infused the constitutionally-entrenched notions of fairness and equality into their interpretation of Section 129(3) of the NCA.

The matter dealt mainly with the issue of when a credit agreement (a mortgage agreement) can be reinstated. The court also pronounced on the issue of the costs incidental to the reinstatement of said credit agreement.

The court ruled in favour of Ms. Nkata and held that once all the arrears are paid, at any time before the actual sale in execution – the credit agreement is reinstated. This happens regardless of the willingness of the credit provider. In addition, it effectively placed the burden on the credit provider to quantify and demand reinstatement costs.

In addition to directly adjudicating on the facts at hand, the court also indicated the intention of the judiciary to give effect to the Housing Clause. This matches the intention of *Jaftha* and *Gundwana* above.

### **The National Credit Act 34 of 2005**

The National Credit Act is one of the newer pieces of legislation that has such a far-reaching effect for businesses and ordinary South Africans (consumers) alike. The NCA applies to every agreement defined as such under the NCA, unless exempted under section 4. In the wake of such a monumental piece of legislation, there has been a predictable squabble, over the interpretation and effect of many provisions of the NCA.

The preamble to the Act cuts straight to the goal of restoring parity regarding access to credit, as well as other racial contingencies directly focused on correcting past imbalances. The preamble goes on to outline specific goals relating to creating a better credit market in general, to be aided by the creating of regulatory bodies as well by using the provisions of the NCA itself.

The NCA provides for certain, more stringent, time-periods, notifications methods, diligence by credit providers among other mechanisms that are provided for to help potentially unknowing consumers. These include mandatory referrals to debt counselors in some circumstances which encompass reviews of the credit agreement when a debtor is in default, allowing for flexible solutions to be implemented before rigid and harsh enforcement can happen.

With regard to this dissertation, the NCA is vitally important; it mainly provides for the preliminary procedures and protections before litigation is initiated.



**Brits, Mortgage foreclosure under the Constitution: Property, Housing and the National Credit Act, LLD thesis, University of Stellenbosch, 2012 & Steyn, Statutory regulation of forced sale of a home in South Africa, LLD thesis, University of Pretoria, 2012**

The doctoral theses by Brits and Steyn respectively are crucial to the structure of this dissertation. Although the authors have contrary views on the current mechanisms in place, the perspectives that lead to such diverging conclusions are invaluable to the education and subsequent critique on this topic. The structure, sources, nuances, perspectives, and relevance of these two sources which examine the process of the sale in execution of immovable property, give me scope to work with academic ideas that have already been formally asserted. This adds to the critique of the primary sources, and validates my claim that reform is needed, albeit with differing ideas on the nature of said reform.

Brits asserts that regardless of deficiencies in the common law framework, the National Credit Act (NCA) provides for sufficient protection of a debtor with regards to section 25 and 26 of the Constitution.

Steyn takes the view that despite the attempted advances in developing our common law to protect the debtor more, again in the light of section 25 and 26 of the Constitution, there must be more certainty as to the circumstances under which immovable property will or will not be sold in execution.

Tentatively, I hypothesize that legislative reform is needed for all sales of immovable property, regardless of the property being the subject to a mortgage bond (perhaps conditions should vary for hypothecated and unhypothecated property).

**Shaw, As Yet Untitled and Unpublished, LLD thesis, University of Johannesburg, 2016**

Advocate Douglas Shaw practices in Johannesburg and is a practical legal professional with several foreign jurisdictions. In addition to practicing in South Africa, he has practiced in the United Kingdom (hereinafter 'the UK') and has practically analysed the law in this area, worldwide. He has generously allowed me to use his unpublished material as a source. His writing include important statistics from credible sources, as well as his own invaluable insights which have been shaped by practicing in this area of law.

Shaw gives a vastly more practical view on the Process and is scathing in his evaluation of the current procedure in South Africa. He uses statistics to compare the situation in South Africa to the United States of America (hereinafter 'the USA') and the UK. In addition to the comparative use of statistics, Shaw interprets the data to provide conclusions. This is the first piece of academic research on this topic that I have come across which includes statistics. This adds great value and strength to the argument made for legislative reform.

**Du Plessis, Judicial oversight for sales in execution of residential property and the National Credit Act, 2012, *De Jure*, 532**

Du Plessis gives a good summary of the chain of events that started the change that we are currently experiencing (which I hope to continue) within the law regarding the sale in execution of immovable property. It charts the course from the ratification of the NCA to the mini-resolution of the *Gundwana* case.

For the purposes of this study, it puts forward very little in terms of a critical analysis, but what it does provide is a succinct, yet informative, overview of the developments in this specific area of law. This helps immeasurably when tackling more detailed and complex texts on the topic by providing a solid and simple overview.

**PJ Badenhorst *et al Silberberg and Schoeman's: The Law of Property* (5<sup>th</sup> Edition) 2006 and Lubbe and Scott '*Mortgage and Pledge*' LAWSA 17**

These textbooks give a detailed overview of the law of security, which is ideal for academics professionals alike.

Its utility in the context of its structure and contents are ideal for this study. My research topic is couched on the law of security, which both the texts give common law foundation. The focus will be placed on the procedure of execution through which security for a debt is realised by the creditor; regarding immovable property specifically. Although there are books dedicated to the law of security, which forms the basis of and aids the understanding of the overall topic; therefore an authoritative and detailed discussion is crucial so as not to lose the focus of the dissertation – making these books fit for purpose.

Furthermore, this text provides for a sound understanding of the importance of security as a mechanism to get access to housing initially; which will be a crucial factor in understanding the need for sales in execution.

**(i) Research questions**

1. How does immovable property get sold in execution?
  - a. What is the current procedure?
  - b. What is the current legislation?
  - c. What remedies are available to a debtor?
  - d. How has the law developed to arrive at this point?

- e. Are there any developments afoot?
2. How does the current situation align with our constitutional imperatives?
  - a. Is the right to housing (section 26) given proper effect?
  - b. What challenges do creditors and debtors face regarding the current procedures and legislation?
3. How have the seminal cases interpreted South Africa's constitutional imperatives in the form of the Housing Clause balanced against the procedure of execution?
  - a. What are the main issues in these cases?
4. How can these deficiencies be remedied by legislation?
5. What proposals should I make to remedy any deficiencies I may find in this study?

**(j) Methodology**

My research is limited to a desktop study. In the main I will use reported judgments, legislation, standard contractual provisions, articles and other academic works to complete the study. I will also make reference to newspaper reports.

These sources will be to inform and buttress my recommendations as well as to set out the basis of the current standing of the law.

## **CHAPTER 2 – AN OVERVIEW OF THE CURRENT SUBSTANTIVE AND PROCEDURAL LAW REGARDING THE SALE OF IMMOVABLE PROPERTY IN EXECUTION OF A JUDGMENT DEBT IN SOUTH AFRICA**

### **(a) Chapter overview**

The purpose of this chapter is to explain the substantive theory behind mortgage bonds and the practical procedure that must be followed to enforce the right derived from the substantive law.

The first part of this chapter will briefly discuss the general law of security, before exploring the more specific area of mortgage bonds. The first section concludes with a contextualisation of the substantive law, and why it is important to consider it when evaluating the procedure of execution.

The second part of the chapter will examine the steps that need to be followed to exercise the substantive right discussed in part one. While the substantive law discussed in this chapter is for context, I assert that the procedural aspects are included to exemplify the flaws in mortgage law in South Africa. On this point, the strengths and weaknesses of the procedure of execution will be discussed – as a precursor to the recommendations that will be made in Chapter 4. These recommendations will be aimed at correcting any apparent weaknesses in the procedure of execution.

### **(b) The current substantive law regarding the sale of immovable property in South Africa**

#### **(i) Security in general**

Although this study focuses on the procedure of execution, the actual right that the procedure of execution wishes to enforce, namely the right of a creditor to be repaid the amount he is owed by the debtor by selling the immovable property of the debtor, is derived from the law of security.

Primarily, the function of a security agreement is to ensure that a debtor discharges their obligation under an agreement and to indemnify the creditor should the discharging of the debt not be forthcoming.<sup>42</sup> Theoretically, any valid obligation may be secured. Logically, when the creditor undertakes to give credit to the debtor (in whatever form) he runs the risk that some, or part, of the corresponding performance will not be reciprocated.<sup>43</sup> That risk can either can be

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<sup>42</sup> *Seamen Bros v Collett* 1928 EDL 170 at 173; Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3rd ed 1987) at 1; Lubbe and Scott "Mortgage and Pledge" *LAWSA* 17 pars 439 – 441, 459, 464, 467 and 479.

<sup>43</sup> Van der Merwe S et al *Contract: General Principles* (3<sup>rd</sup> Edition) 2007 at 2ff and 8ff; Christie RH *The Law of Contract in South Africa* (5<sup>th</sup> Edition) 2006 at 2.

minimised or removed by an accessory contract of security. The amount of security a person can put forward bears significantly on the amount of credit they can obtain.<sup>44</sup>

Real security, as mentioned above, comes in many different forms depending on the extent and nature of the security in question. The defining characteristic of real security is its relativity to property which can be enforced against the world at large<sup>45</sup> as opposed to personal security which can only be enforced between specific individuals.<sup>46</sup>

Examples of real security include pledge of property to a creditor until completion of the contract.<sup>47</sup> Pledge involves physical delivery of movable property to the creditor<sup>48</sup>. If the obligation fails to be discharged as agreed, the pledged property may be sold or kept as satisfaction for the outstanding obligation.<sup>49</sup> Another example of real security is a notarial bond. A notarial bond operates similarly to a mortgage bond, bar its application exclusively to movable property. A notarial bond gives a creditor a preferential and real right over movable property, while a mortgage bond operates with immovable property.<sup>50</sup>

#### (ii) The Mortgage Bond

The most common, and invariably the most valuable type of security agreement, is a mortgage bond.<sup>51</sup> A mortgage bond is a document which hypothecates immovable property, and when registered,<sup>52</sup> creates a real right of security over the immovable property.<sup>53</sup>

The main right that a creditor obtains from a mortgage is a limited real right of security.<sup>54</sup> An item of immovable property can be seen as a collection of real rights that fit together to form the most

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<sup>44</sup>*Oliphants Tin "B" Syndicate v De Jager* 1912 AD 432. Additionally in terms of Section 80 of the NCA; a creditor must conduct an investigation into whether or not a debtor can afford to pay back the amounts under the credit agreement and that the debtor understands the risks, costs and obligations under the credit agreement.

<sup>45</sup> Brits (note 26 above) 26.

<sup>46</sup> See generally, JC de Wet & AH van Wyk *Die Suid-Afrikaanse kontraktereg en handelsreg* (5th Edition) 1992 391-401.

<sup>47</sup> See generally, Wille's and PJ Badenhorst et al Silberberg and Schoeman's *the law of property* (5th Edition) 2006.

<sup>48</sup> GF Lubbe "Mortgage and pledge" rev TJ Scott in WA Joubert & JA Faris (eds) *LAWSA Vol 17 Part 2* (2nd Edition) 2008 324-404.

<sup>49</sup> PJ Badenhorst et al Silberberg and Schoeman: *The Law of Property* 390-395; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2<sup>nd</sup> Edition) 1994 at 754-760.

<sup>50</sup> PJ Badenhorst et al Silberberg and Schoeman's: *The law of property* (5<sup>th</sup> Edition) 2006 384-390; JC Sonnekus & JL Neels *Sakereg vonnisbundel* 1994 754-760.

<sup>51</sup> Although this area of law is taken from our Roman-Dutch legal heritage, the term 'mortgage bond' derived from English Law. Gibson *South African Mercantile and Company Law* (4<sup>th</sup> Edition) 1977 at 562.

<sup>52</sup> See note 121 and 122 below.

<sup>53</sup> JC Sonnekus '*Sub hasta-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging*' 2008 TSAR 696-727 at 716.

<sup>54</sup> JC Sonnekus '*Sub hasta-veilings en die onderskeid tussen oorspronklike en afgeleide wyses van regsverkryging*' 2008 TSAR 696-727 714.

complete real right, ownership.<sup>55</sup> Pieces (real rights) of ownership can be given to others without relinquishing ownership.<sup>56</sup> In the case of a mortgage bond, the real right ceded to the mortgagee is the right to sell the immovable property in execution when the mortgagor cannot meet his obligation under the principal agreement.<sup>57</sup> The limited real right of security registered against the deed of the property is the spring from which the other incidental rights of a mortgage agreement can be sourced.<sup>58</sup>

Conception of a mortgage bond occurs in two essential steps: contract (regulated by contract law) and registration (regulated by property law).<sup>59</sup> There are no real formalities regarding the contractual requirement, besides the general pillars of contract, and the additional rule that contracts regarding immovable property must be reduced to writing.<sup>60</sup> It should be noted that the NCA also stipulates particular contractual requirements that apply to credit agreements.<sup>61</sup>

Registration, which is required by the law of property, enunciates the gravity of a mortgage bond. The registration and required documents must be prepared by a registered conveyancer.<sup>62</sup> The conveyancer alone is responsible for the contents of the registration documents.<sup>63</sup> Once prepared the documents must be executed by the owner of the property in person or their agent authorised with power of attorney, in the presence of, and attested to by the Registrar of Deeds.<sup>64</sup> Registration of a mortgage bond is what transforms it from a personal right,<sup>65</sup> to a real right.<sup>66</sup>

Failure to register the mortgage bond does not prejudice the mortgagee in terms of their rights against the mortgagor, but it does affect the mortgagee in relation to third parties.<sup>67</sup> Preference over third parties is one of the significant advantages of the mortgage bond for the mortgagee.<sup>68</sup> The real right created by registration has the consequence of making the mortgagee a

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<sup>55</sup> R Brits (note 26 above) 25.

<sup>56</sup> Kilbourne and Botha "The ABC of Conveyancing" 2015 at 2-5.

<sup>57</sup> R Brits (note 26 above) 27.

<sup>58</sup> In *Oloff v. Minnie*, 1953 (1) SA 1 (A) our then highest court described the multi-faceted nature of a mortgage bond by stating: "a mortgage bond as we know it is an acknowledgment of debt and at the same time an instrument hypothecating landed property or other goods".

<sup>59</sup> CG van der Merwe *Sakereg* (2<sup>nd</sup> Edition) 1989 at 620.

<sup>60</sup> CG van der Merwe *Sakereg* (2<sup>nd</sup> Edition) 1989 at 621.

<sup>61</sup> Section 86(7) of the NCA.

<sup>62</sup> The Deeds Registries Act 47 of 1937, section 43(1).

<sup>63</sup> *Kilbourne and Botha* (note 70 above) at 17-1.

<sup>64</sup> The Deeds Registries Act 47 of 1937, section 50(1).

<sup>65</sup> *Lief NO v Dettmann* 1964 (2) SA 252 (A).

<sup>66</sup> See generally part 3 of Kilbourne and Both (note 70 above) for a complete rundown of the registration process.

<sup>67</sup> As explained above, only a real right (which has to be properly registered with the Deeds Registry) is enforceable against the world at large.

<sup>68</sup> PJ Badenhorst *et al Silberberg and Schoeman's: The Law of Property* (5<sup>th</sup> Edition) 2006 at 361-363.

preferential creditor, which is a creditor that has a real right over the immovable property in question, to the exclusion of other creditors in the context of a mortgage bond.

(iii) The Rights of a Creditor Regarding a Mortgage Bond

As alluded to above, the mortgage bond affords additional rights to the creditor that flow from the limited real right<sup>69</sup>: the right to limit the handling of the property by the owner and to follow the property.<sup>70</sup>

In the case where the mortgagor defaults on their mortgage agreement, the right to follow the property gives the creditor the right to have the property declared executable and sold to discharge the obligation to the mortgagee. The value of a mortgage bond to a creditor lies within their ability to enforce this right. The possibility that a creditor can enforce this right, acts as a deterrent to the debtor against defaulting on their instalments in terms of the mortgage agreement. In addition to this, if the debtor cannot meet their obligations under the agreement, the right can actually be enforced so that the creditor is fully remunerated for the outstanding amount under the agreement, plus costs and interest.

From a contractual perspective, part of why a mortgage such a formidable right, and why it affords security to a large debt, lies in the acceleration and foreclosure clauses. These are now standard in a mortgage bond agreement.<sup>71</sup>

Although an acceleration clause and a foreclosure clause perform separate legal functions, they are usually combined into a single, formidable, clause in the agreement.<sup>72</sup> Firstly the acceleration clause provides for the entire outstanding debt to become due and payable as soon as the mortgagor defaults on their payment structure.<sup>73</sup> Subsequent to the debt becoming entirely due, the foreclosure clause entitles the mortgagee to sell the property in execution.<sup>74</sup>

There are two practical notes to make on each clause. Regarding the acceleration clause, with advent of the NCA and even internal intervention by banks (who are typically the mortgagee in South African banking law), there is usually a long process before payment default results in the debt becoming due and payable in totality. Section 129(3) of the NCA now allows for execution

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<sup>69</sup> In *Oliff v. Minnie*, 1953 (1) SA 1 (A) the court defined a mortgage bond as ‘a mortgage bond as we know it is an acknowledgment of debt and at the same time an instrument hypothecating landed property or other goods’.

<sup>70</sup> PJ Badenhorst *et al Silberberg and Schoeman’s: The Law of Property* (5<sup>th</sup> Edition) 2006 at 363.

<sup>71</sup> PJ Badenhorst *et al Silberberg and Schoeman’s: The Law of Property* (5<sup>th</sup> Edition) 2006 at 364.

<sup>72</sup> Lubbe and Scott ‘*Mortgage and Pledge*’ *LAWSA* 17 at paras 465, 472; R Brits (note 26 above) 46.

<sup>73</sup> Christie *Law of Contract* at 420-421; Van der Merwe *et al Contract* at 380; *TG Bradfield Coastal Properties (Pty) Ltd. & Another v Toogood* 1977 2 SA 724 (EC) 730.

<sup>74</sup> This is the ratio from the *Nedcor Bank Ltd v Kindo* 2002 3 SA 185 (C) matter.



to be stayed once only the arrear amounts under the credit agreement are paid.<sup>75</sup> This section basically nullifies the effect of an acceleration clause of a credit agreement with regard to execution – if the entire outstanding amount is paid in full. Despite this, with regard to other aspects such as, *inter alia*, the amount due, owing and payable for purposes of interest, the acceleration clause may still be a prudent inclusion in credit agreements, and the *Nkata* judgment notwithstanding, will likely still be included in future as a matter of course.

Regarding the foreclosure part of this clause, our courts<sup>76</sup> have decided that practical necessity and common law dictate that the substantive right to foreclose and sell a property in execution is an implied term of a mortgage agreement, and need not be written into the contract.<sup>77</sup> A foreclosure clause written into the mortgage agreement would be preferable, however, to avoid any disputes and to expedite the foreclosure process.

The final significant entitlement that a mortgagee obtains as a holder of a real right in the property, is the exclusivity of the right to sell the property.<sup>78</sup> The consequence of this is that regardless of other monetary claims against the debtor,<sup>79</sup> the immovable property subject to the mortgage bond may not be sold to satisfy such claim.<sup>80</sup>

#### (iv) Prohibited provisions

The distinctive nature of the mortgage bond has the further consequence of disallowing contractual clauses that would, but for the nature of the security interest, be allowed. The most common example is a *parate executie*<sup>81</sup> which is a clause that allows for summary judgement (judgement against the debtor without his notice), which is void in the case of mortgage bonds<sup>82</sup>. The other void clause in a mortgage agreement is the *pactum commissorium*,<sup>83</sup> which is a clause

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<sup>75</sup> This is discussed in more detail in Chapter 3 below.

<sup>76</sup> R Brits (note 26 above) 45.

<sup>77</sup> PJ Badenhorst *et al Silberberg and Schoeman's: The Law of Property* (5<sup>th</sup> Edition) 2006 at 364; R Sharrock *Business Transaction Law* 8<sup>th</sup> ed 2011 at 751.

<sup>78</sup> PJ Badenhorst *et al Silberberg and Schoeman's: The Law of Property* (5<sup>th</sup> Edition) 2006 at 371-373; JC Sonnekus & JL Neels *Sakereg vonnisbundel* (2<sup>nd</sup> Edition) 1994 at 752-753.

<sup>79</sup> Often, debtors will owe money to other creditors in addition to their mortgage bond. The case often arises where said creditors may want to foreclose on the immovable property owned by the debtor. The mortgage agreement properly registered against the property, creating a real right, does not allow this.

<sup>80</sup> See note 77 above.

<sup>81</sup> *Iscor Housing Utility Co and Another v Chief Registrar of Deeds* 1971 1 SA 614 (T); Brits (note 26 above) at 50; PJ Badenhorst *et al Silberberg and Schoeman's: The Law of Property* (5<sup>th</sup> Edition) 2006 at 368; R Sharrock (note 76 above) at 749.

<sup>82</sup> *The Law of Property* (5<sup>th</sup> Edition) 2006 at 368; R Sharrock (note 76 above) at 749.

<sup>83</sup> *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A) 611; Brits (note 26 above) at 50; PJ Badenhorst *et al Silberberg and Schoeman's: The Law of Property* (5<sup>th</sup> Edition) 2006 at 368; R Sharrock (note 76 above) at 749.



that states the ownership of the immovable property will automatically transfer to the mortgagee upon default of the mortgagor.

The sum effect of these clauses being unlawful is that a mortgagee cannot sell the property subject to the mortgage bond without approval of a competent court.<sup>84</sup> Consequently, for a mortgagee to enforce his right in the property as discussed above, the procedure of execution must be followed.

(v) Comments on the current substantive law

The rights of a creditor in terms of the law of security may seem clear-cut and infallible in light of the substantive considerations above. This contention is enhanced when considering that the substantive aspects of the law around mortgage bonds remains largely unchanged (bar the prohibited provisions discussed directly above) – even in light of the socio-economic emphasis of the Bill of Rights.<sup>85</sup> However, the seemingly clear-cut and infallible rights of the creditor are eroded by the specific circumstances of both the creditor and debtor,<sup>86</sup> when the right to call-up the mortgage in terms of the procedure of execution is exercised. This is to ensure that the right to foreclose on a mortgage is not abused<sup>87</sup> and that due process is followed so that fairness is ensured.

Therefore, I aver that it is crucial that the procedure of execution is perfected as far as practically possible to avoid prejudice to both parties. I further aver that the issues in the procedure of execution do not stem from the substantive aspects of mortgage bonds. Indeed, as expressed in *Standard Bank of South Africa Ltd v Saunderson and Others*.<sup>88</sup> The actual value of a real security right such as a mortgage bond, lies in its enforcement. Logic dictates that without the value of the right to foreclose on a mortgage, no money would be advanced by the creditor to purchase the immovable property in the first place. The absence of such credit being extended would undoubtedly lead to an economic crisis, in my opinion.

Consequently, my view is that mortgage bonds are a vital tool in fostering social and economic growth.<sup>89</sup> The positive role they play in society must be understood, to fully understand the corresponding imperative of having the correct law to govern them. I fully agree with *Brits* when

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<sup>84</sup> *Brits* (note 26 above) at 50.

<sup>85</sup> Chapter 2, the Constitution.

<sup>86</sup> The need for this balance was emphasised in *Jaftha v Schoeman* 2005 (CC) at para 55.

<sup>87</sup> In *Gundwana v Steko Development and Others* at para 48 the CC aptly remarked that agreeing to bond one's property does 'equate to a licence for the mortgagee to enforce execution in bad faith'. Clearly then, there is a need for the real right over the immovable property the creditor holds to be regulated.

<sup>88</sup> 2006 2 SA 264 (SCA) at para 3 (hereinafter '*Saunderson*').

<sup>89</sup> *Nedcore Bank Ltd v Kindo* 2002 3 SA 185 (C) provides for a general discussion on the importance of the mortgage bond to this end.

he states that the mortgage is a formidable right.<sup>90</sup> It can be a formidable catalyst for growth when regulated properly, and a formidable force of social destruction when open to abuse.

The following section seeks to explain the procedure of execution around enforcing the theoretical real right a creditor gains from a mortgage bond.

### **(c) The current procedural law regarding the sale of immovable property in South Africa**

#### **(i) Section overview**

This section details the practical application of the procedure of execution, from default on a mortgage agreement to the sale in execution of the mortgaged property. It flows from the previous topic by explaining the practical steps a creditor needs to take to enforce his real right in the property, which is to have it sold in execution. The monetary proceeds from the sale in execution are used to pay back the outstanding amount owed to the creditor by the debtor in terms of the mortgage agreement.<sup>91</sup>

The pre-judicial requirements and protections that the NCA contains will be visited. The contractual basis on which judicial relief via the procedure of execution is sought will then be discussed, before the actual litigious elements of the procedure of execution are then dealt with.

#### **(ii) Preliminary Procedures and Protections from the NCA**

##### **(1) The Purpose of the NCA**

The NCA was enacted, *inter alia*, to encourage and foster a credit model that reflected an important South African core value of equality, while paying special attention to black economic empowerment.<sup>92</sup> The effect of the NCA cannot be overstated; at the time of enactment it replaced all other consumer legislation in South Africa.<sup>93</sup> Due to its overarching nature in the new

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<sup>90</sup> Brits (note 26 above) 45.

<sup>91</sup> See: *Rothschild v Lowndes* 1908 TS at 493 and 498; *Roodepoort United Main Reef GM Co Ltd (In Liquidation) v Du Toit NO* 1928 AD 66 at 71. See also TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (3<sup>rd</sup> Edition) 1987 at 128.

<sup>92</sup> Preamble, The NCA; Mathe-Ndlazi *Aspects of Debt Enforcement Under the National Credit Act 34 of 2005*, LLM Dissertation, The University of Pretoria, 2015 at 2; Boraine and Renke *De Jure* at 223.

<sup>93</sup> Section 172(4), the NCA. The pieces of law that the NCA are the Usury Act 73 of 1968; the Credit Agreements Act 75 of 1980; and the Integration of Usury Laws Act 57 of 1996. Section 172(2) of the NCA also partially repealed 15 other pieces of legislation.

South African consumer credit dispensation, academic<sup>94</sup> as well as judicial<sup>95</sup> interpretation and opinion continue to flow on the NCA – making its authority more potent as legal clarity on its provisions develops.<sup>96</sup>

The legislature was especially deliberate when drafting, including a specific section sounding out the purpose of, the NCA.<sup>97</sup> the purpose echoes the Preamble by stating:

*‘The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers’<sup>98</sup>*

The pertinent mechanisms, in relation to this study, for achieving the purposes of the NCA (as stated above) are:

- Ensuring consistent treatment for different credit products and providers;<sup>99</sup>
- The promotion of equality in the credit marketplace by balancing the rights and responsibilities of creditor providers and debtors<sup>100</sup> alike;<sup>101</sup>
- Providing debtors with protection from deception as well as unfair and fraudulent conduct from credit providers and bureaux;<sup>102</sup> and
- Providing for a consistent and accessible system of consensual resolution of disputes stemming from credit agreements.<sup>103</sup>

While the purpose and preamble of the NCA are not binding in nature themselves, Section 2(1) dictates that the NCA be interpreted in light of its stated purpose. This provides for an important

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<sup>94</sup> The seminal academic text on the NCA, from my experience and in my opinion, is JM Otto & R-L Otto *The National Credit Act explained* (3<sup>rd</sup> Edition) 2013; see also Coetzee *‘The Impact of the National Credit Act on Civil Procedural Aspects Relating to Debt Enforcement’* LLM Dissertation The University of Pretoria 2009.

<sup>95</sup> *Nkata v Firststrand Bank Limited and Others* 2016 (4) SA 257 (CC) is a recent CC case which deals specifically with the provisions of the NCA that deal with reinstatement of a credit agreement – in specific relation to a mortgage agreement. Besides the *ratio* in the matter, the judgement exemplified how provisions of the NCA require different interpretations for different types of credit agreements. It also showed that there is a long way to go before the full effect of the NCA is felt, with many sections still requiring judicial interpretation to give them full effect.

<sup>96</sup> Such was the promise of the NCA when it first came into force *Brits* (note 26 above) at 144 states that “The role that the NCA can play to alleviate the financial and socio-economic pressures on over-indebted homeowners faced with foreclosure is potentially invaluable.”

<sup>97</sup> Section 3, the NCA.

<sup>98</sup> *Supra*.

<sup>99</sup> Section 3(b), the NCA.

<sup>100</sup> Note that in terms of the NCA the correct term for what would traditionally be called a debtor is ‘consumer’; for the sake of flow and to avoid confusion I will use the term debtor for this section.

<sup>101</sup> Section 3(d), the NCA.

<sup>102</sup> Section 3(e)(iii), the NCA.

<sup>103</sup> Section 3(h-i), the NCA. For purposes of this dissertation and more specially this study, the credit agreement being referred to is invariably a mortgage agreement.

guide in the interpretation of not only the NCA, but the rights associated with agreements that fall under the NCA.<sup>104</sup>

## (2) Pre-enforcement Procedures under the NCA<sup>105</sup>

The NCA provides for certain procedures to be followed before a credit agreement,<sup>106</sup> in this case a mortgage bond agreement, can be judicially enforced.<sup>107</sup> A debtor must first default on their credit obligations, be it mortgage or otherwise, on debt that is due, owing and payable before the provisions regarding credit agreement enforcement apply under the NCA.

The main way which the NCA features in the procedure of execution is via the Section 129 Notice (hereafter 'the Section 129 Notice') in terms of the NCA. The Section 129 Notice is a written document which must be delivered to the debtor before judicial enforcement of the credit agreement is enforced.<sup>108</sup>

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<sup>104</sup> A good example of the advancement of the purpose of the NCA in the context of the sale in execution of immovable property can be found in *FirstRand Bank Ltd v Maleke* 2010 1 SA 143 (GSJ). In this matter the procedural aspects had been complied with by the credit provider, however, the overdue amounts that led to the default by the consumer were considered trivial by the High Court. In light of this, it was held that an injustice would be done if the immovable property was declared executable, even though the application was procedurally sound – the purpose of the NCA demanded that equality was promoted by balancing the rights and responsibilities of the stakeholders in the matter.

<sup>105</sup> In addition to the general texts on the NCA cited in note 89 above, see Maphalla 'The Section 129(1)(a) Notice as a Prerequisite for Debt Enforcement in terms of the National Credit Act 34 of 2005' LLM Dissertation The University of Pretoria 2015.

<sup>106</sup> See generally Section 8 of the NCA which defines a 'Credit Agreement' for NCA purposes. If the agreement does not meet the requirements of the NCA, the entire NCA will not apply. This is crucial as the NCA provides a significant layer of protection for debtor under the act.

<sup>107</sup> Otto and Otto (note 92 above) at 113 assert that in terms of the NCA 'enforcement' should be interpreted to mean a creditor using any remedies available to him.

<sup>108</sup> Section 130, the NCA; Mathe-Ndlazi (note 90 above) asserts that the main purpose of the Section 129 Notice is to obligate the creditor by forcing them to notify the consumer of the alternate methods at their disposal besides formal legal action; Stoop and Kelly-Louw *The National Credit Act Regarding Suretyships and Reckless Lending* (1<sup>st</sup> Edition) 2012 at 441.

It must be remembered that in terms of the NCA<sup>109</sup> a debtor has to be in *mora*<sup>110</sup> for a period of at least 20 days<sup>111</sup> before the Section 129 Notice can be delivered<sup>112</sup> to the defaulting debtor. Practically, this letter is framed as a letter of demand, which includes the statutory imperatives below.

In addition to alerting the debtor to their default, the content of The Section 129 Notice sets out the avenues of relief available to the debtor which entails the referral of the credit agreement to:<sup>113</sup>

- a debt counsellor;
- an alternate dispute resolution agent;<sup>114</sup>
- the consumer court;<sup>115</sup> or
- an ombud within the jurisdiction.<sup>116</sup>

The NCA states that these options must be engaged in with the intention to resolve any disputes or devise a payment plan under the agreement; these options cannot be taken up for solely dilatory purposes.<sup>117</sup>

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<sup>109</sup> Section 129, the NCA.

<sup>110</sup> In RD Claassen J *Dictionary of legal words and phrases* 2016 it is described as a Latin term borrowed by Roman Law that means something is overdue, or in default.

<sup>111</sup> With regards to the ways days are calculated the interpretation section of the NCA states:

- The day on which the event occurs must be excluded (in this case the day the debt becomes due, owing and payable);
- We must include the day the second event is to occur (the 20<sup>th</sup> day Section 129 notice can be sent out); and finally
- Public holidays, Saturdays and Sundays are excluded.

Section 2(5), the NCA.

<sup>112</sup> Section 168 provides for what constitutes proper service of documents under the NCA. It states when a document is either delivered to the person or sent by registered mail – proper service has taken place.

<sup>113</sup> Section 129(1)(a), the NCA.

<sup>114</sup> Section 1, the NCA defines this as “a person providing services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration”.

<sup>115</sup> Section 1, the NCA defines this as “a body of that name, or a consumer tribunal, established by provincial legislation”.

<sup>116</sup> Section 1, the NCA defers to the Financial Services Ombud Schemes Act 37 of 2004 for the definition of an ombud, the latter act defines this person as someone who has jurisdiction in terms of that Act to deal with a complaint against that financial institution”.

<sup>117</sup> Van Heerden CM and Otto JM *Debt enforcement in terms of the National Credit Act 34 of 2005* TSAR 4 2007 655-684 at para 12.4.1.

The Section 129 Notice gives the debtor 10 days<sup>118</sup> to either elect one of the abovementioned relief mechanisms or pay the arrear amounts in terms of the credit agreement.<sup>119</sup> The opportunity to select one of the options available shows clear intention to avoid litigation.

If no response is forthcoming from the debtor in the form of payment of debt or engagement with one of the remedies set out in the Section 129 Notice within 10 days, judicial proceedings may be brought against the debtor to enforce the debt. If, alternatively, the debtor elects one of the alternate options of relief, no judicial proceeding may be brought or decided until such alternate option is exhausted.<sup>120</sup>

The courts have interpreted The Section 129 Notice in a manner that gives it a dual purpose; to encourage the resolution of a dispute under the corresponding credit agreement and to facilitate the conception of a plan to bring the credit agreement up-to-date.<sup>121</sup> The salient inference to make from this, is that the underlying purposes of The Section 129 Notice (facilitated by the ostensible purposes), are to educate the debtor in their rights and avoid enforcement or cancellation of the agreement.<sup>122</sup>

### (3) Additional protection under the NCA

The final layer of protection that the NCA gives a debtor under the procedure of execution is the ability to reinstate the credit agreement when all overdue amounts are paid in full.<sup>123</sup> In short, the effect of this provision is that a person cannot have their house sold in execution if they pay the arrear amounts on their credit agreement (mortgage bond) at any point before the property is sold at auction.<sup>124</sup> Once the credit agreement is brought up-to-date, it will automatically run as normal, with there being no need to notify, or for the approval of, the creditor with regards to the reinstatement.<sup>125</sup> Another detail to note with regards to this mechanism, is that the NCA does not require The Section 129 Notice to inform the consumer of this relief option.

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<sup>118</sup> See note 47 above with regards to how days are calculated in terms of the NCA.

<sup>119</sup> Section 130(1)(b), the NCA.

<sup>120</sup> Section 130(3)(c)(i), the NCA.

<sup>121</sup> *Nedbank Ltd and Other v The National Credit Regulator* 2011 (3) SA 581 (SCA) at para 12.

<sup>122</sup> In *Sebola v Standard Bank of South Africa* 2012 (5) SA 142 (CC) at para 59 the CC eloquently put it: “(the NCA Notices) are designed to help debtors to restructure their debts, or find other relief, before the guillotine of cancellation or judicial enforcement falls”. In *Naidoo v The Standard Bank of South Africa* 2016 SCA 9 at para 5 the SCA confirmed the importance of alerting the consumer not only to their default, but also to their rights, via the Section 129 Notice.

<sup>123</sup> Section 129(3), the NCA.

<sup>124</sup> *Brits* (note 26 above) at 157.

<sup>125</sup> *Nkata v Firstrand Bank Limited and Others* 2016 (4) SA 257 (CC) at para 104.

#### (4) Comments on the preliminary NCA procedures

With stated purposes of, *inter alia*, enhancing equality, consistency as well as consumer education and protection, the NCA provisions have added significant protection to debtors – particularly in the context of mortgage bonds.<sup>126</sup>

In my opinion, the NCA provides for important pre-judicial procedures and relief mechanisms without which, our mortgage foreclosure procedure would be unsustainable. The Section 129 Notice performs a vital function by essentially making a letter of demand mandatory.<sup>127</sup> In addition to this, there are several relief mechanisms offered by the NCA<sup>128</sup> to assist debtors who are financially distressed – with the ultimate purpose of avoiding judicial enforcement of the credit (mortgage) agreement.<sup>129</sup>

Relative to the mortgage bond, the ability to reinstate the credit agreement when the arrears are paid,<sup>130</sup> in my view, is the most important protection offered to debtors.<sup>131</sup> When considered in the context of a mortgage agreement with an acceleration clause, its value in assisting debtors becomes apparent.<sup>132</sup>

While these provisions are laudable, in considering the cumulative effect of the NCA on the procedure of execution, I aver that its overarching nature should be acknowledged and understood. It applies to all credit agreements that fall within its ambit – not just mortgage agreements. It seeks to regulate credit agreements in general. It is this general nature that stops the NCA from having a more profound positive effect on the procedure of execution.

To my mind, the procedure of execution needs to be legislatively tailored in a manner that best balances the rights of both parties to the mortgage agreement, and should deal specifically with the issues thereof. This is not something the NCA can do, as it does not contain any mortgage-specific provisions and primarily deals with the procedure of execution outside of litigation, while most of the legislation governing the procedure of execution is litigation based.

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<sup>126</sup> Which are the most valuable type of day-to-day credit agreements.

<sup>127</sup> Beyond being merely a letter of demand, the Section 129 Notice also draws to the attention the debtor the amount outstanding and the relief mechanisms available. As I see it, this goes a long way to avoiding judicial proceedings altogether. Avoiding judicial proceedings not only takes the possibility of a debtor losing his home out of the equation, but also limits costs which are usually simply added to the account of the already distressed debtor.

<sup>128</sup> See 2(c)(ii)(2-3) above.

<sup>129</sup> Boraine and Van Heerden *The Conundrum of the Non-compulsory/ Compulsory Notice in terms of Section 129(1)(a) of the National Credit Act* SAMLJ 2011 at 52.

<sup>130</sup> Section 129(3), the NCA.

<sup>131</sup> See 2(c)(ii)(3) above.

<sup>132</sup> The typically large value of the mortgage bond means that it was often impossible for a debtor to pay-off the entire amount that becomes due, owing and payable when an acceleration clause is triggered – before the NCA intervened.



Furthermore, the flaws identified in this study relate primarily to the MCA, MCR and the HCR.<sup>133</sup> My opinion is that it is not the function of the NCA to specifically deal with mortgage-specific issues.

While I do not believe that the NCA alone is sufficient to deal with the issues of the procedure of execution, I do think that its approach to avoiding judicial proceedings should be mirrored in the amendment of the MCA and HCR. Avoiding judicial proceedings not only takes the possibility of a debtor losing their home out of the equation, but also limits costs which are usually just added to the account of the already financially distressed debtor.

Where litigation is unavoidable, I further assert that the MCR and the HCR must be amended in a manner that ensures that the property of the debtor is sold for something close to its value; but also in a manner that is transparent, accountable and fair.

The NCA should be utilised for what it sets out to do, to provide relief mechanisms to the debtor, and to inform the debtor that such mechanisms are available to them. We should rather look to the MCA, MCR and HCR to provide fair and reasonable execution procedures.

*Brits* asserts that the NCA provides sufficient protection to debtors in their bid to have their homes protected from unjust repossession and sale. He explains that:

*‘the NCA provides extensive and innovative protection measures and remedies and that these are nuanced and narrow enough to ensure that there is a proper and justifiable balance.’<sup>134</sup>*

He further states that the NCA must be interpreted in a way that promotes the values underscoring the Housing Clause.<sup>135</sup> To this end, *Brits* suggests that homeowners should use the protections of the NCA and that courts must adjudicate within the framework to prevent homes being sold in execution.<sup>136</sup> He concludes by saying that the NCA provides for justifiable debt relief mechanisms in terms of the procedure of execution<sup>137</sup>, as enunciated in *Gundwana*.<sup>138</sup>

Conversely to *Brits*, *Steyn* believes that legislative reform is needed in the procedure.<sup>139</sup> This mirrors my belief as above. *Steyn* proposed that there should be a ‘menu’ of options when deciding the correct application to commence the litigious stage of the Procedure.<sup>140</sup> The choice of application would be dependent on the facts and circumstances of each situation.<sup>141</sup>

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<sup>133</sup> See 2(c)(v) for a discussion of the flaws in the procedure of execution identified in this study.

<sup>134</sup> *Brits* (note 26 above) at 385.

<sup>135</sup> *Brits* (note 26 above) at 385.

<sup>136</sup> *Brits* (note 26 above) at 385.

<sup>137</sup> *Brits* (note 26 above) at 387.

<sup>138</sup> *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) at para 53.

<sup>139</sup> *Steyn* (note 35 above) at 586.

<sup>140</sup> *Steyn* (note 35 above) at 586.

<sup>141</sup> *Steyn* (note 35 above) at 586.



- (iii) The legal basis under the judicial process of declaring immovable property subject to a mortgage executable

It is important to be cognisant of the legal basis on which an action to enforce a mortgage bond is founded. The basis is, of course, the mortgage agreement.<sup>142</sup> The mortgage agreement is a contract like any other, built on the contractual cornerstone of *pacta sunt servanda*, which Christie describes as the requirement that contracts be enforced, no matter how informal.<sup>143</sup> The consequence of this is that parties are free to enter into agreements as they see fit, and alienate their rights as they wish (*boni mores* and legislation permitting).<sup>144</sup>

A mortgage agreement essentially gives the mortgagee (invariably a bank), a right of security over immovable property in exchange for the capital to the mortgagor purchase said property<sup>145</sup> while the mortgagor remains the owner and remunerates the mortgagee, usually in instalments,<sup>146</sup> so that the mortgagor never exercises their real rights over the property. The right of security over the mortgage bond becomes a real right of security<sup>147</sup> when registered in the Deeds Registry in terms of the Deeds Registries Act.<sup>148</sup> This process is how a mortgage agreement creates a mortgage bond.<sup>149</sup>

It then follows that failure timeously to pay your monthly instalments to the mortgagee is a breach of contract.<sup>150</sup> Therefore when the procedures under the NCA are duly complied with,<sup>151</sup> and a mortgagee wants to enforce their rights under the mortgage agreement, the cause of action would be breach of contract.<sup>152</sup>

Although the cause of action is the often-encountered breach of contract, a mortgage agreement is regarded as *sui generis*; therefore the way the documents commencing judicial proceedings are drafted, differ from other agreements. Accordingly, a summons commencing action in which immovable property is declared executable must read as follows<sup>153</sup> in the MC:<sup>154</sup>

<sup>142</sup> Steyn (note 38 above) at 126.

<sup>143</sup> RH Christie *The Law of Contract in South Africa* 5<sup>th</sup> edition 2006 at 199; Van der Merwe *et al Contract* 2ff, 8ff.

<sup>144</sup> For more on the lengthy topic of illegal and unenforceable contracts see Chapter 10 of Christie at page 337, *supra*.

<sup>145</sup> Lubbe and Scott 'Mortgage and Pledge' *LAWSA* 17 pars 439 – 441, 459, 464, 467 and 479.

<sup>146</sup> Brits (note 26 above) at 49.

<sup>147</sup> A real right of security is a right that is enforceable against the world at large. When a debtor registers the mortgage bond against the property in the Deeds Registry, the mortgage bond becomes a real right of security.

<sup>148</sup> The Deeds Registries Act, 47 of 1937.

<sup>149</sup> Note that these mortgage agreements are 'credit agreements' as defined in section 8 of the NCA.

<sup>150</sup> <sup>150</sup> TJ Scott and S Scott *Wille's: Law of Mortgage and Pledge in South Africa* (3<sup>rd</sup> Edition) 1987 at 128.

<sup>151</sup> While the NCA in no uncertain terms requires the provisions of Sections 129 and 130 to be adhered to before judicial relief is sought, compliance with the NCA is reinforced by Rule 5(7) of the MCR which compels a plaintiff to allege compliance with the NCA.

<sup>152</sup> TJ Scott and S Scott *Wille's: Law of Mortgage and Pledge in South Africa* (3<sup>rd</sup> Edition) 1987 at 204.

<sup>153</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (9) BCLR 1022 (SCA) (hereinafter 'Saunderson').

<sup>154</sup> The judgment in *Saunderson* does not apply to the HC.

*"The defendant's attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for eviction [sic] will infringe that right it is incumbent on the defendant to place information supporting that claim before the Court".<sup>155</sup>*

Besides the abovementioned notice, the summons commencing action must also pray for payment of the overdue amount in addition to asking for the property to be declared executable.<sup>156</sup> In theory, the immovable property may only be declared executable on a judgment debt – in practice they are often prayed for and ordered in tandem.

While the cause of action is breach of contract, the actual right to have the property sold in execution is derived from the creditor's real right to 'hold'<sup>157</sup> the property as security until the debt has been discharged by the debtor.<sup>158</sup> It is also derived from the debtor's contractual duty to pay back the money owed under the mortgage agreement to the creditor.<sup>159</sup>

Being a branch of private law, contractual law usually allows parties to pursue their remedies without the need for judicial consent – this is not the case in terms of mortgage agreements.<sup>160</sup> As explained above<sup>161</sup> the *parate executie*<sup>162</sup> and *pactum commissorium*<sup>163</sup> clauses are unlawful, consequently, the only way to sell a property in execution in terms of a mortgage agreement is via the approval of a competent court.<sup>164</sup>

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<sup>155</sup> Rule 5(10) of the MCR. In her LLD thesis: Steyn *Statutory regulation of forced sale of a home in South Africa*, LLD thesis, University of Pretoria (2012), Steyn asserts that the MCR, which had to be altered to reflect the judgment in *Saunderson*, should contain the word 'execution' in place of eviction. I must agree as having property sold in execution is very different to being evicted. This could be interpreted as another indication of the careless and *laissez-fair* approach that often characterises the procedure of execution.

<sup>156</sup> Property being declared executable occurs when the court gives the sheriff the authority to commence and conclude the process of selling the immovable property in question to satisfy the debts of the debtor, *Execution against immovable property: Negotiating the tightrope of Section 26* Smith and van Niekerk - De Rebus January / February 2010 at 32.

<sup>157</sup> Brits (note 26 above) at 49.

<sup>158</sup> TJ Scott and S Scott Wille's: *Law of Mortgage and Pledge in South Africa* (3<sup>rd</sup> Edition) 1987 at 128.

<sup>159</sup> PJ Badenhorst *et al Silberberg and Schoeman's: The Law of Property* (5<sup>th</sup> Edition) 2006 at 364,

<sup>160</sup> Brits (note 26 above) at 49 states that a mortgagee (creditor), lacks an inherent right to sell the property himself – they must obtain judicial consent by following the procedure of execution.

<sup>161</sup> See note 79 and 80 above.

<sup>162</sup> *Iscor Housing Utility Co and Another v Chief Registrar of Deeds* 1971 1 SA 614 (T); Brits (note 26 above) at 50; PJ Badenhorst *et al Silberberg and Schoeman's: The Law of Property* (5<sup>th</sup> Edition) 2006 at 368; R Sharrock (note 76 above) at 749.

<sup>163</sup> *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A) 611; Brits (note 26 above) at 50; PJ Badenhorst *et al Silberberg and Schoeman's: The Law of Property* (5<sup>th</sup> Edition) 2006 at 368; R Sharrock (note 76 above) at 749.

<sup>164</sup> Brits (note 26 above) at 50.

The compulsory need for judicial approval for a creditor to redeem his real right in terms of the mortgage agreement highlights the need for the procedure of execution to correctly balance the rights of all parties, so that a just and equitable solution is obtained.

(iv) The Formal Judicial Process of Declaring Immovable Property Subject to a Mortgage Executable

(1) Overview of Litigious Aspects of the procedure of execution<sup>165</sup>

The real right a creditor has over the immovable property is based on the remedy they have in executing the property.<sup>166</sup> As explained above, after the provisions of the NCA have been complied with, judicial relief must be sought for a creditor to enforce their real right in the mortgaged property.<sup>167</sup>

Before the formal process of execution can begin, a combined summons<sup>168</sup> must be sued out of the appropriate court and leave to execute against the immovable property secured by the mortgage bond must be prayed for.<sup>169</sup> During this process the debtor has the right to oppose this action, in practice, most applications are not defended by the debtor and judgment is granted by default after days to defend expire. The prayer to declare the immovable property executable is crucial. It formally begins the three step execution process which consists of:

1. A warrant/writ of execution been granted by court;
2. Attachment of the property by the sheriff; and
3. Sale of the immovable property by public auction.<sup>170</sup>

Once the order for both the debt to be paid and the property to be deemed executable is made,<sup>171</sup> the first step of selling immovable property is complete.<sup>172</sup>

The final two steps in the execution procedure are carried out exclusively by the sheriff.<sup>173</sup> The writ of execution given to the sheriff is tantamount to a mandate that he must execute as the

<sup>165</sup> Harms and Southwood *Civil Procedure in Magistrates' Courts* (Online Edition) 2016 at B43.2.

<sup>166</sup> PJ Badenhorst *et al Silberberg and Schoeman's: The Law of Property* (5<sup>th</sup> Edition) 2006 at 363.

<sup>167</sup> Brits (note 26 above) at 49.

<sup>168</sup> Rule 1 of the HCR defines a combined summons as a summons which has a statement of claim attached to it in terms of Rule 17(2)(a). Rule 17(2)(a) of the HCR states that the attachment must contain a statement of the facts on which the Plaintiff wants to rely on (it would be here that the contractual cause of action will be set out for calling up mortgage bonds), in line with Rule 18 regarding pleas in the HC. The corresponding MCR is Rule 5.

<sup>169</sup> A prayer refers to the order which a person is seeking from the court.

<sup>170</sup> *Mattoida Constructions (SA) (Pty) Ltd v E Carbonari Construction (Pty) Ltd* 1973 3 SA 327 (D) 332.

<sup>171</sup> This is usually done in terms of the Plaintiff's prayer mentioned above.

<sup>172</sup> Brit (note 26 above) at 51; Steyn (note 35 above) at 134.

<sup>173</sup> Section 36(1-2), the Supreme Court Act, 59 of 1959; MCR 8.

officer of the court.<sup>174</sup> Consequently, the attachment<sup>175</sup> and auction of the property, as well as all incidental matters surrounding the process, are carried out by either the sheriff or his deputy.<sup>176</sup>

Attachment of the immovable property is done by way of a notice in writing by the sheriff, which must have a copy of the warrant of execution annexed to the notice.<sup>177</sup> Service of the abovementioned notice must be effected in the same manner as a summons to the owner(s) of the property,<sup>178</sup> the registrar of deeds,<sup>179</sup> the local authority in whose area the property is situated and any occupiers of the property that are not the owners.<sup>180</sup>

After attachment the sheriff is theoretically in control of the property; in practice the occupiers remain in control until the auction is completed;<sup>181</sup> or until the occupiers voluntarily leave or are forced to leave by order of a competent court. The sheriff, in some instances, has to evict the occupiers after the property is sold at auction; as he has an obligation to give the purchaser vacant possession of the property.<sup>182</sup>

The sheriff, at this stage in proceedings, is responsible for property being sold and the proceeds paid to the mortgagee less the expenses.<sup>183</sup> The creditor is obliged to set out the particulars of the public auction.<sup>184</sup> The date, place, notice, conditions and advertisement of the sale must be decided in consultation with the sheriff and carried out.<sup>185</sup> This notice must be published in a local newspaper where the property is situated and the Government Gazette; at least 5 days, but

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<sup>174</sup> *Deputy-Sheriff, Cape Town v SAR&H* 1976 2 SA 391 (C) 396.

<sup>175</sup> *Reynders v Rand Bank Bpk* 1978 (2) SA 630 (T) 633E-F.

<sup>176</sup> Section 36(1-2), the Supreme Court Act, 59 of 1959.

<sup>177</sup> MCR 43(2)(a) and HCR 46(3).

<sup>178</sup> In the relatively recent case of *Hopkins Boerdery (Edms) Bpk v Colyn and Another* 2006 1 All SA 497 (C) at paras 50-52; the HC held that in the case of co-ownership, an sale in execution will not be invalidated if the other owner knew of all the steps leading up to execution and did not intervene.

<sup>179</sup> In *Sowden v ABSA Bank Ltd and Others* 1996 3 SA 814 (W) 821-822; the HC held that proper attachment can only be completed once the registrar of deeds receives the attachment notice from the Sheriff.

<sup>180</sup> These requirements are provided for in MCR 43(2)(a) and HCR 46(3).

<sup>181</sup> *ABSA Bank Ltd v Bisnath NO and Others* 2008 4 SA 92 (SCA) paras 24 and 28.

<sup>182</sup> *Sedibe v United Building Society Ltd* 1991 (4) SA 65 (W); Harms and Southwood *Civil Procedure in Magistrates' Courts* (Online Edition) 2016 at B43.4.

<sup>183</sup> HCR 46(7)(a); MCR 43(6)(a); Harms and Southwood *Civil Procedure in Magistrates' Courts* (Online Edition) 2016 at B43.4.

<sup>184</sup> HCR 46(7)(a); MCR 43(6)(a); Harms and Southwood *Civil Procedure in Magistrates' Courts* (Online Edition) 2016 at B43.4.

<sup>185</sup> *Ibid.*

not more than 15 days before the auction.<sup>186</sup> The general rule regarding the time between attachment and auction is a month, besides when a court orders otherwise.<sup>187</sup>

The method of sale is via public auction<sup>188</sup> – no reserve price is set unless the creditor sets one,<sup>189</sup> and the property must be sold to the highest bidder.<sup>190</sup> The lack of a reserve price means that bidding can start at a relatively low amount, however, the obligation to accept the highest bid means that the sheriff has no discretion to do otherwise.<sup>191</sup>

The sheriff must do all that is necessary to effect transfer, as if he were the seller to the purchaser.<sup>192</sup> After the property has been transferred to the purchaser, only the sheriff can receive payment for the property (as opposed to the preferential creditor).<sup>193</sup> It is then his responsibility to transfer the price to the mortgagee less costs and fees. In addition, when the price is more than the outstanding debt,<sup>194</sup> the surplus must be paid back the mortgagor.<sup>195</sup> Furthermore, if the judgment leading to the sale in execution is invalidated, even a *bona fide* purchaser does not have any rights under the sale.<sup>196</sup>

The sale of the property at the public action extinguishes the limited real right of mortgage that the mortgagee held, regardless of whether the debt was fully discharged or not. If the debt is still

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<sup>186</sup> HCR 46(7)(c); MCR 43(6)(c); Harms and Southwood *Civil Procedure in Magistrates' Courts* (Online Edition) 2016 at B43.4 state that this notice is for the benefit of both the creditor and debtor; *Messenger of the Magistrate's Court Durban v Pillay* 1951 (1) SA 259 (N) 684; *Chasfre Investments (Pty) Ltd v Majavie* 1971 (1) SA 219 (C).

<sup>187</sup> HCR 46(8)(a)(i); MCR 43(7)(a).

<sup>188</sup> HCR 46(10); MCR 43(10). While a 'public auction' is not defined, *Brits* suggests that we look to the common law, as per *Syfre's Bank Ltd and Others v Sheriff of the Supreme Court, Durban Central* 1997 1 SA 764 (D) 770-771.

<sup>189</sup> HCR 46(12); MCR 43(10).

<sup>190</sup> HCR 46(10); MCR 43(10).

<sup>191</sup> *McCreath v Wolmarans NO and Others* 2009 (5) SA 451 (ECG); *Brits* (note 26 above) 55.

<sup>192</sup> HCR 46(16); MCR 43(13); *Modelay v Zeeman* 1968 (4) SA 639 (A) 644; *Sheriff for the District of Wynberg v Jakoet* 1997 (3) SA 425 (C); Harms and Southwood *Civil Procedure in Magistrates' Courts* (Online Edition) 2016 at B43.4.

<sup>193</sup> Section 71, the MCA; Harms and Southwood *Civil Procedure in Magistrates' Courts* (Online Edition) 2016 at B43.5.

<sup>194</sup> Because there is no legislation dictating that there must be a reserve price, cases law has shown that property seldom gets sold for its market value. It often gets sold for the amount the debtor owes the creditor, or more commonly, less. See generally: *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); *Gundwana v Steko Development CC and Others* (CCT 44/10) [2011] ZACC 14; 2011 (3) SA 608 (CC). In both the cases that dealt directly with the application of the Housing Clause that reached the CC, the immovable property was being sold for well below their market value. What is particularly alarming about this, is that the sale price was only a side issue.

<sup>195</sup> HCR 45(11)(b); MCR 43(14)(g); Harms and Southwood *Civil Procedure in Magistrates' Courts* (Online Edition) 2016 at B43.5. As explained directly above, the actual sale price is seldom more than the debt outstanding – the author has not encountered this in his experience on this topic.

<sup>196</sup> *Jubb v Sheriff, Magistrate's Court, Inanda District, and Others; Gottschalk v Sheriff, Magistrate's Court, Inanda District, and Others* 1999 4 SA 596 (D) 600-605.

not fully discharged after the proceeds of the property have been paid, he merely has a claim which is concurrent<sup>197</sup> to any other credit claims against the debtor.<sup>198</sup>

## (2) Comments on the litigious aspects of the procedure of execution

In analysing the procedure of execution, it is worth repeating that not all sales in execution constitute an unfair limitation of the right to housing.<sup>199</sup> An unfair limitation arises when the procedure of execution is incorrectly followed, or as I assert, when it is incorrectly regulated. As a preliminary observation, my view is that the primary issue with the MCA, MCR and the HCR (hereinafter 'the Legislation' for the remainder of this subsection) is the lack of protection for homeowners altogether, rather than flaws in their existing content. The news reports,<sup>200</sup> statistical data<sup>201</sup> and cases<sup>202</sup> have exposed the specific shortcomings of the procedure of execution – consequently informing the general observation.

Firstly, the common injustice of houses being sold for prices significantly below their value<sup>203</sup>, can be attributed to the lack of a mandatory reserve auction price in the procedure of execution. I submit that the current rules<sup>204</sup>, which only permit creditors to set a reserve price at the execution auction, is patently and wholly insufficient. It is not in the interests of the creditor to obtain as high a price as possible for the property. The creditor need only obtain a price that meets the amount that is owed to them.<sup>205</sup> Additionally, the sheriff, who also functions as auctioneer in the procedure of execution, is not remunerated according to the price obtained for the property – he too has no incentive to obtain a higher price.<sup>206</sup> This is contrary to the norm in any other commercial auction.

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<sup>197</sup> As explained in Note 62 above, a real right of security gives the holder of such right a claim against the world at large. This means that his claim, in this case his claim to sell the immovable property for cash, trumps everyone else's potential claim. Conversely, a concurrent claim is a claim which '*ranks concurrently or pro rata in the distribution of an estate after the preferent claims have been provided for or paid.*' RD Claassen J *Dictionary of legal words and phrases* 2016.

<sup>198</sup> R Brits (note 26 above) at 58.

<sup>199</sup> See Harms SC *Civil Procedure in the Superior Courts* (2<sup>nd</sup> Edition) 2016; *Standard Bank of South Africa Ltd v Saunderson and Others* [2006] 2 All SA 382; 2006 (2) SA 264 (SCA); *Mkhize v Umvoti Municipality and Others* 2012 (1) SA 1 (SCA); *Standard Bank of South Africa Ltd v Bekker and Another and Four Similar Cases* 2011 (6) SA 111 (WCC); *Gundwana v Steko Development and Others* 2011 (8) BCLR 792 (CC), 2011 (3) SA 608 (CC) at [41], [49], [58], [59]. *Ekurhuleni Metropolitan Municipality and Another v Various Occupiers, Eden Park Extension 5* [2014] 1 All SA 386 (SCA); *Nedbank Limited v Fraser and Another* 2011 (4) SA 363 (GSJ) at para 21.

<sup>200</sup> See note 35 above.

<sup>201</sup> See Chapter 2(b) below.

<sup>202</sup> See Chapter 2(a) below.

<sup>203</sup> See note 35 above; Chapter 3(b) below; note 186 above.

<sup>204</sup> HCR 46(12); MCR 43(10).

<sup>205</sup> J Smit *Outrageous in this Day and Age*, Without Prejudice, September 2010 at 36.

<sup>206</sup> J Smit *Outrageous in this Day and Age*, Without Prejudice, September 2010 at 36.



A diminished sale price could have the consequence of preventing the debtor from finding alternate housing<sup>207</sup> – this could then be seen as an infringement of his right to have access to adequate housing.<sup>208</sup> Furthermore, this problem is not connected to whether or not these properties should be sold in execution or not – rather it highlights the need for the procedure of execution, which is a necessity for a functioning housing market, to be regulated properly.

Another frequent, disquieting occurrence, is that houses are sold via the procedure of execution to ‘insiders’ such as creditors, people privy to the affairs of the creditors and even agents acting for the sheriff.<sup>209</sup> These ‘insiders’ purchase the homes at the cut-prices discussed directly above. This practice immediately points to corruption in the procedure of execution. My view is that these abnormalities are facilitated by a lack of judicial oversight in the latter parts of the procedure of execution – as explained, the attachment, sale and transfer process is overseen exclusively by the sheriff.

In addition to the well-documented abuses of the procedure of execution, my submission is that the legislature has not been proactive enough in narrowing the scope of the procedure of execution. There should be additional regulation in place to exclude the most vulnerable in society from losing their homes. I aver that a major weakness in the procedure of execution is that houses not subject to a mortgage bond can be sold to satisfy an unsecured debt, regardless of how diminutive the amount.<sup>210</sup>

#### **(d) Chapter Conclusions**

The purpose of this chapter was to give an overview and analysis of the various legal components that work together to constitute the procedure of execution.

An examination of both substantive mortgage law and the procedure of execution itself, clearly show that the flaws and insufficiency of the latter are stifling the legitimate purpose of the

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<sup>207</sup> Having a judgment debt on the debtor’s credit record (as would be the case if property mortgaged by the debtor is executable) would make it virtually impossible for them to obtain any credit to obtain further credit to purchase a new home. It is therefore crucial that such a debtor obtains as high a price as possible when their house is being auctioned.

<sup>208</sup> Section 26(1), the Constitution.

<sup>209</sup> See: *Mkhize v Umvoti Municipality* 2010 (4) SA 509 (KZP); *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2003 (10) BCLR 1149 (C) at para 25; *Campbell v Botha* 2009 (1) SA 238 (SCA) at para 6; Steyn (note 35 above) at 137; <http://uncensoredopinion.co.za/human-rights-commission-right-housing-abused-banks/> (Accessed December 15<sup>th</sup> 2016); IOL news South Africa ‘Banks to be sued over repossession’ <http://www.iol.co.za/news/crime-courts/banks-to-be-sued-over-repossessions-1.1854341> (Accessed 12 October 2015); Sapa ‘Pensioner’s home confiscated, sold for profit’ IOL news South Africa (26 December 2004) <http://www.iol.co.za/news/south-africa/pensioner-shome-confiscated-sold-for-profit-1.230318> (date of use 15 October 2015); Sapa ‘Protest over pensioner’s plight’ News24 South Africa (6 January 2010) <http://www.news24.com/SouthAfrica/News/Protest-overpensioners-plight-20100106> (date of use 15 October 2015).

<sup>210</sup> In *Jaftha v Schoeman* 2003 (C) the First Applicant borrowed R 250.00 and the Second Applicant borrowed R 190.00. This led to both Applicants having their homes sold in execution.

former. To my mind, the low auction prices and collusive conduct that occurs within the procedure of execution, which have been facilitated by lack of judicial oversight and legislative intervention, has the consequence pulling it short of the constitutional imperatives of the Housing Clause.

More specifically, I submit that the low auction prices which are imposed on a debtor does not constitute a justifiable limitation of the debtor's right to have access to adequate housing.<sup>211</sup> The consequence of a debtor's home being sold for a low price, means that not only are they deprived of their property without getting close to the actual or market value of it – but they may not be able to obtain alternate housing with such a low return.

I further submit that the lack of judicial oversight in the latter stages of the procedure of execution does not fulfil the constitutional requirement that eviction from the home cannot be done without an order of court considering the relevant circumstances.<sup>212</sup> The low auction prices and corrupt dealings exemplify the clear need for the auction and sale portion of the procedure of execution to be subject to judicial scrutiny, just as the initial order to declare the property executable does. I submit that low auction prices and irregularities in the procedure of execution most certainly constitute a change in the 'relevant circumstances' that a court is required to consider under the Housing Clause before authorising eviction. These new circumstances cannot be considered if there is no judicial oversight in the auction and sale part of the procedure of execution.

With this in mind, my main conclusion from this chapter, and indeed this dissertation, is that the current procedural law governing the sale of immovable property in the courts, specifically Rule 43 and Rule 46 of the MCR and HCR respectively, are unconstitutional.

Accordingly, Chapter 4 below discusses the remedies this study proposes to bring the procedure of execution in line with the requirement of the Housing Clause.

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<sup>211</sup> Section 26(1), the Constitution.

<sup>212</sup> Section 26(3), the Constitution.



## **CHAPTER 3 – JUDICIAL AND LEGISLATIVE PROGRESS IN THE PROCEDURE OF EXECUTION**

### **(a) Chapter overview**

As mentioned in the conclusion to Chapter 2 above, the main assertion in this paper is to encourage legislative reform, although the most significant recent advancements regarding the procedure of execution have come from judicial precedent.<sup>213</sup>

This chapter will discuss the main judicial and legislative developments in the procedure of execution under the new constitutional dispensation. The inclusion of the cases in the discussion of the judicial developments are to illustrate the social considerations acknowledged by the courts as well to exemplify the way the Process can have increased oversight without undue prejudice to the creditor. It is not to show how the judiciary has incrementally developed the procedure of execution. An incidental but crucial consequence of reviewing case law on this topic is that the major disparity between regulation and enforcement that has been facilitated by a lack of judicial and legislative oversight becomes clear.

The discussion of the legislative developments regarding the procedure of execution is based on proposed legislation to amend the procedure of execution, in the form of the Amendment Bills. These are bills that have been proposed to amend the current MCR and HCR regarding the sale in execution of immovable property. I will evaluate the proposed provisions against the weaknesses in the procedure of execution that has been identified in Chapter 2 above and from the case analysis in this chapter.

### **(a) Background of the judicial developments regarding the procedure of execution in South African law**

Repossession is the ultimate limitation of a person's right to property and lies in direct opposition to the constitutional objectives embodied in the Housing Clause. The task for a court then becomes one of balancing the competing rights of the mortgagor under the Housing Clause, and the validity of the limitation of that right by the mortgagee.

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<sup>213</sup> The three main cases on the topic to have reached the Constitutional Court are: *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); *Gundwana v Steko Development CC and Others* (CCT 44/10) [2011] ZACC 14; 2011 (3) SA 608 (CC) and *Nkata v Firstrand Bank Limited and Others* 2016 (4) SA 257 (CC).

Previously, clerks of the Magistrates' Courts and the registrar of the High Court respectively, were empowered to grant an execution order for immovable property.<sup>214</sup> Their function in these matters was solely to ensure that the prerequisites pursuant to an attachment order were met. This was extended in unsecured debt matters to verify that there was no mortgage bond over the property as well as to evaluate whether or not the amount of movable property was sufficient to satisfy the outstanding debt. If not, then they would grant an order allowing for a warrant of execution.<sup>215</sup>

Judicial oversight before the MCR and HCR were amended,<sup>216</sup> was limited to exceptional circumstances that had to be raised by the mortgagor, or when the clerk or registrar referred the application to a magistrate or judge. The position pre-amendment of the respective rules allow for either a registrar in the High Court, or a clerk in the Magistrates' Courts, to authorise default judgment allowing for immovable property to be declared executable.<sup>217</sup>

The main reason put forward by opposition<sup>218</sup> to judicial oversight was that courts would get congested with matters of this nature.<sup>219</sup> This again played-down the seriousness and socio-economic impact of housing repossession.<sup>220</sup>

The cases specifically examined below<sup>221</sup> are to show the way the highest courts in the country have altered and interpreted the Process. It is not to show the incremental development of the law in this area.

*Steyn* states that legislation that is altered by the Constitution has had the capacity to be amended accordingly since enactment of the Constitution.<sup>222</sup> This profound sentiment, in my

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<sup>214</sup> R Brits (note 26 above) 51.

<sup>215</sup> If there was insufficient movable property to satisfy the outstanding debt, a document called a *nulla bona* would be issued confirmed this; and allowing the sheriff to attach the movable property of the debtor. R Brits (note 26 above) 51.

<sup>216</sup> The main amendment being referred to in this context is the requirement that only a magistrate or judge may order a warrant execution of immovable property, even when default judgment is being applied for. *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 was the matter which amended the MCR while *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) amended the HCR accordingly.

<sup>217</sup> HCR 46 and Section 64 MCA (both pre-amendment).

<sup>218</sup> In this context I am specifically referring to the Minister of Justice and Constitutional Development who was joined as a respondent in both the *Jaftha* and *Gundwana* CC cases.

<sup>219</sup> This has been gathered by a review of the comments on the proposed amendments on the 2016 HCRs Amendment Bill on its mortgage provisions.

<sup>220</sup> See generally Fox (note 4 above). See also note 165 below where the CC outlined the role of proper home in *Jaftha*. The role that land deprivation and housing evictions played in the history of our country are factors the author feels readers should be mindful of whenever considering the importance of housing – even when considering the Housing Clause itself. The legitimacy of these concerns will be addressed in the case law analysis at the end of this chapter.

<sup>221</sup> Namely the *Jaftha*, *Saunderson*, *Gundwana* and *Ntsane* matters.

<sup>222</sup> L Steyn (note 35 above) 4.

view, instils confidence that established legal processes may still be altered to reflect the needs and aspirations of society. To dissect this assertion by *Steyn* further, I interpret this as the Constitution giving us certain broad objectives that must be refined and practically obtained by the three branches of State. With regards to the Housing Clause, I will argue at the end of this chapter, that the judicial branch of the State has done all it can to further the Housing Clause without legislative intervention.

***(b) Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others***<sup>223</sup>

(i) Facts of *Jaftha v Schoeman and Others*

The Applicant in the matter, Ms Jaftha, was from a small town called Prince Albert in the Western Cape. She only had a grade 4 (standard 2 when she was at school) education and was too ill to work. She initially lived in an informal settlement until she was granted a government subsidised house, under the Reconstruction and Development Program (these are commonly known as RDP houses)<sup>224</sup> in 1997. The amount subsidised was R 15 000.00.

The following year in 1998, Ms Jaftha, not being employed at the time due to her ill health, borrowed R 250.00 from a community member. She made some repayment on the capital amount, but subsequently fell into arrears. At the time, the only firm of attorneys in Prince Albert was Markotter Attorneys. They assisted the community member from whom Ms Jaftha had borrowed the money in obtaining judgment against her in the amount of R 632,45.

As Ms Jaftha was not able to pay the judgement debt in cash, the sheriff was instructed to execute against her movable property to satisfy said debt. Unfortunately, such was her state of hardship, a *nulla bona* return was submitted by the sheriff. This reflected the fact that there was not enough movable property to satisfy the judgment debt. Ms Jaftha's immovable property had to be sold.

Ms Jaftha's RDP house was attached by the sheriff before a warrant of execution could be issued to authorise the sale by public auction. Subsequently, Ms Jaftha was advised by Markotter attorneys that unless she pays R 5 500.00,<sup>225</sup> her house would be sold to satisfy the judgment debt against her. A few payments were made in this respect by Ms. Jaftha, but months passed

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<sup>223</sup> 2003 (10) BCLR 1149 (C) (High Court); (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC)<sup>223</sup>

<sup>224</sup> Steyn gives a comprehensive breakdown of the South African Government's housing policy at Steyn (note 35 above) 118.

<sup>225</sup> It is noteworthy that the figure of R 5 500.00 mushroomed from a R 250.00 capital amount; exactly 22 times the amount borrowed.

with no further payment. The months of non-payment led to a demand of R 7000.00 (28 times the capital amount)<sup>226</sup> being made against Ms Jaftha, a demand she could not possibly obey.

Her house which, cost R 15 000.00 to build, was sold in execution of an initial R 250.00 debt, for an amount of R 5 000.00.

(ii) Facts of Van Rooyen v Stoltz and Others

Ms Van Rooyen lived in the same small Western Cape town of Prince Albert where Ms Jaftha did, and the legal proceedings took place around the similar 1997-2001 period.

In this matter, Ms Van Rooyen purchased fresh produce from a member of the local community in Prince Albert for the amount of R 190.00, on credit. She was not able to pay back this debt. Consequently, the creditor demanded an amount of R 198.30 after consulting Markotter attorneys. Default judgment was granted against Ms Van Rooyen.

Ms Van Rooyen, like Ms Jaftha, owned a RDP house. She had no schooling at all and had to support three children after her husband had passed away. Ms Van Rooyen acquired her house via inheritance from her deceased husband. As she was unable to make payments on the judgment debt, a *nulla bona* return was issued before her home was attached and sold at a public auction.

Ms Van Rooyen's house was sold for the paltry amount of R 1000.00 on the same day as Ms Jaftha's house was sold.

(iii) Common facts in both matters

In the above matter, alarming facts came to light during litigation. The five month period between May and September 2001 was analysed (the same period during which both the above women lost their houses) and the results reflected that nineteen RDP houses were sold in execution. Nine of these houses were sold to partners of Markotter Attorneys,<sup>227</sup> the attorneys who represented both Applicants in this case, at prices between R 500.00 and R 8000.00.<sup>228</sup> Such shocking statistics

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<sup>226</sup> This would appear to be a violation of the common law *in duplum* rule, which states that the interest accrued on a capital amount, may not exceed the capital amount itself, *Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in Liquidation)* [1998] 1 All SA 413 (SCA). The *in duplum* rule has a similar counterpart in Section 103(5) the NCA which builds on the rationale behind the *in duplum* rule by further adding that any recovery charges, and the like, may not exceed the capital amount. This only applies to credit agreements that fall under the NCA, such as a mortgage bond. However, the amount claimed included legal fees and collection charges – which the *in duplum* rule does not cover.

<sup>227</sup> The issue of Markotter Attorneys purchasing houses at auction was not referred to the Cape Law Society (the dishonourable conduct of their attorneys was given a special mention in *Jaftha v Schoeman* 2003 (C) at para 51). However, in the CC case, the court referred the allegations of non-compliance with the imperatives of the procedure of execution and acting without a mandate to the Cape Law Society for investigation, *Jaftha* at para 65.

<sup>228</sup> *Jaftha* at paras 25 and 26.

exemplified that society's most desperate<sup>229</sup> were having their homes sold for not only meagre debts, but for well below their value.<sup>230</sup>

According to Ms Jaftha and Ms Van Rooyen (the Applicants), they were pressed to leave their homes by the sheriff shortly after the sale in execution and before the transfer of the property had not taken place yet.<sup>231</sup>

The plight of the Applicants reached the desk of a local accountant, who passed her findings onto lawyer friend of his. The matter ended up being handled by various senior counsels.<sup>232</sup> Markotter Attorneys acknowledged the presence of various material irregularities in the procedural steps they had taken pursuant to the sales in execution of the Applicant's property.<sup>233</sup>

(iv) The argument of the Applicants

The main argument put forward in the High Court and sustained in the Constitutional Court by the Applicants was that Section 66(1)(a) of the MCA did not 'respect' and/or 'protect'<sup>234</sup> their constitutionally enshrined Section 26 right to have access to adequate housing. Their submission was that although Section 66(1)(a) had a legitimate purpose, the fact that large parts of the procedure of execution was devoid of judicial oversight, meant that the net effect of it rendered it unconstitutional. The Applicants also submitted that in addition to the lack of judicial oversight, homes being sold for small debts at prices alarmingly below market (or even actual) value also breached their constitutional right to housing.<sup>235</sup>

The Applicants submitted the following as suitable alterations to Section 66(1)(a) of the MCA to remedy its unconstitutionality:

- a. Introduce judicial discretion that could be exercised;

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<sup>229</sup> In *Jaftha v Schoeman* 2003 (C) at para 25 the HC asserted that on a single day in May 2001 five RDP houses were sold for prices between R 5000.00 and R8000.00. In June that same year two were sold for R 4500.00 and R 6000.00 respectively. Between August and September that same year 12 houses were sold for between R 500.00 and R 5000.00. These all took place in the small town of Price Albert.

<sup>230</sup> Although the exact value of the houses in cases of Ms. Jaftha and Ms. Van Rooeyen respectively are unknown, it was common cause that it was below market value in the matter, *Jaftha* at para 12. Furthermore in terms of the National Housing Subsidy Scheme, which was championed under the *White Paper on Housing* 1994, the RDP housing subsidy was R 15 000.00. This is exponentially more than the auction price in both cases. Even with depreciation, or more likely appreciation, it would be hard to imagine any formal housing being valued at less than R 5000.00 (*Jaftha*) or R 1000.00 (*Schoeman*).

<sup>231</sup> *Jaftha v Schoeman* 2003 (C) at para 5.

<sup>232</sup> Steyn (note 35 above) at 178.

<sup>233</sup> *Jaftha v Schoeman* 2003 (C) at paras 13 and 14.

<sup>234</sup> This comes from Section 7(2) of the Bill of Rights where the Constitution burdens the state with respecting, protecting, promoting and fulfilling the rights enumerated within.

<sup>235</sup> *Jaftha v Schoeman* 2003 (C) at para 31.

- b. Provide immunity from execution for immovable property up to a certain value, which would be determined by the Minister for Justice and Constitutional Development, as per the protection that the goods enjoy in Section 67 of the MCA; and
- c. Immovable property which was actually the home (as opposed to an office or vacation house) of a judgment debtor should only be sold in execution if such sale would provide sufficient value to justify the sale of the property.<sup>236</sup>

These arguments were rejected as the High Court found that the procedure of execution in terms of Section 66(1)(a) did not erode the Section 26(3)<sup>237</sup> right of the judgment debtor.<sup>238</sup>

(v) The Constitutional Court judgment

The same argument made in the High Court was advanced in the Constitutional Court by the Applicants.<sup>239</sup> This was refuted by the Minister of Justice and Constitutional Development (the Minister), as she asserted that Sections 63 and 73 of the MCA had intrinsic safety mechanisms that protected debtors.<sup>240</sup> She did qualify this by admitting that many debtors in a similar position to the Applicants may not have the resources to utilise said protections.<sup>241</sup>

An additional argument advanced by the Applicants was that their right to dignity was also infringed by such repossession. Although adding this to their legal contentions did not give weight to the outcome of the case (as dignity was inevitably infringed when a socio-economic right was limited),<sup>242</sup> Mogkoro J did shed light on the importance of housing to the self-worth particularly in the historical context:

‘The situation under apartheid demonstrates the extent to which access to adequate housing is linked to dignity and self-worth. Not only did legislation permit the summary eviction of people from their land and homes which, in many cases, had been occupied for an extremely long time, it branded as criminal anyone who was deemed to be occupying land in contravention of it. In this sense a person was made to suffer double indignity – the loss of one’s home and the stigma that attaches to criminal sanction.’<sup>243</sup>

<sup>236</sup> *Jaftha v Schoeman* 2003 (C) at para 32.

<sup>237</sup> The section states: “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.”

<sup>238</sup> *Jaftha v Schoeman* 2003 (C) paras 47 and 48.

<sup>239</sup> *Jaftha v Schoeman* 2005 (CC) paras 17 and 18.

<sup>240</sup> The Minister argued that Section 73(1) of the MCA allowed for payment of a judgment debt in periodical installments or via an emoluments attachment or garnishee order.

<sup>241</sup> *Jaftha v Schoeman* 2005 (CC) para 19.

<sup>242</sup> This was decided in *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19.

<sup>243</sup> *Jaftha v Schoeman* 2005 (CC) para 27.

She further commented that for a person to have a home was ‘a most empowering and dignifying human experience.’<sup>244</sup>

In considering the right to adequate housing, the Constitutional Court first looked at international law<sup>245</sup> in the form of Article 11(1) of the International Covenant on Economic, Social and Cultural Rights 1966.<sup>246</sup> The Article as quoted by the CC states:

‘The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.’<sup>247</sup>

In interpreting the Article, Mokgoro J looked at General Comment 4<sup>248</sup> which emphasised that the right to housing should be interpreted widely and be taken as ‘the right to live somewhere in security, peace and dignity’.<sup>249</sup>

The CC further remarked that the internationally agreed concept of adequate housing was reflected in the Housing Clause; taking into consideration our past scarred with the infringement of land and dignity rights.<sup>250</sup>

It was noted that this matter was unique, as it was the first matter which dealt with the negative obligation of the state (Section 26(3)) to not unreasonably prevent or impair existing access to housing. The CC then turned to the limitation clause embodied in Section 36 of the Constitution.

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<sup>244</sup> *Jaftha v Schoeman* 2005 (CC) para 28.

<sup>245</sup> This is in line with Section 39 of the Constitution which states:

“39.

(1) When interpreting the Bill of Rights, a court, tribunal or forum—

(a)...

(b) must consider international law.”

<sup>246</sup> It should be noted that at the time that this judgment was handed down, South Africa was only a signatory to this convention, only ratifying it in 2015, however note 169 above explains how it could still be applied in *Jaftha*. The convention can be found at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> (accessed on the 23rd of December 2016) and was quoted in *Jaftha v Schoeman* 2005 (CC) para 24.

<sup>247</sup> Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, 1966.

<sup>248</sup> This can be found at [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en) (accessed on the 23<sup>rd</sup> of December 2016) and was quoted in *Jaftha v Schoeman* 2005 (CC) para 24.

<sup>249</sup> *Jaftha v Schoeman* 2005 (CC) para 24.

<sup>250</sup> *Jaftha v Schoeman* 2005 (CC) paras 25 and 27.



It was an inquiry to discover whether or not the procedure of execution within the MCA regarding the sale of immovable property in execution was a justifiable limitation of the right to housing.

Writing for the unanimous majority, the CC agreed with the Applicants in saying that Section 66(1)(a) constitutes a significant limitation of the right to housing. Agreeing again with the submissions by the Applicants, the CC acknowledged that the need for debts to be recovered as crucial; but not more vital than the right to housing when the debt is as small as was *in casu*.<sup>251</sup>

Clearly, the CC had to consider the above two competing interests when coming to a workable and just solution. Eventually the court settled on the need for a value judgment that must be made on a case-by-case basis by a judicial officer.<sup>252</sup>

Due to the novelty of this matter, acutely emphasised in the judgment, Mokgoro J decided it would be prudent to set out some form of guidance.<sup>253</sup> The following guidelines were sounded out:

1. If procedural aspects of the procedure of execution are not complied with, immovable property cannot be declared executable;
2. Other reasonable debt recovery methods should be explored before a sale in execution is authorised;
3. If the first two requirements do not apply, the default position would be to authorise the sale in execution. An example of this would be when the interests of the debtor are more worthy of protection than those of the creditor. Considerations in coming to this conclusion often include the amount owed to the creditor and how the debt was incurred, as well as the likelihood that the debtor will find alternative accommodation.<sup>254</sup>

After stating the above considerations to be mindful of, the CC ordered that the lack of judicial oversight permitted by Section 66(1)(a) of the MCA in the process of granting default judgment when declaring immovable property executable was unconstitutional.<sup>255</sup>

The words in bold below were ordered to be read into Section 66(1)(a) of the MCA to bring it in line with the imperatives of the Housing Clause:

‘...if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then **a court, after consideration of all relevant circumstances,**

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<sup>251</sup> *Jaftha v Schoeman* 2005 (CC) para 57.

<sup>252</sup> *Jaftha v Schoeman* 2005 (CC) para 55.

<sup>253</sup> *Jaftha v Schoeman* 2005 (CC) para 56.

<sup>254</sup> *Supra*.

<sup>255</sup> *Jaftha v Schoeman* 2005 (CC) para 67.

*may order execution against the immovable property of the party against whom such judgment has been given or such order has been made.*<sup>256</sup> (Emphasis added by Mokgoro J.)

I further submit that this has the effect of limiting the reform progress on this matter to issues that are directly before the judiciary. This means that not only are narrow issues addressed on a piecemeal basis, but gaps between matters often span years. Additionally, even when judicial reform does take place, courts are reluctant to deal with matters that are not explicitly pleaded by the parties.

**(c) *Standard Bank of South Africa Ltd v Saunderson and Others* (358/2005) 2005 ZASCA 131 (Saunderson)**

In this matter, the Supreme Court of Appeal (the SCA) attempted to reassure<sup>257</sup> banks and legal practitioners alike, that the decision in *Jaftha* (handed down by the CC earlier that year) would not significantly affect the procedure of executions of the latter,<sup>258</sup> nor the business of the former with regard to calling up a mortgage bond.

To allay fears that the security offered to a creditor in a mortgage bond may be compromised, the SCA made it clear that the judgment in *Jaftha* does not extend to properties secured by mortgage bonds.<sup>259</sup> The main reasoning behind this was the underlying contractual value of *pacta sunt servanda*.

While the SCA went on to elaborate on how its view was that the judgment in *Jaftha* should be interpreted to quell the confusion, the main legal development in this matter was the practice directive ordered.

The practice directive read as follows:

The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, from the date of this judgment, inform the defendant as follows:

“The defendant’s attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the

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<sup>256</sup> *Jaftha v Schoeman* 2005 (CC) para 64.

<sup>257</sup> Van Heerden and Boraine 2006 *De Jure* 319; Saller 2005 *SALJ* 725; Steyn 2007 *Law Dem Dev* 119 detail the confusion to this end.

<sup>258</sup> In *Standard Bank of South Africa Ltd v Saunderson and Others* (358/2005) [2005] ZASCA 131 at para 14 the SCA remarked “What until now has been routine practice in the courts has thus become controversial because of uncertainty as to what must be alleged to justify an order for execution”.

<sup>259</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* (358/2005) [2005] ZASCA 131 at para 15.

defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the court.”<sup>260</sup>

While the main procedural alteration to be taken from *Saunderson* is the above practice directive; the case also secured the position of the creditor in terms of a mortgage bond after the uncertainty of the extent of the application of the *Jaftha* judgement.<sup>261</sup>

**(d) *ABSA Bank Limited v Ntsane and Another* (1865/2006) [2006] ZAGPHC 115 (*Ntsane*)**

**(i) Facts**

The Defendants owned a property which was subject to a mortgage bond held by ABSA. The mortgage bond agreement included an acceleration clause,<sup>262</sup> which made the entire balance of the money advanced by ABSA to the Defendants due and payable as soon as the Defendants defaulted on their repayments.<sup>263</sup> The amount claimed, after the acceleration clause was activated, fell within the jurisdiction of the Magistrates’ Courts. ABSA applied to the High Court in a clear attempt to circumvent proper judicial oversight. When the amount of R 18.46<sup>264</sup> was shown to be the actual amount overdue by the Defendants, the reason why ABSA attempted to circumvent judicial oversight became clear.<sup>265</sup>

**(ii) The judgment of the High Court**

The High Court noted that the Defendants had made real attempts to get their arrears up to date, but struggled.<sup>266</sup> Surprisingly, ABSA did not provide a comprehensive record of the attempts by the Defendants to meet their mortgage bond payments; the court added that on this ground alone the Application should be dismissed.<sup>267</sup>

Importantly, the High Court referred to specific considerations in the *Jaftha* judgment when coming to its decision. These factors are important as this, the *Ntsane* matter, concerned immovable property subject to a mortgage bond. These factors illustrate which points a court will consider from the *Jaftha* judgment in relation to a mortgaged property. They read:

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<sup>260</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* (358/2005) [2005] ZASCA 131 at para 27.

<sup>261</sup> Du Plessis, Judicial oversight for sales in execution of residential property and the National Credit Act, 2012, *De Jure*, 532 at 548.

<sup>262</sup> *ABSA Bank Limited v Ntsane and Another* at para 17.

<sup>263</sup> *Supra*

<sup>264</sup> The amount was described as ‘piffling’ by the High Court due to its diminutive nature, considering that was the amount that caused the acceleration clause to be activated; *ABSA Bank Limited v Ntsane and Another* at para 18.

<sup>265</sup> *ABSA Bank Limited v Ntsane and Another* at para 12.

<sup>266</sup> *ABSA Bank Limited v Ntsane and Another* at para 42.

<sup>267</sup> *ABSA Bank Limited v Ntsane and Another* at paras 49-54.

1. *'Execution against the family home will not be justifiable when it is for the recovery of a debt of trifling importance to the creditor that would result in a disastrous dispossession of the debtor's family of its only shelter.*
2. *Consideration of the legitimacy of a sale in execution of a house should be seen as a balancing of the interests of the debtor and the creditor.*
3. *The circumstances in which the debt arose are important: if the debtor has mortgaged his home in favour of the creditor, "a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure. The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge."<sup>268</sup>*

The High Court then turned its attention to the circumstances under which an acceleration clause could be considered unlawful.<sup>269</sup> Thankfully the provision of the NCA now dictate that as long as the arrears are paid, the entire amount due does not need to be paid to avoid a sale in execution.<sup>270</sup>

The next step that the High Court took was the balancing of the rights of ABSA to enforce the agreement and the rights of the Defendant to have access to adequate housing.<sup>271</sup> It identified certain rights of each of the parties to consider when coming to a decision, namely:

1. the value of the bonded property;
2. the amount outstanding on the bond;
3. the past history of payments made by the debtor;
4. any other assets which the debtor owns, particularly movable assets capable of easy attachment and sale in execution;
5. any other debts of which the bondholder is aware, such as arrear rates and municipal taxes; and
6. whether the debtor is employed or not.<sup>272</sup>

In conclusion the court merely granted judgment in favour of ABSA for the amount of R 18,46 with costs and interest – one of the more cynical orders one is ever likely to encounter. Interestingly, the court also offered its opinion on the way it feels the procedure of execution should be developed.

The court suggested a compulsory arbitration process that the Court could invoke by referring the question whether execution against the immovable property should be granted when the

<sup>268</sup> *Jaftha v Schoeman* 2005 (CC) para 58.

<sup>269</sup> *ABSA Bank Limited v Ntsane and Another* at para 68.

<sup>270</sup> Section 129(4) of the NCA.

<sup>271</sup> *ABSA Bank Limited v Ntsane and Another* at para 71.

<sup>272</sup> *ABSA Bank Limited v Ntsane and Another* at para 72.

arrear amount is relatively small.<sup>273</sup> The court explained that this would expedite the judicial procedure and would perhaps even provide for a cheaper, more detailed and comprehensive review of the facts than would ordinarily be done in court.<sup>274</sup>

**(e) *Gundwana v Steko Development and Others* 2011 3 SA 608 (CC) – A brief summary**

In *Gundwana* the court finally extended the consequence of *Jaftha* on the Magistrate Court Rules, to the High Court rules. The reasoning was similar to that in *Jaftha*, that judicial oversight is needed to insure that the right to housing was not infringed.

What differentiates *Gundwana* from the other cases that resisted a change to the high court process of execution is in the CC's dealing with the concerns of a mortgagor. The CC rejected the two main arguments of the Respondents.

The first argument put forward was that the facts of *Gundwana* did not fall within the scope of protection of *Jaftha*.<sup>275</sup> The CC rejected this by stating: 'the constitutional validity of the rule cannot depend on the subjective position of a particular applicant it is either objectively valid or not'.<sup>276</sup>

The second key argument that was rejected by the court was that the applicant had willingly placed themselves in a position where their house could be sold execution. This claim was also refuted by the court where it reasoned that if the claim submitted to be true, other inferences had to be considered as well. Such inferences, as the court questioned, were: Must we also assume that the debtor consents to the debt being enforced without judicial sanction? Does the debtor waive their section 26 rights to housing? Can the mortgage agreement be enforced in bad faith? The court concluded that these questions could only be answered by judicial evaluation of each matter.<sup>277</sup>

*Gundwana* covered the gaps that *Jaftha* did not, firstly requiring judicial oversight even in the cases where the property was hypothecated (this changed the process in the Magistrates' Court as well), and finally all applications for a warrant to execute against immovable property is required to be judicially considered, regardless of whether they emanate from a secured debt or not.<sup>278</sup>

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<sup>273</sup> *ABSA Bank Limited v Ntsane and Another* at para 97.

<sup>274</sup> *ABSA Bank Limited v Ntsane and Another* at para 97.

<sup>275</sup> *Gundwana v Steko Development and Others* at para 9.

<sup>276</sup> *Gundwana v Steko Development and Others* at para 44.

<sup>277</sup> *Gundwana v Steko Development and Others* at paras 49-54.

<sup>278</sup> *Gundwana v Steko Development and Others* at para at 53.

**(f) Comments on how the judiciary has developed the procedure of execution**

My assertion is that, when the need to balance rights becomes apparent, legislative certainty is crucial for a just and equitable solution to be reached. Only with legislative certainty can there be judicial certainty. With judicial certainty comes proper oversight that provides for consistency in the dispensation of justice. Legislative and judicial certainty need to work in tandem for there to be proper enforcement of the Housing Clause.

I further assert that the current uncertainty lies mainly in the fact that the developments in the procedure of execution have been via judicial intervention, as opposed to legislative reform.

My general view on how the courts have developed the procedure of execution can best be summed up by *Steyn* who states: 'the courts' often over-cautious, casuistic, incrementalist approach stifles the transformative potential of the Constitution'.<sup>279</sup> This assertion becomes understandable when the timeline between the matters of *Jaftha* and *Gundwana* cases are considered. These matters essentially ensured the same thing – that only a magistrate or judge can declare immovable property executable, even if it is for default judgment. This rule was first introduced into the Magistrates' Court in 2005 after the CC directed accordingly.<sup>280</sup> It was only extended to the HC via the *Gundwana* judgment in 2011 – 6 years later.<sup>281</sup> Incidentally, it is also the sum total of the significant judicial development regarding the procedure of execution that has materialised over the years.

The inclusion of the *Saunderson* and *Ntsane* cases were partially to illustrate the missed opportunities by the judiciary in extending the need for mandatory judicial oversight in the procedure of execution to the HC, subsequent the *Jaftha* judgement. The judicial uncertainty arose because the CC in *Jaftha* failed to specifically pronounce on the corresponding HCR, after ordering the alteration of the MCA. My assertion is that the opportunities were missed in these matters, as well as others, because there was no guiding legislation that compelled the judiciary to interpret the Housing Clause in line with *Jaftha*. The judiciary was reluctant to assume that the judgment applied to the HCR as well, despite the procedure of execution being almost identical in the MC and HC.<sup>282</sup>

The other main improvement attempted to be made to the procedure of execution from the *Jaftha* case was to define 'relevant circumstances' that must be considered when allowing

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<sup>279</sup> Steyn (note 35 above) at 543.

<sup>280</sup> Section 66(1), the MCA; *Jaftha v Schoeman* 2005 (CC) para 67.

<sup>281</sup> Rule 46, the HCR; *Gundwana v Steko Development and Others* at para at 53.

<sup>282</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* (358/2005) [2005] ZASCA 131 at para 27.

immovable property to be declared executable by the CC.<sup>283</sup> Unfortunately, in an attempt to leave the requirements flexible, the CC inadvertently created legal uncertainty by not properly enumerating a finite and definite list of factors that a court should take into account when declaring immovable property executable.<sup>284</sup> At the time of the judgment, it was said that the decision had caused the procedure of execution to become ‘somewhat of a legal quagmire’.<sup>285</sup>

Another issue that arose as a consequence of the *Jaftha* case, was the submission by *Van Heerden* and *Boraine* that the courts may become overburdened because every application to declare immovable property executable must be considered by a court.<sup>286</sup> The author submits that his experience in practice supports this contention. A further general observation has been that the daily Motion Court Roll in the MC and HC respectively have at least a few matters where default judgment is requested for applicants seeking immovable property executable. Resultantly, this could lead to the procedure of execution, especially when undefended, becoming ineffective due to courts being overburdened. This would have the effect of not only prejudicing people who cannot afford to defend the matter, but it could also lead to courts ‘rubber stamping’ applications where there has been *prima facie* compliance – at the expense of forsaking the nuances that may exist.

**(g) Amendment of the rules regulating the conduct of the proceedings of the several provincial and local divisions of the High Court Of South Africa & amendment of the rules regulating the conduct of the proceedings Of Magistrates’ of South Africa<sup>287</sup>**

**(i) Section Overview**

At the beginning of 2016, the Department of Justice and Constitutional Development published The Amendment Bills. The explanatory note in the bill details that the Amendment Bills have been introduced to deal with *inter alia*:

1. The procedure for applications to declare residential property executable.
2. Personal service on the debtor.
3. Enquiry into the need for excitability (reserve price and the like).

Most of the amendments to the current HCR 46 and MCR 43 are directed at giving the sheriff more of a role in the execution process. Objections are to be delivered to the sheriff and he must

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<sup>283</sup> *Jaftha v Schoeman* 2005 (CC) para 56.

<sup>284</sup> *Van Heerden and Boraine* 2006 *De Jure* at 319; *Saller* 2005 *SALJ* 725; *Steyn* 2007 *Law Dem Dev* at 119.

<sup>285</sup> *Steenkamp and Burr-Dixon* 2006 *De Rebus* (August) 12-14.

<sup>286</sup> *Van Heerden and Boraine* 2006 *De Jure* at 331. See also *Deosaran* 2005 *De Rebus* (July) at 39-40.

<sup>287</sup> Hereinafter ‘the Amendment Rules’.



also draw up a plan of distribution of the auction proceeds.<sup>288</sup> The sheriff is also empowered to, in terms of a new rule, employ a locksmith to enter any premises he has a warrant for.<sup>289</sup>

- (ii) New proposed HCR 46A and MCR 43B<sup>290</sup> – execution against Residential immovable property

These rules form the crux of the proposed amendments and *prima facie* a huge advancement in the procedure of execution. In each of the Proposed Rules, the sub-rules are identical in order and structure, therefore the content discussed below applies to both the MCR and HCR.

Sub-rule 1 of The Proposed Rules states that they apply whenever an execution creditor wants to execute the residential property of a judgment debtor. This essentially means that these provisions are only applicable when the home of a debtor is threatened – the first indication of judicial concern bearing legislative fruit.

Sub-rule 2(b) compels the court to consider ‘all relevant factors’ before execution is warranted.<sup>291</sup> This again smacks of judicial intervention, stemming from Mokgoro J’s guidance in Jaftha some 12 years ago. My initial concern with this is the lack of clarity as to what qualifies as ‘all relevant factors’.

Sub-rule 3 also addresses another big loophole in the law by requiring the application to not only be on notice (as opposed to being by Notice of Motion), but to be personally served by the Sheriff.<sup>292</sup> This is particularly important considering the reports of people having their houses sold without their knowledge.<sup>293</sup>

Sub-rule 5 states that the following documents must be attached to an application for execution, *inter alia*<sup>294</sup>:

- a. Showing the market value of the property;
- b. The local authority’s valuation of the property;
- c. The amounts owing on the mortgage bond registered over the immovable property;
- d. The amount owing to the local authority; and
- e. The amount owing to the body corporate as levies.

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<sup>288</sup> The Amendment Bills, 2016.

<sup>289</sup> The Amendment Bills, 2016; HCR 46(4)(c), MCR 43(4)(c).

<sup>290</sup> Hereinafter ‘the Proposed Rules’.

<sup>291</sup> The Amendment Bills, 2016; HCR 46A(2), MCR 43B(2).

<sup>292</sup> The Amendment Bills, 2016; HCR 46A(3), MCR 43B(3).

<sup>293</sup> <http://www.iol.co.za/news/crime-courts/banks-to-be-sued-over-repossessions-1.1854341> (Accessed 12 October 2015).

<sup>294</sup> The Amendment Bills, 2016; HCR 46A(5), MCR 43B(5).

Sub-rule 9 authorises the MC and HC to set a reserve price based on the representations attached to the application in terms of Sub-rule 5, as well as based on a request by the respondent.<sup>295</sup>

(iii) Public Comment on the Proposed Rules<sup>296</sup>

Members of the public were invited to comment on the Amendment Bills.<sup>297</sup> The main respondents I focused on were the Banking Association of South Africa (hereinafter 'the BASA'). Additionally submissions by the South African Board for Sheriffs (hereinafter 'the SABFS'), the Law Society of South Africa (hereinafter 'the LSSA')<sup>298</sup> and a joint submission on behalf of the Association of Community Advice Offices of South Africa and ProBono.Org (hereinafter 'ProBono')<sup>299</sup> are briefly looked at. The purpose of the comments are to gauge the public opinion of the Amendment Bills as well as to listen to concerns and suggestions.

(1) Submissions of the BASA

While the BASA made detailed submissions on almost every other amendment provision, regarding the Proposed Rules the main submissions that was made was in relation to MCR 43B and HCR 46A – dealing with reserve prices.<sup>300</sup> The submission by the BASA begins by stating that they understand that the Amendment Bills are aimed to protect the interests of both the debtor and creditor, but their view is that it will have a more negative than positive effect on the law.<sup>301</sup> They further assert that the amendments do not make clear how these rights will be protected.<sup>302</sup>

I disagree with the submission of the BASA, as discussed above, that a fair price being obtained is crucial for both parties under the procedure of execution. An introduction of a court-set reserve price with a method of determining such reserve price is clearly a method that could ensure this. This is clearly a matter of the BASA protecting the interests of their own members only.

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<sup>295</sup> The Amendment Bills, 2016; Rule 46A(9), MCR 43B(9).

<sup>296</sup> The total submissions made to the Department of Justice and Constitutional Development on the Amendment Bills were voluminous and went into detail not directly relevant to this study. For that reason, the author has curated the pertinent responses and comments.

<sup>297</sup> The invitation is available at [http://www.justice.gov.za/rules\\_board/invite/2016-SalesExecution-HCR46-MCR43.pdf](http://www.justice.gov.za/rules_board/invite/2016-SalesExecution-HCR46-MCR43.pdf) hereinafter 'Public Comment Document', (Accessed 21st December 2016).

<sup>298</sup> The South African Board for Sheriffs (hereinafter 'the SABFS') at 168.

<sup>299</sup> These are in terms of the comments published on the website of the Department of Justice and Constitutional Development and is available at [http://www.justice.gov.za/rules\\_board/documents/201608-DialogueComments-Page086-146.pdf](http://www.justice.gov.za/rules_board/documents/201608-DialogueComments-Page086-146.pdf) (Accessed 21st December 2016).

<sup>300</sup> Public Comment Document at 104 for both HCR and MCR.

<sup>301</sup> Public Comment Document at 104 for both HCR and MCR.

<sup>302</sup> Public Comment Document at 104 for both HCR and MCR.

The BASA states that a distinction must be drawn between a sale in execution via auction and a normal sale which they term an ‘unrushed open market transaction’.<sup>303</sup> They go on to say that the environment created by a sale in execution creates an environment conducive to ‘bargain hunters’ – this is why creditors should set reserve prices they argue.<sup>304</sup> They submit that they do various calculations and take many things into consideration before coming to a value.<sup>305</sup> This price is then compared to the amount outstanding by the debtor – the bank then sets the lower amount as the reserve price.<sup>306</sup>

This admission is a direct contradiction of the above assertion that the BASA understand that the rights of the debtor need to be protected. Selecting the lower price out of the actual market value against the amount owed is a blatant admission that banks are primarily interested in recovering their outlay regardless of the loss to the debtor.

The BASA go on to make various claims about why the courts setting a reserve is disadvantageous to both the debtor and creditor; severe delays and ballooning costs (which, it should be remembered, the banks impose on the creditor) are most frequently cited to this end.<sup>307</sup>

The tone of the objections by the BASA is best summed up in the paragraph where they state:

“It will place an unreasonable restriction on the right of the execution creditor to protect its economic interest by way of execution. In the event that the immovable property cannot be sold at the set reserve price, the execution debtor will remain in default for longer, which will cause the residual debt and arrears owed by the execution debtor to increase and the *in-duplum* rule to apply which will in turn reduce the amount that the execution creditor may collect, hence the execution creditor will be disadvantaged financially”.<sup>308</sup>

They conclude by suggesting that the all provisions regarding the introduction of a reserve price be deleted.<sup>309</sup>

The quote above and the submissions of the BASA in general, to my mind, illustrate that they are vehemently opposed to a court being allowed to set a reserve price purely to protect their own interests. As this is expected, I assert that the rejection of reform by the BASA supports my proposal of legislative reform in the procedure of execution.

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<sup>303</sup> Public Comment Document at 104 for both HCR and MCR.

<sup>304</sup> Public Comment Document at 105 for both HCR and MCR.

<sup>305</sup> Public Comment Document at 105 for both HCR and MCR.

<sup>306</sup> Public Comment Document at 105 for both HCR and MCR.

<sup>307</sup> Public Comment Document at 105 for both HCR and MCR.

<sup>308</sup> Public Comment Document at 105 for both HCR and MCR.

<sup>309</sup> Public Comment Document at 105 for both HCR and MCR.

(2) Submissions of the SABFS, ProBono.Org and the LSSAW

The SABFS supported sub-rules 1 – 3, but on the point of mandatory personal service they asserted that this would be impractical.<sup>310</sup> Crucially, on sub-rule 9 which proposes a reserve price to be introduced the SABFS support said introduction, save for the fact that they propose that a sheriff be remunerated equally regardless of whether a buyer is found or not. The fact that the SABFS generally supports the Proposed Rules and specifically the introduction of a reserve price is positive. It indicates that the sheriffs collectively, who play a pivotal role in the procedure of execution, acknowledge and understand the need for reform thereof.

Probono.Org submitted that the debtor should be able to stipulate a reserve price, and that failure to do so is unconstitutional in terms of Sections 25 and 26 of the Constitution.<sup>311</sup>

The LSSA did not object to a reserve price being introduced, but did suggest that provision should be made for a court to relax the rules under the Proposed Rules when the property cannot be sold in auction.<sup>312</sup>

The submissions from these bodies that do not have direct vested interest in the auction process is markedly different to that of the BASA. In accordance with my view set out below, these bodies welcome an introduction of a reserve price, but stress the need to fine-tune the Amendment Bills before promulgation.

(iv) Author's Comments on the Amendment Bills

I submit that while the Amendment Bills address the main issue within the HCR, namely the introduction of a reserve price, important considerations have still been overlooked. There is still no provision regarding judicial oversight in the auction and sale parts of the procedure of execution. Furthermore, no proposal has been tabled to set a lower debt limit for immovable property to be sold in execution of an unsecured debt.

The salient addition is the introduction of a reserve price and a method which courts can use to arrive at such a price. My view is that this addition alone will avoid injustices in most cases.

The major advantage of requiring that the specified documents must be attached in terms of Sub-rule 5<sup>313</sup> will give the court a good idea of the amount that should be expected to be obtained

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<sup>310</sup> Public Comment Document at 91 HCR and 99 MCR.

<sup>311</sup> Public Comment Document at 137 HCR and 164 MCR.

<sup>312</sup> Public Comment Document at 171 HCR and 172 MCR.

<sup>313</sup> In terms of the Amendment Bills, 2016, HCR 46A(5) and MCR 43B(5) the documents that must be included are the one showing the market value of the property; the local authority's valuation of the property; the amounts owing on the mortgage bond registered over the immovable property; the amount owing to the local authority; and the amount owing to the body corporate as levies.

in a sale in execution. This knowledge will not only help him decide whether or not to grant the execution, but also determine if the auction price obtained is fair. Unfortunately, as mentioned above, the full benefit of this proposed rule is somewhat hindered by the lack of a provision that allows for a court to review the proposed sale before it goes through. This is still the job of the sheriff.

The other notable proposal in this section lies in Subrule 8. This rule allows the court to consider and order alternative means to satisfy the judgment debt rather than selling the residence of the home of the debtor. I assert that this will go a long way to ensure that sales of homes are avoided altogether.<sup>314</sup> It also shows the legislatures progressive attitude towards the procedure of execution. Traditionally the right to foreclose a mortgage meant that all other debt recovery mechanisms are bypassed so that sale could take place swiftly.<sup>315</sup>

A noticeable issue with the Amendment Bills is Sub-rule 2(b), which states a court must consider all relevant factors before execution is warranted. While this is codification of the common law, it is also a codification of a contentious concept in common law. As stated in Chapter 3 above, no clear definition was given to 'all relevant factors'. It was hoped by academics that the legislature would provide guidance as to the list of factors;<sup>316</sup> however it appears that the legislature is repeating the problem.

## **(h) Chapter Conclusions**

I submit that this chapter illustrates the gulf in purpose of the legislature and the judiciary. While it may be acceptable that the judiciary develop the law where possible; in terms of the procedure of execution that approach has proved to be insufficient.

On the one hand, the legislative nuances and interpretation dominated the discussion of the procedure of execution in the cases over years. Regarding the Amendment Bills, the comments exemplified a variety of input from different organisations, all within a few months, with solutions and suggestions about how the proposed procedure can be perfected. I submit that this shows that the legislative process is far better suited to remedy the deficiencies in the procedure of execution than the judicial process.

Accordingly, I postulate that the Amendment Bills will have a profoundly positive effect on the procedure of execution. It show that the legislature, or at least the drafting committee, listens to judicial and academic suggestion. In my view, a possible issues with implementation of this

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<sup>314</sup> The Amendment Bills, 2016; HCR 46A(8), MCR 43B(8) .

<sup>315</sup> Van Heerden and Boraine 2006 *De Jure* at 330.

<sup>316</sup> Steyn (note 35 above) at 203; Van Heerden and Boraine 2006 *De Jure* at 330.

amendment, is that such detailed applications may be particularly burdensome on courts. In the proposals below I suggest that a separate court is setup to deal with dispossession of property and evictions, to alleviate the pressure on the courts and for the maximum amount of attention to be given to each matter.

Despite this, my conclusion is that it is not the function of the judiciary to formulate legislation where the law is lacking. It is their job to interpret legislation in terms of the matter at hand. In terms of the procedure of execution, legislative intervention is clearly required – the attempts by the judiciary to provide this have been shown to be too slow and ineffective. Furthermore, the lack of legislative guidance stifles the function and effectiveness of the judiciary, as has been exemplified by often contradictory and ambiguous judgments regarding the procedure of execution.

## **CHAPTER 4 – REPOSSESSION STATISTICS, PROPOSALS AND CONCLUSION**

### **(a) Chapter overview**

My interest was initially piqued in this matter by a report published by the Independent Online.<sup>317</sup> The article stated that even in a post-Gundwana repossession climate most homes are still being sold for around 30% less than their market value.<sup>318</sup>

In extreme cases, not unlike Jaftha, houses are sold for a few hundred rand.<sup>319</sup> The article outlines a class-action suit being instituted by the Housing Class Action. The spokesman cited in the article, Ian Beddows, exclaimed that over 10 000 homes a year are repossessed in South Africa, just under 200 weekly.<sup>320</sup> This confirms what the article says, we really do have one of the most predatory banking systems in the world.

This is supported by Steyn who states: ‘A common, disquieting occurrence has been identified that judgment creditors, or persons who are privy to their affairs, or even the sheriff's agent, buy the auctioned properties for exceedingly low prices’.<sup>321</sup>

The proposal of greater legislative clarity and control of this legal area, which among other things would require greater judicial oversight, is premised on the reasoning, salient issues and conclusions in both the *Jaftha* and *Gundwana* cases respectively. Both these cases have recognised and given effect to the Housing Clause by recognising the scope for abuse to take place when such a fundamental right may be limited without control and oversight.

In both cases, an apparent feature was the general lack of information that citizens are burdened with. Ignorance of their rights – or insufficient means to enforce rights, buttress the conclusion that the only safeguard against such a harming scenario, is by mandatory judicial procedures to be put into place, supported and outlined in legislation. The compulsory procedures will force courts to come to equitable decisions regarding steps beyond the actual granting of the warrant of execution. As enunciated in both cases, the point is not to prevent repossession, it is to make sure unjustifiable repossessions do not take place.

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<sup>317</sup> <http://www.iol.co.za/news/crime-courts/banks-to-be-sued-over-repossessions-1.1854341> (Accessed 12 October 2015).

<sup>318</sup> <http://www.iol.co.za/news/crime-courts/banks-to-be-sued-over-repossessions-1.1854341> (Accessed 12 October 2015); see Chapter 3(d) above for a more detailed explanation of the prices of houses sold in execution at auction.

<sup>319</sup> <http://www.iol.co.za/news/crime-courts/banks-to-be-sued-over-repossessions-1.1854341> (Accessed 12 October 2015).

<sup>320</sup> I personally spoke to Ian Beddows on this matter where he confirmed this to me.

<sup>321</sup> Steyn (note 35 above) at 137.



As mentioned above, repossession consists of three steps. The warrant of execution, attachment by the sheriff, and the sale by public auction by the sheriff. Currently the only step that has judicial oversight is the initial step which allows for the sale – the granting of the warrant of execution. While the oversight at this stage goes a long way to prevent injustices from materialising by stopping the institution of repossession proceedings if the limitation of the right to housing is not justified, the latter two steps are still, in my opinion, open to abuse and injustice.

With the above in mind, I have included a statistical comparison of the rate of repossession in South Africa, with that of the United States of America and the United Kingdom respectively. These statistics have been included to illustrate the issues discussed in the chapter above.

**(b) The rate of repossession of immovable property in South Africa (SA) compared to the rate in the United Kingdom (The UK) and the United States of America (The USA)**

**(i) Section overview**

This chapter will attempt to buttress the need for legislative reform in the Process by using statistics. The statics will be used to show the rate of repossession (hereinafter ‘the ROR’) in SA compared to the ROR in the USA and the UK.

**(ii) The rate of immovable property repossession in South Africa**

As a general rule, Notices issued for the Sale in Execution (Notices) are more common during times of economic hardship and scarcer during an economic boom. In support of this, statistics show that during the economic upturn of 2005, Notices were at a low of 12 400 per annum. In contrast, during the economic downturns in both 2003 and 2009, Notices hit almost 30 000<sup>322</sup> per annum.

It should be noted that not all of these resulted in a sale in execution, with around 36% actually being sold.<sup>323</sup> Consultant specialists Lightstone estimate that over the decade ending in 2015, 112 325 properties have been sold in execution, translating to around 11 200 per annum.<sup>324</sup> With around 1.8 million mortgages in South Africa,<sup>325</sup> this translates to 0,62% of all houses under mortgage in South Africa being sold every year for the last 10 years. These statistics become even more alarming when considered against repossession statistics in the USA and the UK.

<sup>322</sup> <http://www.sacommercialpropnews.co.za/property-types/housing-residential-property/5937-sa-to-experience-fewer-home-repos-in-2013.html> (accessed on the 20th December 2016).

<sup>323</sup> <http://www.sacommercialpropnews.co.za/property-investment/6385-banks-striving-to-reduce-bond-defaults.html> (accessed on the 20th December 2016).

<sup>324</sup> <http://www.lightstoneproperty.co.za/adminNews/news.aspx?cld=3> (Accessed 20<sup>th</sup> December 2016).

<sup>325</sup> <http://www.statssa.gov.za/isi2009/ScientificProgramme/IPMS/0230.pdf> at 14 (Accessed 20<sup>th</sup> December 2016).

With regards to the price of sale, *Shaw*, who is a practicing advocate in the field, obtained spreadsheets<sup>326</sup> detailing the prices of homes sold in execution the last 4 years.<sup>327</sup> *Shaw* states that the spreadsheets show that the average price of all the houses sold as a result of the Process was 45% of the market value.<sup>328</sup> This means that on average, the sale price was 55% below market value.<sup>329</sup> *Shaw* further added that the bottom 20% of the houses sold, in terms of price, only obtained 17% of their market value – 83% below their market price.<sup>330</sup> In a damning conclusion, *Shaw* states that many of the properties on the spreadsheet were sold for a measly R 100.00.<sup>331</sup>

(iii) The rate of immovable property repossession in the USA

The collapse of the US housing market led to a worldwide recession at the end of the 2000's. Still feeling the aftershocks of the crash, the latest data available from October 2013, saw 1 252 416 of all properties under mortgage in the USA at some stage of foreclosure. This equates to 1.5% of all 83 494 400 mortgages in the USA.<sup>332</sup> This figure drops when the actual ROR is considered, out of the 1.5% of mortgages at some stage of foreclosure, only 0.58% of all houses under mortgages were sold in 2013 – equating to 463 000 houses sold.<sup>333</sup>

When looking at non-crises periods, the number of properties at some stage of foreclosure drops to 600 000 houses – with the number of actual repossessions plummeting to 150 000.<sup>334</sup> This equates to 0.18% of all mortgages in the USA.<sup>335</sup>

(iv) The rate of immovable property repossession in the UK

The repossession system in the UK is regarded as more a more globally representative<sup>336</sup> than the often criticized and atypical USA system.<sup>337</sup>

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<sup>326</sup> These were obtained during litigation in the pending matter of *NCR v ABSA and Four Others*, in which *Shaw* is counsel for one of the parties. The statistics taken from these spreadsheets are enumerated in *Shaw's* LLD thesis, I am merely referencing his findings. According to *Shaw*, the spreadsheet details every case from the main five mortgage lenders in SA. These are ABSA, First National Bank, Standard Bank, Nedbank and Capitec.

<sup>327</sup> *Shaw*, As Yet Untitled and Unpublished, LLD thesis, University of Johannesburg, 2016, Chapter 2 at 5.

<sup>328</sup> *Shaw* (note 220 above) at 5.

<sup>329</sup> *Shaw* (note 220 above) at 5.

<sup>330</sup> *Shaw* (note 220 above) at 5.

<sup>331</sup> *Shaw* (note 220 above) at 5.

<sup>332</sup> <http://www.realtytrac.com/content/news-and-opinion/2013-year-end-us-foreclosure-report-7963> (Accessed 18 December 2016).

<sup>333</sup> *Shaw* (note 220 above) at 6.

<sup>334</sup> *Shaw* (note 220 above) at 7.

<sup>335</sup> This is calculated by taking the 150 000 homes actually sold and dividing it by the total number of homes under mortgage in the USA, being 83 494 400.

<sup>336</sup> *Shaw* (note 220 above) at 8.

<sup>337</sup> Nicholas Krebs "British Cures for American Foreclosure Woes: A Comparative Analysis of Foreclosure Law in the United States and United Kingdom" *Chi.-Kent J. Int'l & Comp. L.* Vol. XV at 3.

With around 11 300 000 mortgages in the UK in total,<sup>338</sup> statistics over the decade ending in 2011 show that 160 000 properties were sold in execution in total.<sup>339</sup> This is around 16 000 a year, meaning the average annual ROR was 0.14% a year over the decade ending in 2011. It is worth noting that this period included the global recession, instigated by the abovementioned USA housing collapse.

- (v) Comparing the rate of repossession in SA with the USA and UK respectively

While the number of mortgages in both the USA and UK dwarf that of SA, the key comparison is made when looking at the ROR. This is done by taking the total number of mortgage bonds in a country and dividing it by the number of mortgaged homes sold over a period of time at the instance of mortgagees.

As explained above, the ROR in SA over the decade ending in 2015 was 0.62%. This means that out of every 5000 houses bonded under a mortgage in South Africa, 31 are sold in execution.

In the USA there is no decade average, rather peak levels and normal levels, which can still be used for comparative purposes. A peak ROR level in the USA is 0.58%, which is 29 homes sold in execution out of 5000 under a mortgage bond. The normal ROR level in the USA stands at 0.18%, a mere 9 out of 5000 homes. The peak level in the USA is 2 less than SA's average per 5000 homes under mortgage, and the normal level is 22 homes less than SA.

Turning to the ROR in the UK against the ROR in SA, the statistics again paint the procedure of execution in a negative light. With the average ROR of 0.14% over a decade ending in 2011, which included the global recession, the UK outperforms the USA and SA. The ROR of 0.14% of all mortgages translates into a mere 7 out of every 5000 homes subject to a mortgage bond being sold in execution. This is 24 more than SA per 5000 homes. As stated by Shaw, the UK is a better indicator of worldwide trends than the US.

- (vi) Comments on the rate of repossession of immovable property in SA compared to the rate in the UK And the USA.

As stated at the beginning of this section, the purpose of these statistics is to show the need for legislative reform in the procedure of execution. I submit that the statistics have shown exactly

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<sup>338</sup> <https://www.cml.org.uk/industry-data/key-uk-mortgage-facts/> (Accessed 8<sup>th</sup> January 2017).

<sup>339</sup> [http://www.ncbi.nlm.nih.gov/core/lw/2.0/html/tileshop\\_pmc/tileshop\\_pmc\\_inline.html?title=Click%20on%20image%20to%20zoom&p=PMC3&id=4151136\\_gr1.jpg](http://www.ncbi.nlm.nih.gov/core/lw/2.0/html/tileshop_pmc/tileshop_pmc_inline.html?title=Click%20on%20image%20to%20zoom&p=PMC3&id=4151136_gr1.jpg) (Accessed 8<sup>th</sup> January 2017).

that. Although the data compared have not shared all the same variables, the pattern derived is clear – the ROR in SA is higher than the USA at its worst and the UK over the last decade.

These statistics show that even in a strong capitalist society like the USA, the rate of repossession in a non-crises period is fair lower than our 10-year average. With our history of land dispossession and supposedly progressive socio-economic laden constitution, we have an appalling rate of sales in execution of immovable property. It should be noted that these statistics have been captured after the major judicial developments and protections above.

### **(c) Proposals**

In light of the research on this topic and the Amendment Bills, I have formulated a series of proposals that I believe will remedy the injustices that still occur in the sale of repossessed houses:

1. A court must set a reserve price on all immovable property to be sold by way of auction. The price must be arrived at in a methodical manner than allows for the reflection of the closest market value approximation.

This proposal is a salient feature of the Amendment Bills, the public comments have also shown it to also be one of the more contentious proposals. My view is that an introduction of a reserve price is the single most progressive action the legislature could take to curb injustice in the procedure of execution.

The need for a reserve price comes sharply into focus in *Jaftha*, and despite judicial advancements, we can directly attribute the low auction prices to a lack of legislative intervention.<sup>340</sup> When creditors are allowed to set the auction price, there is no need for them to set a price above the debt they are owed.<sup>341</sup> In the case of the sheriff, they do not have any financial interest in obtaining a larger price at auction – they get paid a flat rate.<sup>342</sup> The consequences of the sheriff having a lack of financial interest in the matter is exacerbated by the lack of experience such officers often have.<sup>343</sup> I further propose that sheriffs should also be remunerated in proportion to the selling price. This would act as incentive for them to obtain as high a price as possible.

As explained above, a fair reserve price ensures that parties are not prejudiced during the procedure of execution. In terms of The Amendment Bill, the reserve price is obtained by the court via documents which must be attached to the application to declare the property

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<sup>340</sup>J Smit *Outrageous in this Day and Age*, Without Prejudice, September 2010 at 36.

<sup>341</sup> J Smit *Outrageous in this Day and Age*, Without Prejudice, September 2010 at 36.

<sup>342</sup> J Smit *Outrageous in this Day and Age*, Without Prejudice, September 2010 at 36.

<sup>343</sup> J Smit, *Outrageous in this Day and Age*, Without Prejudice, September 2010 at 36.

executable. The documents that must be included are: the ones showing the market value of the property; the local authority's valuation of the property; the amounts owing on the mortgage bond registered over the immovable property; the amount owing to the local authority and the amount owing to the body corporate as levies. I submit that this is a fair and objective manner in which the reserve price can be obtained and would be suited to advance my proposal.

2. There should be a central electronic system in place operated by the relevant government department, that has the details and values of immovable property, as well as any real rights registered over it (such as a mortgage bond).

Such a system will not only allow government to derive important statistics for socio-economic development, but it will also allow courts to be guided as to the history of the property as well as a suitable reserve price to be set for it to be sold in execution. An electronic system also allows for accuracy, effective storage of data and faster communication.

While this would be costly in terms of cash and personpower, I believe that the long term positive effects outweigh the immediate costs. Having said that, our government has faced recent problems when implementing new infrastructural systems for the public.<sup>344</sup>

3. The central electronic system above should have a separate interface for auctions. It should require prospective bidders to register online with their identification number before attending the auction and provide guidelines to the auctioneer on suggested price increments according to property value. Perhaps, if the system had sufficient data it could even suggest reserve prices for a court to confirm.

This will drive down fraud and collusion which has widely been reported in auctions.<sup>345</sup>

4. A sale in execution must be confirmed by a court after it is satisfied that all the correct procedures have been followed and that the property was sold at a fair price. Only then should transfer of the property be completed.

The fact that sales in execution are not judicially monitored after a warrant of execution is granted, shows the lack of understanding or knowledge of the mischief that takes place during

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<sup>344</sup> <https://mg.co.za/article/2017-03-03-breaking-sassa-and-cps-reach-agreement-on-grant-payments> (Accessed 4th March 2017).

<sup>345</sup> <http://www.iol.co.za/news/crime-courts/hammer-falls-on-auction-boss-1.1267813#.VhzRUPmqgko>; <http://www.news24.com/SouthAfrica/News/Auction-kickback-scandal-revealed-20120218>; <http://www.financialmail.co.za/features/2014/02/06/auction-industry-at-a-crossroads> (accessed 3rd January 2017).

and after the auction stage. A court should make sure a fair price has been obtained by the seller and that no wrongdoing has taken place.

5. A separate housing and evictions court should be set up.

The increased requirement in the procedure of execution mean that more time and expertise will be needed to effectively implement it.

A specialised court would allow for judges who specialise in the procedure of execution to adjudicate on and interpret the law in the most effective manner, while also ensuring that it is given the consideration it deserves.

In addition, eviction and rental issues could also be added to the ambit of this court. It would be setup and structured in a similar manner to the Labour Court.

6. The MCA and HCR should be amended to include a list of factors that should be taken into account when considering the issue of a warrant of execution.

The inclusion of factors that a court should take into account when deciding whether or not to declare property executable has been a common theme in the judicial developments in this area. The issue with this, however, is that these value judgments are often only made when the factors are pleaded in litigation. From my experience in practice, most of the requests for judgments declaring a property executable ends up with default judgment being granted. If the factors set out in judgments are crystallised into legislation, plaintiffs and judges alike will be forced to adhere to the factors, or risk having their application dismissed.

7. The sale of immovable property in execution for debt should be limited to certain agreements outlined in the NCA. Unsecured debt should not be recoverable via execution of immovable property, or at least limits should be put in place for a lowest amount of debt to be incurred before immovable property can be proceeded against.

The current South African constitutional dispensation places heavy weight on equality, justice and socio-economic development. As we saw in the *Jaftha* case, many provisions of the Constitution can be violated when the judiciary works mechanically and without stringent legislative parameters. If the law continues to allow immovable property to be sold without a lower limit for the debt, cases like *Jaftha* will continue to occur.

8. Agreements secured by immovable property should not be able to be satisfied by selling the immovable property; once a certain threshold is reached in payment. Either the capital value of the amount secured or half of the value of the property mortgaged.

There are many scenarios, where a financial rough patch ebbs the flow of personal finance. This could occur at any time during the usually lengthy period of having a mortgage bond. For example, if a person pays diligently for 18 years and a year or two before the bond is to be settled and he then loses his job. In turn, he cannot pay his bond and his house gets sold for what would then be the interest portion of his bond. This seems logically unfair, but is legally sound. The obvious counter-argument would be that after a period of time the owner would just stop paying his bond if there was no risk of losing his home. Other mechanisms to collect debt such as garnishee orders or execution against movable property (the *Ntsane* court contemplated this) are still effective ways to settle debt.

#### **(d) Conclusion**

In sum, reports that show situations similar to *Jaftha* indicate the insufficiency or ineffectiveness of measures to our process of repossession. Enforcement of the current procedures seems impossible without requisite legislative guidance. It is crucial to the immediate social, and eventual economic future of our country that we look beyond judgements that masquerade as protection and towards effective regulation that will actually provide salvation.

The apparent reluctance to disturb the rights of creditors seems farcical when the majority not only have stronger bargaining positions in the initiation of a contract, but also at the occasion of remedy. Our motion courts continue to be filled with advocates and attorneys praying for warrants of execution against debtor's homes on a daily basis – in their scores. As long as the procedure of execution is kept exactly that, a procedural exercise, substantive societal change will not take place. The proposed amendments shows that swift progress is possible – although whether they will actually be implemented remains to be seen. The compilation of this report has allowed me to fully hear the judicial cries for reform – which are muffled by the weight of dusty statute book covers.

In a country with a notorious housing history, to the keen observer it would appear such injustice is playing out in a different, more insidious form, once again.

The current trend of home-owners being executed in execution must change.



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