PhD Law Thesis

"A critical analysis of the home mortgage foreclosure requirements and procedure in South Africa and proposals for legislative reform"

by

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Declaration: This thesis is my own work and all primary and secondary sources have been appropriately acknowledged. This thesis has not been submitted to any other institution as part of an academic qualification. The thesis is submitted for the qualification of a PhD under the rules of the University of KwaZulu-Natal, Howard College Campus.

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'All glory be to God – Jai Ambe Ma'

Special gratitude goes to my parents, Mr. Ameer Singh and Mrs Myneewathie Singh, and to my brother, Mr Nishan Singh, for instilling righteous values in me. I am the person I am today because of you. Thanks also goes to my fiancée, Ms Diaksha Maraj, for encouraging me during my study period.

ABSTRACT

The execution against immovable property, or foreclosure, involves a delicate balancing of mortgagor and mortgagee rights. From a mortgagor perspective, he or she is protected by Section 26 (1) of the South African Constitution which provides that 'everyone has the right to have access to adequate housing'. Although the right to have access to adequate housing does not entitle one to a right to ownership of a home, this right ensures that everyone has the right to a fair standard of living and is linked to other fundamental human rights such as the right to dignity, privacy and freedom. From a mortgagee perspective, they are protected by Section 25 of the Constitution which provides for the right to acquire property, and the right not to be unlawfully deprived of such property. Section 25 thus protects a mortgagee's property rights and, in particular, his real right of security (foreclosure rights).

Foreclosure against a home can be seen as an infringement of a mortgagor's right to have access to adequate housing. However, it must be accepted that during foreclosure, the mortgagee enjoys a right to direct execution against the hypothecated immovable property (the home), in the event of a default by the mortgagor. When a mortgage agreement is signed, the mortgagor hypothecates his home as security for the capital lent by the mortgagee. During foreclosure a balance needs to be struck between the mortgagor's right to have access to adequate housing and the mortgagee's foreclosure rights. Unfortunately, South African law has not provided clarity as to the balancing of mortgagor and mortgagee rights during the foreclosure process and this has resulted in much inconsistency and, in some instances, abuse of process. The foreclosure process is currently not regulated by any specific legislation. With the exception of Rule 46A of the Uniform Rules of Court, there is no statute that specifically governs the foreclosure process. This gap in the law is concerning, given the economic and social impact of mortgage and foreclosure. Therefore, the decision to foreclose against a person's home requires a structured framework.

In this thesis it will be argued that the current laws governing foreclosure and the debt relief process, namely: the court rules, debt review under the National Credit Act, and insolvency laws, are inadequate and lack clarity, despite being intended to assist mortgagors facing foreclosure. In particular, the current laws do not provide any clarity as to when foreclosure against a home is justifiable or when it is not, nor do they provide any guidelines for the courts to consider during foreclosure proceedings. This lack of clarity has resulted in much confusion, and it is submitted that there is a need for clarity to be established. Therefore, the purpose of this thesis is to expose some of the inconsistencies and lacunae within the current foreclosure process, and to provide recommendations as to how these issues can be resolved.

It will be concluded that the current foreclosure process and debt relief mechanisms in South Africa are inadequate as they lack clarity and uniformity. In particular, the current foreclosure process does not provide clarity as to how a mortgagee should exercise his foreclosure rights, nor does it provide adequate protection or debt relief options for South African homeowners. It is submitted that regulation and development of the foreclosure process is urgently needed. Accordingly, it will be argued that a Foreclosure Act is required to establish clarity in foreclosure processes, and to ensure a fair balance between the interests of all parties during foreclosure against a home.

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DISCLAIMERS

Research end date. The foreclosure environment is a constantly changing world. It will be noted that legal developments occurs frequently, almost monthly, in foreclosure practice. Hence, legal developments that occurred after 1 October, 2018 were not considered in this thesis.

Content limitations. The research undertaken in this thesis relates specifically to the current laws, rules and practices for the foreclosure process, or the enforcement of a mortgage agreement. Accordingly, debt relief and foreign laws and process will only be considered in relation to their application to foreclosure process.

Foreclosure. The term 'foreclosure' is not defined in South African law. The term is generically used in South Africa to describe the action or process by a mortgagee to enforce a mortgage agreement and execute against the hypothecated immovable property, when a mortgagor fails to meet his/her mortgage repayments. Thus, the term 'foreclosure' will be used in this thesis to describe the action or process taken by the mortgagee to enforce its real right of security against the mortgagor's home. (See Annexure to Chapter Seven for a suggested definition of the term 'foreclosure').

Mortgagor/Debtor and Mortgagee/Creditor. These terms will be used interchangeably. In other words, the term 'debtor' includes the term 'mortgagor', and the term 'creditor' includes the term 'mortgagee'.

Home. The term 'home' is also not defined in South African law. It will be used in this thesis to describe immovable residential property, or immovable property used as a primary residence for its occupants. In particular, this thesis will consider the issue of when a home – primary residence, which is hypothecated or mortgaged, is under foreclosure (See Annexure to Chapter Seven for a suggested definition for the term 'home').

CHAPTER ONE

INTRODUCTION

> Housing forms an indispensable part of ensuring human dignity. Adequate housing encompasses more than just the four walls of a room and roof over one's head. Housing is essential for normal healthy living. It fulfils deep-seated psychological needs for privacy and personal space; physical needs for security and protection from inclement weather; and social needs for basic gathering points where important relationships are forged and nurtured. In many societies a house also serves an important function as an economic centre where essential commercial activities are performed. Our Constitution provides for justiciability of the Bill of Rights, including the right to adequate housing. It expressly confers legal standing to aggrieved persons and their representatives to approach the courts to enforce their rights.[1]

1.1 Introduction

In the case of *Jaftha v Schoeman and Others*,[2] the Constitutional Court held that the joy of having a home to call one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience.[3] The 'home' is an important aspect of every individual's well-being. The home is a place where families are made, memories are created, and where people feel most secure.[4] The value of, and protection afforded by, the home has been expressed in several well-known maxims, such as 'a man's home is his castle', 'home is where the heart is', and 'safe as houses'.[5] These encapsulate the idea that a home is much more than a physical object – it holds deep sentimental value and is a symbol for security, autonomy, comfort and freedom.

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[1] *City of Johannesburg v Rand Properties (Pty) Ltd and Others* 2007 (1) SA 78 (W), para 49 (hereinafter referred to as '*Rand Properties*').

[2] *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) (hereinafter referred to as '*Jaftha*'). See also *Sarrahwitz v Maritz* 2015 (4) SA (CC) (hereinafter referred to as '*Sarrahwitz*'), and *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) (hereinafter referred to as '*Grootboom*').

[3] *Jaftha*, para 39.

[4] See Fox O' Mahony & Sweeney, *The Idea of Home in Law: Displacement and Dispossession (Law, Property and Society),* (2010), 4 (hereinafter referred to as 'Fox & Sweeney'), and Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review*, 957 (hereinafter referred to as 'Radin, 'Property and Personhood'').

[5] See Ferguson, *The Ascent of Money: A financial history of the world*, (2008), Chapter 5, 241 (hereinafter referred to as 'Ferguson, *The Ascent of Money*'), and Steyn, 'Safe as houses? Balancing a mortgagee's security interest with a homeowner's security of tenure' (2007) 11, *Law, Democracy and Development*, 101 (hereinafter referred to as 'Steyn, 'Safe as houses").

Despite the significance attached to it, the idea or concept of 'home' is not solidly present in law.[6] While various international statutes[7] and court judgments have highlighted the importance of a home to individual and family life,[8] in South Africa there is no statute that exclusively protects the sanctity of the home.[9] Furthermore, South African law does not provide any legal definition for the term 'home', nor does the law provide any specific protection to a home.[10] Several international property law scholars[11] argue that, given the unique nature and value of a home, it should enjoy an enhanced legal status.[12] International property law experts Lorna Fox and Dean Barros, argue that the idea of a home has carried little weight in law, particularly when balanced against easily measurable, and legally definable, contractual rights, such as a mortgagee's right to foreclose against a home.[13] Barros submits that the idea of a home as a 'castle' is a powerful metaphor suggestive of its role in providing protection. However, the metaphor has its limits, and the 'castle's' walls can be breached by sufficiently strong competing interests.[14] One of these is a mortgagee's right to foreclosure.

Foreclosure can be seen as a threat to one's home. Despite the value and significance attached to owning a home, there is equal significance attached to a mortgagee's right to foreclosure (or right to execute against the hypothecated immovable property). When a mortgage agreement is signed, the mortgagee lends the mortgagor the necessary finance to purchase a home on the condition that,

[6] Fox & Sweeney, 1.
[7] There are various international statutes that recognise the value of the home by providing for the right to an adequate standard of living and/or housing. These include the International Covenant on Economic, Social and Cultural Rights (article 11 (1)), the Universal Declaration of Human Rights (article 25), the European Social Charter (article 31), and the African Charter on Human and People's Rights. See also the Convention on the Rights of the Child which imposes an obligation on States to assist parents in providing adequate housing for their children, and the Protocol to the African Charter, which explicitly guarantees women and children the right to adequate housing.
[8] See *Jaftha*, and *Grootboom.*
[9] Section 26 (1) of the Constitution Act 108 of 1996 provides that 'everyone has the right to have access to adequate housing', and section 26 (2) provides that 'the State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'. Despite, the existence of section 26 (2), it is submitted that there is currently no legislation in place that exclusively protects the right to have access to adequate housing, in particular one's existing right to housing.
[10] This will be discussed further in Chapters Two and Three.
[11] See Fox & Sweeney, Radin 'Property and Personhood', 957-972, and Barros, 'Home as a Legal Concept', *Santa Clara Law Review*, (2006), 46.2, 255, 256 (hereinafter referred to as Barros, 'Home as a Legal Concept'). See Chapter Two (2.3) for a detailed discussion on 'the home'.
[12] Radin 'Property and Personhood', 957-972, and Barros, 'Home as a Legal Concept', 256.
[13] See Fox & Sweeney, 'Chapter One', and Barros, (2006), 276.
[14] Barros, (2006), 276-277.

should the mortgagor default on the mortgage agreement, the mortgagee will have a right to attach and sell the hypothecated immovable property (the home). The mortgage agreement gives the mortgagee a real right of security over the hypothecated immovable property and allows him the right to seek direct execution against the home in the event of a default by the mortgagor. In *Standard Bank v Saunderson*,[15] Cameron JA emphasised the importance of the mortgagee's right by finding that:

> The mortgage bond is an indispensable tool for spreading home ownership. Few people can buy a home immediately: by providing security for a loan, the mortgage bond enables them to do so. There can hardly be a private residence in this country that has not at one time or another been mortgaged, nor a home-owner who has not at some time been a mortgagor.... A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself.[16]

Given the strength of a mortgagee's right and the impact that foreclosure may have on a mortgagor and his or her family,[17] it is concerning that there is no specific legislation that regulates the manner in which a mortgagee can enforce his foreclosure rights against the home. As a result, different mortgagees use different policies when making a decision as to whether or not to execute against residential property.[18] Moreover, due to the lack of specific legislative guidelines relating to the foreclosure process, courts have made contrasting decisions in relation to the

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[15] *Standard Bank of South Africa Ltd v Saunderson and Others*, 2006 (2) SA 264 SCA (hereinafter referred to as '*Saunderson'*)

[16] *Saunderson*, paras 1-2. See statistics compiled by the Deed Registrations Office of South Africa and Lightstone for 2015 and 2017 available at www.gov.za/stats, which reveals that approximately sixty percent of home-owners in South Africa are burdened with mortgage debt.

[17] See Chapter Two for an overview of the effects of foreclosure. See also Peterson, 'Fannie Mae, Freddie Mac, and the home mortgage foreclosure crisis', *Loyola Journal of Public Interest Law*, Vol 10 (2009) 149, 157, Ellen and Dastrup, 'Housing and the Great Recession', (2012), *The Stanford Centre on Poverty and Inequality*, and Baker, 'The housing bubble and the financial crisis', *Real World Economics Review* (2009) Issue 46, 73, and Holt, 'A summary of the primary causes of the housing bubble and the resulting credit crisis', *The Journal of Business Inquiry* (2009) 8.1, 120.

[18] In practice, different mortgagees adopt different approaches to assist their mortgagors during mortgage repayment default. Some mortgagees assist their mortgagors with holiday instalment payments, recapitalisation of the arrear amount, or restructuring and/or extending the mortgage period. Other mortgagees do not provide such relaxed repayment terms, and prefer to initiate foreclosure proceedings immediately upon repayment default. Accordingly, there is much uncertainty in practice between mortgagees. For example of the different internal debt relief options used by mortgagees see www.fnb.co.za/home-loans, www.absa.co.za/personal/loans/for-a-home, www.standardbank.co.za/southafrica/homeloans, and www.sahomeloans.com/advice-centre.

mortgagee's right to direct execution against the home.[19] This has created inconsistency and distrust in the current foreclosure process.

From a mortgagor's perspective, there are minimal protective debt relief mechanisms in place to assist them during execution against their immovable property, this being normally their home.[20] The current debt relief mechanisms provided during foreclosure are unsatisfactory and limited legislative guidelines have been provided to interpret existing debt relief legislation, in particular, the National Credit Act 34 of 2005 (hereinafter referred to as the 'NCA'). This gap in the law, involving lack of a clear foreclosure framework, and failure to provide adequate debt relief to mortgagors, creates uncertainty and potentially allows for abuse of process. This thesis seeks to reveal these inconsistencies and gaps within the current South African foreclosure process and debt relief mechanisms[21], and suggests the introduction of a uniform structure in the form of a proposed Foreclosure Act, which would appropriately balance the interests of the mortgagor and mortgagee. Such a Foreclosure Act would create clarity in the foreclosure process by providing clear rules and procedures, thus creating certainty and uniformity in the foreclosure process. It would also ensure that execution against a home only occurs under fair and just circumstances.

1.2 The history of debt relief mechanisms in South Africa

The South African legal structure has never effectively equipped its consumers with an adequate debt relief system to assist them in the rehabilitation of their finances.[22] In particular, there has been little or no assistance provided to a mortgagor facing foreclosure of his home. During the 1980s, the administration order provided for in

[19] These court decisions will be considered in Chapter Three (3.3).
[20] See Heyns and Mmusinyane, 'Should the Alienation of Land Act 68 of 1981 be amended to Address Homelessness? *Sarrahwitz v Maritz* 2015 8 BCLR 925 (CC)', *PELJ* 2017(20), 1, 13 (hereinafter referred to as 'Heyns and Mmusinyane, *PELJ*'), and Evans, 'Waiving of rights to property in insolvent estates and advantage to creditors in sequestration proceedings in South Africa' (2018) *De Jure*, 298, 299 (hereinafter referred to as 'Evans, (2018) *De Jure*'). Historically there is a need for debtors and creditors to seek assistance from the legislature during the repayments of debts. In South Africa, legislative assistance to provided for in the NCA and Insolvency Act.
[21] The consideration of debt relief laws will be specific to the options available for mortgage debt.
[22] Roestoff and Coetzee, 'Consumer debt relief in South Africa: Lessons from America and England; and suggestions for the way forward' (2012) 24 *SA Merc LJ*, 53 (hereinafter referred to as 'Roestoff and Coetzee (2012) *SA Merc LJ*').

section 74 of the Magistrates' Courts Act 32 of 1944, was used by many South African debtors to rearrange their debts. However, this system proved ineffective as the total debt could not exceed R50 000 and *in futuro* debts could not be included under administration.[23] Therefore, the administration order provided no solution for mortgage debts. At the turn of the millennium, the South African Law Commission (now called the 'South African Law Reform Commission') recognised the inefficiencies of these debt relief mechanisms and undertook a re-evaluation of insolvency and consumer legislation. One of the key proposals of the Commission was the 'pre-liquidation composition' procedure. This essentially proposed the restructuring of a consumer's unsecured debts. Secured debts, such as mortgage debts, could not be included under the composition repayment plan. Many academics believed that this would have been a favourable solution for both mortgagors and mortgagees.[24] However, more than two decades have passed since the initial proposals by the Commission and this proposal has yet to be implemented.[25] This delay would seem to indicate a lack of concern on the part of the government for providing effective debt relief for its citizens.

In 2007, the NCA was implemented. This provided consumers, including mortgagors, with a framework, which was previously lacking in South Africa, to mediate, negotiate, rearrange and resolve conflicts with creditors. It introduced a unique system of debt relief into South African law by way of a debt review mechanism which allowed for the consensual restructuring of debts. It was hoped that this legislation would provide much needed relief to South African home-owners. However, the NCA has been subject to much criticism on the basis of poor drafting and inconsistency. The anomalies and ambiguities of the NCA have created confusion in practice, and this can be seen in several conflicting judicial decisions that will be discussed in this thesis.[26] Further, debt review does not provide the debtor with any discharge of the debt. In other words, a debtor who is under debt review is bound to pay the full outstanding debt together with accumulated interest. Accordingly, debtors, in particular mortgagors, have minimal debt relief remedies to

[23] See Greig, 'Administration orders as shark nets', (2000) *SALJ*, 622.
[24] See Steyn, Statutory regulation of forced sale of a home in South Africa, LLD thesis, University of Pretoria (2012) (hereinafter referred to as 'Steyn, LLD thesis'), 335.
[25] See Chapter Five (5.4).
[26] See Chapter Four (4.2.4 and 4.3).

assist them during foreclosure, and some debtors have been left with no alternative but to voluntarily apply for the sequestration of their estates. This has also proven challenging as debtors are placed with the burden of proving strict sequestration requirements which cannot always be met.[27] Moreover, during sequestration, the home is put up for sale as a matter of course, and no consideration is afforded in ensuring protection of the debtor's constitutional rights, in particular, the right to have access to adequate housing.

Mortgagees have equally felt the frustrations of the lack of clear debt relief procedures and a uniform foreclosure framework. The mortgagee's right to direct execution against the hypothecated immovable property, and the right to accelerated payment upon default, have been subject to several conflicting court decisions.[28] This has left mortgagees wary and uncertain of the process to be used in enforcing their rights. Further, the nature and strength of their foreclosure rights have been disputed, and this has created a lack of confidence in the mortgage bond as an instrument of security.[29]

It is submitted that the need has arisen for the legislature to scrutinise the current foreclosure rules and debt relief options available during the foreclosure process, and to close the gaps in the law. The lack of strict regulation during execution against residential property is concerning in view of the social and economic impact of foreclosure and debt relief in any country.[30] Hence, it is submitted that development in the foreclosure process is long overdue and that immediate reform is required to create more certainty in relation to mortgagee and mortgagor rights during the execution against a home.

1.3 Purpose of this thesis

[27] See Chapter Five (5.3).
[28] These issues will be discussed in detail in Chapter Three (3.3) and Four (4.4).
[29] See *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC), para 54 (hereinafter referred to as '*Gundwana*'), and *FirstRand Bank Ltd v Folscher and Another* 2011 (4) SA 314 (GNP), para 39 (hereinafter referred to as '*Folscher*').
[30] See Chapter Two (2.2) which will discuss the importance of mortgage, and the effects of foreclosure, in society.

The primary purpose of this thesis is to analyse the South African legal system governing foreclosure, debt review, and insolvency,[31] and to investigate whether the present laws provide adequate and clear rights and responsibilities for mortgagees and mortgagors during the foreclosure process. Several South African academics have recently undertaken research in this area, and considerable knowledge has been gained on this topic over the past decade.[32] This thesis seeks to build on this research and intends to create a new approach to South African foreclosure law. As indicated above, foreclosure of a home is currently not governed by specific legislation,[33] nor is there any specific debt relief mechanism designed to assist a mortgagor financially when facing execution against his home. This gap in the law has created uncertainty in practice. Consequently, it will be recommended that in order to create clarity in the law, the adoption of legislation, such as a proposed Foreclosure Act, is required specifically to govern execution against a home. The adoption of a Foreclosure Act would create uniformity in the foreclosure process as it would set out a clear set of rules and responsibilities for both mortgagees and mortgagors. It is also recommended that a debt relief system be created in South Africa that applies specifically to mortgage debt, preferably in the form of a *moratorium* on the forced sale of a home and/or a formalised mortgage debt restructuring programme. Thus, the main purpose of this thesis is to address the flaws in the current foreclosure process and, ultimately, to put forward the provisions of a Foreclosure Act for consideration by law-makers and policy-makers.

1.4 Structure of this thesis

This thesis is divided into seven chapters. This first chapter serves as an introduction to the topic and outlines the background and challenges surrounding execution against residential property.

[31] Debt review and insolvency law will only be considered in relation to foreclosure process.
[32] See Steyn, LLD thesis, Brits, Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act, LLD thesis, University of Stellenbosch, (2012) (hereinafter referred to as 'Brits, LLD thesis'), and Evans, A critical analysis of problem areas in respect of assets of insolvent estates of individuals, LLD thesis, University of Pretoria (2008) (hereinafter referred to as 'Evans, LLD thesis').
[33] With the exception of Rule 46A of the Uniform Rules of Court, there is no specific statute that protects the home or governs the foreclosure process.

Chapter Two discusses the two main rights implicated during execution against a home, namely the mortgagor's right to have access to adequate housing, and the mortgagee's right to direct execution against the home. The foundations and jurisprudence of these rights will be analysed and the balancing of these rights will constitute a theme throughout this thesis. The concept and theories of mortgage law will also be considered in relation to the constitutional and international protection afforded to a home.[34]

Chapter Three will discuss the inconsistencies within the current foreclosure process and, in particular, the conflicting judgments that have been given relating to execution against residential property. Early and recent case law will be discussed in detail. This chapter will also investigate the different steps during the foreclosure process which eventually results in a sale in execution of a home. Most importantly, this chapter intends to expose the inconsistencies and contradictions within the current foreclosure process and will provide suggestions to resolve these by creating an explicit statutory framework, in the form of a Foreclosure Act, to govern execution against a home.

Chapter Four will consider the application of debt review under the NCA in relation to the foreclosure process. This section will investigate the processes behind debt review and the inconsistencies and ambiguity in the NCA. In this respect, sections 129 and 86 of the NCA, and case law interpreting these sections in respect of foreclosure law, will be considered in detail. This chapter will also consider whether or not debt review has provided any debt relief to a mortgagor who is facing foreclosure against his or her home.

Chapter Five will provide a brief overview of insolvency law in South Africa. This chapter will briefly analyse the process of sequestration and consider whether insolvency law provides an insolvent with any protection for his/her home.[35]

[34] Chapter Two does not intend to provide a detail exposition of the history and rights of mortgagees and mortgagors. The main purpose of this chapter is to serve as a backdrop to the topic and understand the balancing of these two rights during the foreclosure process.
[35] Chapter Five does not intend to provide a detailed exposition of insolvency law. The main purpose of this chapter is to determine whether insolvency law provides any protection to the home.

Chapter Six will undertake a comparative analysis of foreclosure and debt relief mechanisms found in England and the United States of America. This chapter will also summarise the debt relief forms used in these jurisdictions and identify lessons that may be learnt from them.

Chapter Seven will serve as the conclusion to the thesis. This chapter will summarise the findings of each of the preceding chapters and further provide recommendations as to how the flaws exposed in the thesis can be addressed. It will conclude that the problems discussed in the thesis could be resolved by the enactment of a Foreclosure Act. The implementation of such an Act would provide clarity in the rules governing execution against the home and would set out step by step guidelines for the foreclosure process. Such an Act would set out clearly the rights and responsibilities of both mortgagors and mortgagees, and establish an unambiguous framework indicating how these rights can be protected. Further, it is recommended that a special mortgage debt relief mechanism be adopted to assist home-owners, as the current mechanisms do not provide any assistance to mortgagors who seek to protect their home from foreclosure. Accordingly, it is suggested that a foreclosure *moratorium,* in the form of a stay on foreclosure proceedings, should be considered in South Africa. The adoption of a *moratorium* will provide mortgagors with a period of relief to allow them an opportunity to either recover from their financial difficulties, or consider alternatives to foreclosure. However, the adoption of a *moratorium* could potentially open the door to abuse of process by *mala fide* mortgagors and therefore it is suggested that this *moratorium* should not be available to all mortgagors, but that it should only be available to a *bona fide* mortgagor after due consideration of certain specific requirements.[36]

[36] The option of a home *moratorium* will be considered in Chapter Seven (7.3).

CHAPTER TWO

BALANCING THE RIGHTS OF MORTGAGORS AND MORTGAGEES[37]

> [T]he right to execute is not absolute. It has its limitations. Certain assets necessary for the maintenance and sustenance of a debtor and the means of earning a livelihood are beyond the reach of execution…. What is of significance is that a residential home is not placed beyond the process of execution…. [I]n the competition between the rights of the judgment creditor to obtain satisfaction of the judgment debt by execution against immovable property and the rights to housing of a judgment debtor, or person in the position of a beneficial owner occupying through the judgment debtor, the judgment creditor's rights will enjoy relative primacy. If this were not so, it would bring about a situation in which debtors could borrow money to purchase immovable property and defeat their creditors' legitimate claims to repayment by asserting a constitutional right to housing at the expense of the creditor…. Viewing considerations on a macro-economic level beyond the parochial concerns of individual litigants, the two social values are not so much juxtaposed as symbiotic. To put residential immovable property which is a person's home into that class of assets beyond the reach of execution would be to sterilise the immovable property from commerce thereby rendering it useless as a means to raise credit. Preventing debtors from using their homes as security to raise credit will create a class of homeless persons; those who are unable to afford the full purchase price of their homes in a cash sale, but could afford to repay a loan for the purchase price.[38]

2.1 Introduction

Section 26 (1) of the Constitution provides that everyone has the right to have access to adequate housing. While section 26 does not provide for the right to ownership of property or the right to a home, several judgments have confirmed that the right to have access to adequate housing forms an indispensable part of ensuring human dignity, freedom and security of person.[39] Thus, this important right should be strongly protected and should not be trifled with.[40] While it is internationally accepted that every person enjoys the right to have access to adequate housing,[41] it is also internationally accepted that creditors' rights must be enforced in order to

[37] This chapter is not intended to provide an extensive exposition of mortgagor and mortgagee rights. The main purpose of this chapter is to provide an overview of the mortgagor's and mortgagee's rights and understand the competing nature of these rights during the foreclosure process.
[38] *Nedbank Ltd v Fraser and Another* 2011 (4) SA 363 (GSJ), (hereinafter referred to as '*Fraser*') paras 18-21.
[39] See *Jaftha*, para 39, *Sarrahwitz* para 2 and *Rand Properties*, para 49. See also '*The right of access to adequate housing'* April 2000 – March 2002, Report by the South African Human Rights Commission, available at www.sahrc.org.za (hereinafter referred to as ''The right to of access to adequate housing' SAHRC').
[40] See *Sarrahwitz* para 41, wherein the court held that the right to access to adequate housing serves as a catalyst in the liberation of home-ownership. The State should thus take all reasonable measures to realise the right to access to adequate housing and should limit the interference with that access unless otherwise justified.
[41] Ibid 7.

ensure sanctity of contact and the maintenance of social order. The protection and enforcement of creditor rights is clearly important to the positive development of the economy and consumerism.[42] In South Africa section 25 of the Constitution provides for the right to acquire property, and the right not to be unlawfully deprived of such property. When a mortgage agreement is signed the mortgagee acquires a real right of security (a property right which falls within the ambit of section 25 of the Constitution), and accordingly has the right not to be unlawfully deprived of this property.[43] This provides the mortgagee with a right to execute directly against the hypothecated immovable property (the mortgagor's home), in the event of a default by the mortgagor.

During execution against hypothecated immovable property, the rights of mortgagees and mortgagors are therefore in competition with each other. A delicate balance is required when these two rights, namely the mortgagor's right to have access to adequate housing, and the mortgagee's real right to security, are weighed against each other. Accordingly, it is necessary to appreciate the importance of both these rights in the current economic system in South Africa, in order to envisage a better balancing of these rights during the foreclosure process. This chapter will consider the economic and social value of the rights of the mortgagee and the mortgagor, and will investigate the legal protection afforded to these rights. The first part of the chapter will consider the rights of the mortgagee and the right to direct execution against the home. The second part will consider the rights of the mortgagor, the right to have access to adequate housing and the legal protection afforded to a home. A third part will briefly consider the main constitutional rights implicated during foreclosure.

[42] See Chapter Six. See Ferguson, *The Ascent of Money,* Chapter 5, and Suresh, *Economy and Society: Evolution of Capitalism*, (2010), Chapters 6 and 7. Ferguson and Suresh each state that economic theory provides that markets cannot function without mortgages, as it is through borrowing money that houses are purchased and entrepreneurs build their business. Should protection not be afforded to mortgages, this will result in a global financial crisis - this was seen in the latest global recession. Mortgage is thus vital for the proper functioning of the economic system and marketplace.
[43] See Chapter Two (2.2).

2.2 The mortgagee's rights

2.2.1 The definition of mortgage

Under early Roman-Dutch Law, Grotius defined mortgage as a right over another's property which serves to secure an obligation.[44] In the 21st century, South African foreclosure expert, Reghard Brits, defines mortgage as any right over the property of another to secure an obligation, and in this sense it is a generic term for every form of hypothecation.[45] In a stricter sense, mortgage can also be described as a 'real right of security' created by contract and registration which hypothecates the immovable property of the mortgagor for the purpose of securing a loan obtained from the mortgagee.[46] Hence, a mortgage is a credit agreement[47] between a mortgagor and mortgagee and, by its very nature, a mortgage will require the mortgagor to willingly register a mortgage bond over his property in favour of the mortgagee as security for a debt.

Maasdorp has listed four requirements for a mortgage to come into existence: (1) a principal obligation has to be secured; (2) a hypothecated property must be identified; (3) a valid mortgage agreement must be concluded; and (4) the mortgage must be publicly registered.[48] Hence, in order for a mortgage to be concluded there must be an agreement between the mortgagee and mortgagor to burden the property with a real right of security. The act of registration converts the mortgagee's right from a personal right to a real right of security. This occurs because the act of registration makes the mortgage effective against third parties.

Maasdorp submits that mortgage is an indivisible right, as the right burdens the property as a whole and, even when the hypothecated property has a higher value

[44] See Grotius (2.48.1). See also Steyn, LLD thesis, 47, and Singer, *Introduction to Property (Introduction to Law Series)* (2005) 565.
[45] Brits, LLD thesis, 28-30.
[46] See section 102 of the Deeds Registries Act 47 of 1937 which defines a mortgage bond as an instrument hypothecating immovable property to secure existing and future debt.
[47] See section 8 of the NCA which defines the different categories of a credit agreement, and includes a mortgage agreement as a credit agreement.
[48] See Maasdorp, 'The law of mortgage' (1901) 18 *SALJ* 233 (hereinafter referred to as 'Maasdorp, 'The law of mortgage'').

than the debt owed, the mortgagee can still have the whole property sold in execution to satisfy his claim.[49] Mortgage does not transfer the right of one person to another, but it limits the mortgagor's right of ownership by creating a new right for the mortgagee, namely a real right of security. The mortgagee retains this real right of security over the property until the mortgage debt is paid in full. Accordingly, the mortgagor's right is limited during the mortgage period (the duration of the mortgage agreement), as the mortgagor is not entitled to dispose of the hypothecated property without the mortgagee's consent and faces the constant threat of execution against the property in the event of a default on the mortgage agreement.[50]

South African property law expert, Badenhorst, contends that the two most important rights that flow from any mortgage agreement are the mortgagee's 'foreclosure rights' and 'acceleration rights'.[51] These rights entitle the mortgagee, upon default by the mortgagor, to enforce the mortgage and demand that the mortgagor pay the full outstanding amount due in execution to recover his debt. When a mortgagor signs a mortgage agreement hypothecating his property as security for a debt, the mortgagor acknowledges the risk that his property may be lost if the debt is not paid.[52] Thus, the mortgagee's foreclosure right (right to direct execution against the hypothecated property) occurs by operation of law as this is the very nature of a mortgage and is a result of the intentions of both parties. The mortgagor's payment of the mortgage is bound to his ownership of the property, and the mortgage serves the effect of ensuring that the mortgagee has a real right in the property so pledged.[53]

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[49] See Maasdorp, 'The law of mortgage', 237. See also Brits, *Real Security,* 1st ed (2016), Chapter Two.

[50] See Juma, 'Mortgage bonds and the right of access to adequate housing in South Africa: *Gundwana v Stoke Development & Others* 2011 (3) SA 608 (CC)', (2012), *Journal for Juridical Science* 37(1), 1, 2, (hereinafter referred to as 'Juma, *Journal for Juridical Science'*) Kritzinger, *Principles of the law of mortgage, pledge and lien* (1999), 1, (hereinafter referred to as 'Kritzinger, *Principles of the law of mortgage, pledge and lien'*) and Hamese, 'Attachments of immovable property in execution of a debt', available at ul.netd.ac.za (hereinafter referred to as Hamese, 'Attachments of immovable property in execution of a debt'').

[51] See Badenhorst, '*Silberberg and Schoeman's The Law of Property*' (1992) 419-429, and 625. See also *Nedbank Ltd v Fraser and Another* 2011 (4) SA 363 (hereinafter referred to as '*Fraser*'), Chapter Three (3.3.9).

[52] This is referred to as the 'voluntary placing at risk' principle. See also *Gundwana*, and *Nedcor Bank Ltd v Kindo and Another* 2002 (3) SA 185 (C) (hereinafter referred to as '*Kindo*').

[53] See *Kindo*, paras 4-5.

2.2.2 The economic and social value of mortgage

In *Folscher*, the court held that:

> Absent any extraordinary circumstance, the judgment creditor will normally be entitled to enforce his judgment by executing against the immovable property that is bonded as security. Bond finance is an important socio-economic tool enabling persons to acquire their home, to make the most important investment in their lives, to build up a nest egg and to eventually enjoy the fruits of capital growth, quite apart from acquiring an asset that may provide security for further access to capital….. If the lender were no longer to enjoy the assurance of bond security, access to housing for persons not qualifying for a State subsidy would become expensive and beyond the reach of the man on the street, with grave negative consequences for society and its social and commercial stability. Thus, the trust in bond finance, based upon the assurance that its repayment will be upheld by our courts, should not be undermined.[54]

The above *dictum* confirms that mortgage is a valuable tool in the South African economy, as mortgage finance serves the role not only of spreading home ownership, but also of promoting foreign investment in the country.[55] It follows that mortgage, as an instrument of security, has been afforded strong enforcement ranking in the law, and has often overshadowed competing rights.[56] The value of a mortgage agreement lies in the confidence that the law will give effect to its terms, in particular, the mortgagee's right to have the hypothecated property sold for the satisfaction of the mortgage debt in the event of a default by the mortgagor.[57] In *Jaftha*, the Constitutional Court held that:

> The interests of creditors must not be overlooked. There might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighs the harm caused to the debtor. In such circumstances, it may be justifiable to execute. It is in this sense that a consideration of the legitimacy of a sale in execution must be seen as a balancing process…. In this regard, it is important to bear in mind that there is a widely recognised legal and social value that must be acknowledged in debtor's meeting the debts that they incur.[58]

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[54] *Folscher*, para 39.

[55] See also *Absa Bank Limited v Mokebe and Others* (case number 2018/00612) SGHC (hereinafter referred to as '*Mokebe*'), para 1, wherein the court held that it is an economic reality that most people are unable to acquire immovable property by cash. The mortgage is thus an important instrument to assist the man on the street to acquire property and become a home owner.

[56] Roos, 'Execution against immovable property', *The Velile Tinto Voice* (April 2016). Roos submits that commercial reality and sustainable bond financing requires that efficacy in the foreclosure process is specifically important and critical. The goal should therefore be to conduct an effective and relatively expeditious foreclosure process, whilst giving paramount importance to the principle of consumer fairness. See also Ferguson, *The Ascent of Money*, 232-234, wherein he submits that mortgage is one of the safest forms of lending due to the fact that the lender can repossess the debtor's home should they default.

[57] *Saunderson*, para 2.

[58] *Jaftha*, paras 42-57.

The court, in *Jaftha*, acknowledged the view that, even although the value of the home, and the need to protect the home, are significant to an individual's well-being, the value of mortgage and debt enforcement are equally important to ensure social order and trust in the law. Thus, there may be instances where the right to have access to adequate housing may be limited to protect the mortgagee's rights in terms of the mortgage agreement. Credit provision is a common characteristic of modern trade and the successful functioning of any credit system largely depends on creditors having the assurance that they will retrieve their investment in the event of a default by the debtor.[59] When a mortgage agreement is signed the mortgagor puts up his property as security for the loan, this allows the mortgagee to have the faith that he will retrieve his investment (the loan) as the property value should cover the value of the debt.[60] The underlying theories forming the strength of mortgage will be discussed in the following subsection.

2.2.3 A brief analysis of the history of mortgage

South African mortgage law is founded on the principles of Roman law and Roman-Dutch law. The Roman-Dutch authorities summarised the power of mortgage by holding that, if a debtor failed to pay the creditor what he owed, the creditor was entitled to appropriate to himself the encumbered property or sell it of his own motion.[61] Roman law recognised three forms of security.[62] A mortgage was referred to as *hypotheca* and occurred when the hypothecated property remained with the debtor, but, if the debtor failed to pay the debt, the creditor had a real right to obtain possession of the hypothecated property and sell the property in order to satisfy his claim in terms of the *lex commissoria* or *pactum de vendendo*.[63] Under Roman law, creditors enjoyed strong protection and strict enforcement of their contractual

[59] See Brits, LLD thesis, 27, Ferguson, *The Ascent of Money*, 232, and Scott and Scott, *Willies' Mortgage and Pledge in South Africa*, 3rd ed (1987) 5.
[60] See Brits, LLD thesis, 27.
[61] See Voet *Commentarius* (20.5.1) *Digest* (D13.7.4), and Grotius, *Jurisprudence of Hollard* (1) 2.48, 41.
[62] See Grotius, *Inleidinge*, (2.48.7), Voet *Commentarius* (20.1.2), and *Digest* (D13.7.21). The three forms of security were: *Fuducia, Pignus and Hypotheca*. See also Steyn, 'Protection against forced sale of a debtor's home in the Roman context', (2015) *Fundamina*, 119 (hereinafter referred to as 'Steyn, *Fundamina*') 122-129, Brits LLD thesis, 31-34, and Steyn, LLD thesis 128.
[63] Under Roman law, during foreclosure, the debtor could also forfeit the property to the creditor or sell the property to the creditor. Parties could agree to a forfeiture clause which would provide that if the debt was not paid by a certain date, the creditor would become the owner of the property. This was initially known as 'foreclosure' under Roman law.

rights.[64] This, however, did not mean that debtors were helpless and left without any debt relief remedies. During 500 AD, Justinian undertook significant modifications to Roman law. One of the major legal modifications ensured that where the parties agreed that the creditor would sell the property, no sale could take place until two years after formal notice of his intention to the debtor.[65] This two year period afforded the mortgagor an opportunity to save his home. Other significant measures were also put in place to delay foreclosure and require a judicial decree, thereby effectively protecting the debtor from immediate loss of his home.[66] Certain laws allowed a debtor to redeem his property even after a period of two years, and Justinian permitted foreclosure only where no purchaser could be found for the property for an adequate price.[67] Accordingly, under Roman law, while there was a strong emphasis on the protection and enforcement of creditor rights, the rights of debtors were also protected by ensuring that execution against the home was undertaken only as a last resort. The rights of mortgagors will be considered in the section below.

2.3 The mortgagor's rights

2.3.1 The right to have access to adequate housing

The Constitution of the Republic of South Africa recognises the right to have access to adequate housing in Section 26 of the Constitution. This section reads as follows:

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

[64] Chapter Two (2.3.3) will; provide an overview of Roman law.
[65] See Hunter, *Roman Law,* 437, and Steyn LLD thesis, 32.
[66] See Voet *Commentarius* (20.5.1), Codex (8.28.5) and Digest (D.13.7.4). See also Hunter, *Roman Law,* 437, Steyn, *Fundamina*, 131-134, and Brits LLD thesis, 34.
[67] See Voet 20.5.1, Voet 20.5.10, Voet 20.1.25, the Placaat of Charles V of 10 May 1529, and the *Politique Ordonantie* of 1580. See also Steyn, LLD thesis, 34, and Steyn 'Execution against a debtor's home in terms of Roman-Dutch law and the contemporary South African law: Comparative observations, *Fundamina*, 23:2 (2017), 94 (hereinafter referred to as 'Steyn, *Fundamina* (2017)') for an overview of Roman Law and Roman-Dutch Law provisions.

The right to have access to adequate housing, provided for in section 26 of the Constitution, is a central right in South Africa's constitutional democracy.[68] Without access to housing other rights, including the rights to a safe environment, access to healthcare, and access to social services and water, are jeopardised.[69] The right to have access to adequate housing is a basic universal human right and is a key to dignity and freedom, and also an important element in realising other human rights.[70] Thus, the right to have access to adequate housing is arguably one of the most important of all basic human rights and is recognised in a number of international human rights charters, conventions and treaties.[71] One of the judgments that best describes this right in South Africa is the Constitutional Court case of *Grootboom*. Here, the Constitutional Court held that:

> The right delineated in section 26 (1) is a right of "access to adequate housing"…. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and removal of sewage, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.[72]

It must be emphasised that section 26 of the Constitution provides for the 'right to have access to adequate housing' and not for the 'right to housing' itself. In other words, section 26 does not provide a right of home-ownership to citizens, but merely a right to access to a fair standard of living.[73] Nevertheless, from an international

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[68] See 'The right to of access to adequate housing' SAHRC', Chapter Two, 20.
[69] See 'The right to of access to adequate housing' SAHRC', Chapter Two, 20-21.
[70] See '*Report on the public hearing on housing, evictions and repossessions',* (2008) 9, available at www.sahrc.org.za. See also *Rand Properties* para 49, and *Jaftha* 2005, paras 24-29, where the court held that section 26 is a decisive break from the past injustices and emphasised the significance of the right to have access to adequate housing in our new democracy. See also 'Heyns and Mmusinyane, *PELJ'*, 2 – 3.
[71] See Ibid 7. See also The United Nations Committee on Economic, Social, and Cultural Rights and the Istanbul Declaration on Human Settlement 1996 which prescribe that adequate housing has to protect one from natural elements, provide suitable living space for its inhabitants, and be located in a pleasant living environment for economic and social opportunities, such as shopping and entertainment centres. This is reiterated by Article 60 of the United Nations Habitat Agenda 1996, which states that 'adequate housing' means more than just a roof over one's head. It also means adequate privacy and space, adequate security, and structural stability and freedom.
[72] *Grootboom,* paras 35.
[73] See Article 25 of the Universal Declaration of Human Rights and Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights. See also 'The right to have access to adequate housing' SAHRC, 20.

perspective, the United Nations Committee on Economic, Social and Cultural Rights has emphasised that the 'right to have access to adequate housing' need not be given a restrictive interpretation[74] and the concept of 'adequacy' is significant to the right to housing. The United Nations Committee has held that 'adequacy', in terms of the right to have access to 'adequate' housing, is determined by social, economic, cultural and other factors. Accordingly, it is submitted that, although Section 26 may not provide for 'a right to housing' in the form of ownership, the right to have access to 'adequate' housing can be associated with a wide range of other social, economic and cultural rights and factors, as it entitles one to have a reasonable standard of living, a safe environment and access to essential human resources, such as water and electricity.[75] It is therefore submitted that Section 26 enshrines one of the most important rights in the Constitution, as it ensures the protection and preservation of dignity and is the catalyst for other fundamental constitutional rights such as the right to privacy and the protection of children's rights (who may be occupants of the home). Without access to adequate housing, these basic human needs and constitutional rights cannot be realised. Thus, the protection of one's right to have access to adequate housing (in particular, the protection of one's home) is fundamental to the development of society and this right should be limited only in exceptional circumstances and as a last resort.

2.3.2 The value of the home and the rights attached to the home

a. Property (the home) and personhood[76]

Over the last several decades, a number of international property law scholars have developed various theories of property and personhood.[77] These scholars

[74] General Comment No. 4: The right to adequate housing, of the United Nations Committee on Economic, Social and Cultural Rights (December 1991). See also the *3rd Economic and Social Rights Report* by the South African Human Rights Commission, Access to adequate housing, 1999/2000.

[75] See 'The right to of access to adequate housing' SAHRC, 21-22. See also *Port Elizabeth Municipality v Various Occupiers* 2005 91) SA 217 (CC), para 17, wherein Sachs J that 'a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure place of privacy and tranquillity in what (for poor people, in particular) is a turbulent and hostile world'.

[76] See Oxford Dictionary definition of 'personhood' which defines personhood as the status of being a person in the world. The term 'personhood' is a controversial topic in both philosophy and law and is closely tied with legal and political concepts of citizenship, equality, and liberty. The term personhood will be used in this thesis to describe the quality or condition of being a human.

emphasise that the property rights in relation to a home involve more than just ownership rights.[78] The ideas of privacy, shelter, security, freedom, family and continuity are deeply rooted in the psychology of the home.[79] The home is also the physical centre of everyday life and is associated with a range of emotions.

Several scholars contend that the home is necessary for the development of one's personhood and family.[80] These scholars classify the home as a 'personal asset' that cannot be replaced by market value (monetary) compensation. In other words, these scholars contend that certain assets, such as a home, are personally attached to an individual, and these personal assets become important to the self-development and personhood of that individual. International property law experts, Radin, Jones and Stern, each believe that the owner of a personal asset, such as a home, has a personal relationship with that property. The home can thus be an extension of its owner and his family, and displacement from it can result in deep emotional trauma.[81] Radin submits that:

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[77] See Radin, 'Property and Personhood', 957, Barros, 'Home as a legal concept', 277. Jones, 'Property and Personhood Revisited', *Wake Forest Journal of Law and Public Policy*, (2011), 101 (hereinafter referred to as 'Jones, 'Property and Personhood Revisited''), and Davidson, 'Property and Identity: Vulnerability and Insecurity in the Housing Crisis', *Harvard Civil Rights Liberties Law Review*, Vol 47 (September 2012), 119 (hereinafter referred to as 'Davidson, 'Property and Identity''). See also Locke, *The Second Treatises of Government* (1689) Cambridge University Press, (1988), and, *An Essay Concerning Human Understanding* (1690), Oxford Clarendon Press (1975).

[78] See also Alexander, 'Pluralism and Property', (2011) *Cornell Law Faculty Publications,* Paper 452, Dagan*, Property, Values and Institutions* (hereinafter referred to as 'Alexander, 'Pluralism and Property''), and Minow and Singer, 'In favour of foxes, Pluralism as fact and aid to the pursuit of justice', 90, *Boston University Law Review* (April 2010) 903 (hereinafter referred to as 'Minow and Singer').

[79] See Barros, 'Home as a legal concept', 257, and Alexander, 'Pluralism and Property'.

[80] See Radin, 'Property and Personhood', 34, and Stern, 'Residential protectionism and the legal mythology of home', 107 *Mich Law Rev*. 1093 (2009), 1114 (hereinafter referred to as 'Stern, 'Residential protectionism and the legal mythology of home''). Radin's personhood theory of the home maintains that a person constructs himself through a secure and ongoing relationship with his home. Loss of the home jeopardises selfhood and impairs psychological growth and well-being. Home-ownership confers psychological benefits by giving people confidence, self-esteem and skills for success. See also Tuckness, 'Locke's Political Philosophy', *The Stanford Encyclopedia of Philosophy* (May 2016), and Locke, *Two Treatises of Government.* Locke contends that all people have the natural right to life, liberty and property in terms of natural law (natural rights are privileges that all individuals are entitled to). Property ownership (home-ownership) is key to liberty, individualism and happiness and assists in the preservation of mankind. The ownership of property (ownership of a home) is also a primary feature of belonging to society. This, however, did not mean that people who did not own property did not belong to society.

[81] Radin, 'Property and Personhood', 959-973. See also Jones, 'Property and Personhood revisited', 140. Jones states that the home should enjoy special legal protection, not only because it is linked to personhood, but because stable homes encourage stable personhood. Thus, the reason to accord special protection to homes is not because of their status of property for personhood, but rather because it is hard to be any kind of person without a home.

> [M]ost people possess certain objects they feel are almost part of them. These objects are loosely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples are a wedding ring, a portrait, an heirloom, or a house (home).[82]

Radin, Jones and Stern claim that personal assets, like a home, should trump competing fungible assets, like a mortgagee's real right of security. They argue that certain types of property, like the home, are so bound to the holder, that they are necessary for self constitution, identity and human flourishing. The loss of such property can cause pain that cannot be relieved by the object's replacement. Radin, Jones and Stern therefore argue that enhanced legal protection should apply to the home, for personhood.[83] Similarly, for Hegel and Locke, the justification for private property is rooted in the role of property in the formulation of identity and dignity.[84] Property is identified as a vehicle through which a person can manifest himself as being a human being (that is, his personhood). Property denotes a sense of belonging and confers a personal meaning onto the property which expresses the owner's identity.[85] The ownership of property (in particular, a home) satisfies the human need for possession and enables a person to experience freedom and to engage with civil society.[86] Thus, the significance of a home is held to be necessary for self-development, self-preservation and personhood. An individual's attachment to a home can be so strong that the property becomes constitutive of their personhood, identity and dignity.

Radin and Davidson also argue that a strong positive relationship exists between a person and his or her home.[87] Thus, forced displacement from a home goes beyond merely losing a property, as there may also be a loss of dignity, freedom, and identity.[88] Accordingly, Davidson submits that property not only influences one's sense of self, but may also influence how others perceive that self through social

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[82] See Radin, 'Property and Personhood', 957-958.
[83] *Ibid 77-78.*
[84] See Locke, *Two Treatises of Government,* and Hegel, *Elements of the Philosophy of Right* (Cambridge University Press, 1991), 76. Hegel and Locke submit that a person becomes a real self only by engaging in a property relationship with something external. Thus, property is the first embodiment of freedom and so is in itself a substantive end.
[85] Ibid 81.
[86] Fox & Sweeney, 3.
[87] See Radin, 'Property and Personhood', 959-960, and Davidson, 'Property and Identity', 119.
[88] Davidson, 'Property and Identity, 119-120. Davidson contends that 'people make meaning of themselves and base their identity on the things that they own, thus property not only extends a person's will into the world, it also builds their identity'.

status. When identity and status become tied to property, losing this property can carry deep negative emotional and economic consequences.[89]

The cultural cliché that 'a house is not a home' suggests that the home is far more than just a physical structure. The home is a psychologically special form of property and has become a cherished entity in property law.[90] Many academics have therefore submitted that the home should be treated more favourably in the law than other types of property.[91] The common maxim that 'a man's home is his castle' signifies the home as a source of security, privacy and liberty. The law of delict and criminal law empower a man to defend his home in certain circumstances, and further impose severe criminal sanctions upon persons who invade another's home. These principles and laws signify the home as a special type of asset deserving of protection under the law. However, this does not mean that a homeowner's interest of security, privacy and liberty should trump other *bona fide* legally competing interests, such as a mortgagee's right to execution against the home. Thus, although the idea of a home as a castle is a powerful metaphor and is a major component of the ideology of the home, this metaphor has its limits and the 'castle's walls' (the home) can be breached by a significantly stronger competing interest, such as a mortgagee's right to execute against the home.[92]

In sum, it is concluded that the home is a vital part of human existence and development. Various other basic human rights, such as the right to dignity, identity, privacy, freedom and security are all dependant upon it. The home (be it the joys of owning a home, or having the security of living in a home) is a significant part of human culture and society and should be protected against infringement. A conflict thus arises when the home is subject to execution by a mortgagee.[93] The major challenge when balancing the right to have access to adequate housing, with the right to execution against immovable property, is that the courts have not been able to quantify the sentimental and emotional value of the home. It is submitted that each

[89] Davidson, 'Property and Identity', 123-124. Davidson submits that the social status attached to owning a huge luxurious mansion in an elite area creates a sense of vulnerability and anxiety when that mansion is under threat.
[90] Stern, 'Residential protectionism and the legal mythology of home', 1094.
[91] See Ibid 74-77. See also Chapter Six (6.2), in America, houses are protected by the Third and Fourth Amendments of the Constitution.
[92] Barros, 'Home as a legal concept', 276.
[93] See Minow and Singer, 37.

country, society, cultural group and individual has a unique moral and value system, and these differences make defining the value of the home very difficult. The idea of the home as a legal concept will be discussed in the following subsection.

b. The idea of the home as a legal concept

> [T]he idea of a home is both present and absent in the law. In one sense, ideas concerning the home – both in the sense of the dwelling place and as a special type of property, and territorial claims to homeland - underpin many contemporary legal problems, typically where people are displaced or dispossessed from their homes. For example, the significance of the home as a dwelling place has been highlighted in the rise in repossession and foreclosure statistics following the recent credit crunch in the credit markets and housing markets have demonstrated the risks of foreclosure and the value of a home in society…. A home signifies shared human need for a secure dwelling place and sense of security…. The loss of a home has widespread consequences, not only to the owner of the home and his family, but also to society at large. Hence, the home as a physical structure is protected, however, the home as a sentimental and psychological feature is absent in the law.[94]

Although the concept of a 'home' is instantly familiar, and a daily feature in everyone's life, the definition of the 'home' has therefore had little attention before the law. As indicated in the subsections above, the home is a special type of property and is central to most people's everyday life.[95] Despite the significance attached to the home, the concept cannot be easily defined and measured for legal purposes.[96] A home represents complex psychological, cultural, political, economic and emotional interests for its owner and its occupants. Thus, the home, although being a tangible and identifiable asset, also exhibits subjective elements and values which cannot be easily quantified for legal purposes. Fox submits that this fact, namely the intangible and symbolic aspects of the concept of a home, hamper the development of 'the home' as a coherent legal concept,[97] and often the intangible

[94] Fox & Sweeney, 1-3. In addition to the vulnerability of a family who loses their home, several other external costs are generated by dispossession and displacement. For example, the State may be required to provide the dispossessed family with alternative accommodation, and this burden will fall upon taxpayers.

[95] See Fox, 'Creditors and the concept of family home: a functional analysis', (2005), *Durham University Legal Studies*, 25 (2), 201 (hereinafter referred to as 'Fox, 'Creditors and the concept of family home").

[96] See *Barnett and Others v Minister of Land Affairs and Others* 2007 (6) SA 313 (SCA), 39, and *City of Cape Town v Rudolph and Forty Nine Others* (8970/01) [2003] ZAWCHC 29. In these cases, the court held that although the concept of the home is not easy to define, the term does require an element of regular occupation and some degree of permanence. See also *Beck v Scholz* (1953) 1 QB 570 (CA) 575, wherein it was held that 'the word home itself is not easy of exact definition'.

[97] See Fox, *The meaning of home*, 4-7.

qualities of a home are only identifiable when the home is lost.[98] Due to the personal and emotive nature attached to the concept, the value of the 'home' has historically been trivialised, particularly when measured against objective and quantifiable rights, such as mortgagees' rights during execution against residential property. If a legal concept or definition of the home is developed (which takes into account both the tangible and intangible aspects of the home), this could be used to inform decision making in cases where the home is the centre of a dispute, in particular, during foreclosure.

According to Fox, the concept of the home can be broken down into four elements.[99] The first element is the home as a 'house', namely the physical structure and the building itself. This element can be easily quantified for legal purposes and the housing structure or building can easily be evaluated to determine its monetary value. The second, third and fourth elements of the home, are the home as a form of 'territory, identity and culture'. However, the home as a foundation of security, identity and culture are sentimental and emotional values that do not attract monetary value for legal purposes. These aspects are thus difficult to conceptualise legally.[100] Herein lies the challenge in formulating a legal definition for the 'home'.

In English law, specific emphasis is placed on the concept of a 'family home' and the notion of 'family' and its contribution to creating a home.[101] In England, the presence of children and the activity of family life is said to make a house into a home. The home is thus a projection of that family's identity and protection.[102] The focus on family in English law has been helpful in avoiding the forced sale of homes at the

[98] The sentimental values of the home, such as the value of protection, shelter, security, family, privacy and comfort, only become evident when the occupant of the home is deprived of the home. Hence, when the home is lost, the sense of security, family, privacy and love is also lost.
[99] See Fox, *The meaning of home*, 7.
[100] See also Davidson, 'Property and Identity', 125-132. See also *Tshwane University of Technology v The Central Student Representative Council,* Case No. 67856/14 (North Gauteng High Court) (hereinafter referred to as '*Tshwane University*'), paras 61 - 67. In this case the court had to consider whether student residences fell within the definition of a 'home'.
[101] See Fox, 'Creditors and the concept of family home', 201, and Conway and Girard, 'No place like home: The search for a legal framework for cohabitants and the family home in Canada and Britain', *Queen's Law Journal* (2004) 30, 715, 716 (hereinafter referred to as 'Conway and Girard, 'No place like home"). See also the Matrimonial Homes Act 1967 and 1983, and the Family Law Act 1996.
[102] See Fox, 'Creditors and the concept of family home', 201, and Benjamin, *The home: Words, interpretations, meanings and environments* (1995), 137. See also section 335A of the English Insolvency Act 1986 which defines a 'family home' as a property occupied by spouses.

hands of creditors.[103] English law has always recognised the family home to be of great social importance. The family home plays an important role in securing and safeguarding social values such as the institution of marriage and family.[104] Several attempts have been made in England to make the family home immune from execution. However, most of these attempts have been unsuccessful in light of the pro-creditor and pro-sale English regime.[105]

Several academics have argued that the legal definition of the 'home' should follow the English example – namely, that the definition of the home should be based on the notion of a family. However, many of the ideas which are associated with the concept of the home such as, shelter, security, privacy and identity, fall outside the definition of a 'family home'. On the one hand, it is submitted that simplifying the definition of the home as a 'family home' may be easier for legal purposes. However, if such a definition is developed in South Africa, this will exclude single occupants, as well as cohabitating and same sex couples. Single occupants and cohabiting and same sex couples may fall outside the definition of a family, and thus fail to be included within the definition of a family home.[106] Fox therefore submits that this proposition of a 'home' being defined as a 'family home' is incomplete. While a family may be regarded as adding value to the home, there are many other values represented in the concept of a home that are not dependant on a family, including the values of shelter, identity, security, and privacy.[107] Further, sole occupants may be as, or more, dependent on the protection of the home for security, identity and privacy, than a family.[108] Hence, the definition of a 'family home' does not embrace

[103] See House of Lords Debate, Vol 437, Col 640 - 653 (15 December 1982), where Lord Simon and Lord McGregor from the House of Lords argued that the integrity of the family home is of great social importance, and steps to secure and safeguard the values which society upholds in the institution of marriage and family must be welcomed. See also *Williams and Glyn's Bank Ltd v Boland* 1981 AC 487, *Stevens v Hutchinson* 1953 Ch 299, and *Edwards v Lloyd' TSB Bank* 2004 EWCA Civ 487, These judgments reflect the court's approach to treat the family home as a special type of property, with a high degree of immunity against the forced sale by creditors. See also Fox, 'Creditors and the concept of family home', 207-209.

[104] Fox, 'Creditors and the concept of family home', 205-208.

[105] Fox, 'Creditors and the concept of family home', 209. Chapters Five and Six (6.3) will consider these provisions in English Law in more detail.

[106] See Conway and Girard, 'No place like home', 731-735. See also the Law Commission: *Sharing Homes: A discussion paper*, Law Com No. 278 (2002): London HMSO (hereinafter after referred to as '*Sharing Homes'*).

[107] Fox, 'Creditors and the concept of family home', 234.

[108] See Fox, 'Creditors and the concept of family home', 225, and Benjamin, *The Home, Words, Interpretations, Meanings and Environment*, 63.

all the elements and values of the home. This indicates the difficulties encountered in narrowing down a legal definition of the concept of a 'home'.

As a result of the gaps in the 'family home' definition in English law, the Law Commission for England and Wales endorsed the '*home per se'* model.[109] The *home per se* model recognised that special protection should be afforded to the home, not on the basis of family structure and relations, but on the relationship and attachment between the individual and the home.[110] The *home per se* model created a more individualistic approach and provided a modern basis on which to construct legal protection for the home.[111] The individualistic *home per se* model focuses on the relationship between the occupier of the home and the home itself, rather than the relationship with the occupier and the owner or other occupants of the home (which occurs with the family home model). Thus, the *home per se* model recognises that, although the existence of a family may be a significant element to the meaning and value of a home, it is not an essential attribute.

In sum, it is submitted that the sentimental and emotional values attached to the home, such as security, identity, comfort and privacy, have been an obstacle to the recognition and legal definition of the home. However, it is maintained that the successful development of a more systematic approach to the protection of a person's home in law must be premised on developing an understanding of the value and meaning of the home *outside of* its economic value and physical manifestation.[112] There have been strong arguments in favour of developing a coherent legal definition for the concept of the home, which encapsulates the meaning and value of the home, both economically and emotionally. It will be noted throughout this thesis that during disputes between home-owners and mortgagees the balancing of each party's rights, and in particular the home-owner's rights, has been difficult. Achieving a clearer understanding of the values which underpin the

[109] See *Sharing Homes*, para 1.8. The Sharing Homes project was centred on the belief that the home is unique, and is vitally important to the lives of individuals, families and the community. The Law Commission for England and Wales found that although family life is important to the context of the home, the existence of family life was not a core or essential element of the home.
[110] See *Sharing Homes*, para 1.8.
[111] Fox, 'Creditors and the concept of family home', 222.
[112] Fox, 'Creditors and the concept of family home', 230.

concept of the home could however result in stricter court scrutiny and a fairer balancing of mortgagor and mortgagee rights during the foreclosure process.[113]

2.3.3 Mortgagor rights under early Roman and Roman-Dutch law

It is well known that much of South African law is founded on Roman law, Roman-Dutch law and English law.[114] Hence, it is important to consider the historical treatment and protection of the home in these jurisdictions to understand the development of the current South African position.

a. Roman law

The development of Roman law encompasses more than a thousand years of jurisprudence, from the Twelve Tables to the Corpus Juris Civilis ordered by Justinian. Roman law was effective throughout the Roman Empire and later served as a basis for legal practice in Western Europe and in certain parts of Africa and Latin America. Today, Roman law is no longer applied in legal practice, however, certain countries, including South African and San Marino, derive many of their current legal rules and practices from Roman law provisions.

Debt enforcement in Rome initially occurred via self-help against the debtor. The first formal source of Roman law was provided for in the Laws of the Twelve Tables. Written laws contained in Table II and III of the Twelve Tables regulated the structures and procedures around trials and debt enforcement.[115]

> Table III provided that … one who has confessed a debt, or against whom judgment has been pronounced shall have thirty days to pay it in. After that forcible seizure of his person is allowed. The creditor shall bring him before a magistrate. If the debt remains unpaid, the creditor shall take him home and fasten him in stocks or fetter as a prisoner. On the third market day let them cut his body among them. If they cut more or less than each other's share it shall be no crime.

[113] See Chapter Seven for a suggested legal definition of the 'home' to be developed in the proposed Foreclosure Act
[114] Chapter Six (6.3) will provide an overview of English law.
[115] See Buckland and Stein, *Textbook of Roman Law from Augustus to Justinian* (Cambridge 1963), 619, 620. See also Steyn, 'Protection against forced sale of a debtor's home in the Roman context', *Fundamina*, 122.

In the *legis actio* procedure under Roman law, if the judgment debt had not been settled within thirty days, the creditor could arrest the debtor and if the debt remained unpaid, the creditor could hold the debtor in chains in a private prison until a compromise was reached. After a period of sixty days, if no compromise was reached and the debt remained unpaid, the creditor was entitled to sell the debtor as a slave, a 'debt slave'.[116] Where the debtor had more than one creditor, the creditors were entitled to 'cut shares' from the debtor. Some commentators describe this as meaning cutting the debtor's body into pieces, while others regard this to mean that the creditors shared from the proceeds of the debtor's sale into slavery. The primary purpose of this harsh procedure was to pressurise the debtor into payment.[117] In instances where the debtor had no assets, the debtor could enter into a transaction of *nexum* and submit himself to working off the debt to the creditor. During the later Roman Republic, slavery was replaced with imprisonment of the debtor. In 320 AD, Constantine abolished imprisonment for debts. Nevertheless, many debtors still sold themselves into slavery or hired their wives and children to work off the debt.[118]

Thus, debt enforcement procedures in Roman law imposed harsh treatment upon debtors which originally confined them to slavery, imprisonment and possibly even death, as a consequence of default on their contractual obligations.[119] During the 17th century, the law developed to permit execution against the assets of the debtor.[120] Although some assets of the debtor were exempt from execution, the debtor's home did not enjoy this immunity. Despite this, the home held great socio-economic and religious significance under Roman law.[121] Roman law appreciated the value of the home and consequently developed to afford the debtor some protection to avoid the loss of this property. In the time of Justinian, a *moratorium,* in the form of a stay of foreclosure proceedings, was granted to debtors to allow them

[116] See Buckland and Stein, *Textbook of Roman Law from Augustus to Justinian* (Cambridge 1963), 619, and Kaser, *Roman Private Law*, 332.
[117] Steyn, *Fundamina,* 124.
[118] See Wenger, Institutes of the Roman Law of Civil Procedure (New York 1955) 227.
[119] See Buckland and Stein, *Text-book of Roman Law: From Augustus to Justinian* (Cambridge 1963), 619, 620 (hereinafter referred to as 'Buckland and Stein'), Wenger, *Institutes of the Roman Law of Civil Procedure* (New York 1955) 227 (hereinafter referred to as 'Wenger'), Kaser, *Roman Private Law*, 332, and Steyn, *Fundamina*, 122.
[120] See Buckland and Stein, 672, and Wenger, 280-283.
[121] See Steyn, *Fundamina*, 136, and Steyn LLD thesis, 57. In early Roman law, the home not only housed the debtor and his family, the home was also known to be the resident or place of ancestral spirits, household gods and other religious sentiments. The significance of immovable property, in particular, the home, enjoyed a high status under Roman law.

an opportunity to save their home. During the *moratorium* period, the creditor could not institute any foreclosure proceedings against the debtor, and this period provided time for the debtor to either recoup his financial situation or consider alternatives to foreclosure. With the development of mortgage, Justinian introduced more protective measures which sought to delay foreclosure for up to two years after judgment had been granted, and, in appropriate cases, to only allow foreclosure by judicial decree or imperial decree.[122]

b. Roman-Dutch law

Much of Roman-Dutch law is founded on early Roman law customs and principles.[123] However, unlike the strict creditor oriented regime under Roman law, Dutch debt procedures showed leniency towards debtors. Roman-Dutch law required all creditors to first claim satisfaction of their debts in a 'friendly manner' before instituting litigation and issuing summons.[124] Further, several measures were developed to protect debtors and their families and ensure that the forced sale of the debtor's home occurred only as a last resort.[125] Similarly as in Roman law, a *moratorium* was introduced in Holland in the 17th century, and this allowed for the postponement of the debtor's duty to pay his debts for up to five years. During this time no creditor could sue the debtor or execute against the debtor's property or person.[126]

Several Roman law and Roman-Dutch law principles have been imported into South African law. For example, South African law has adopted much of the strict creditor oriented policies of Roman law. However, Roman law's protective measures, such as the *moratorium* against creditor enforcement, and the two year delay on the sale

[122] Steyn, *Fundamina*, 137.
[123] Wessels, *History of Roman-Dutch law*, (1908) 207-209. See also Steyn, LLD thesis, 38.
[124] Wessels, *History of Roman-Dutch law*, 175. In the High Court, the debtor and creditor was required to first appear before a Commissioner, in an attempt to reach a compromise, before summons could be issued. Further, a Process Server had to explain the nature and contents of the summons to the debtor, when serving the summons.
[125] See Goetzmann and Rouwenhorst, *The origins of value: The financial innovations that created modern capital markets* (2005), Chapters 8, 10 and 14,145-239. See also Steyn LLD thesis, 58, wherein she explains the protective measures to prevent the sale of a home. Under Roman-Dutch law, a sale in execution had to be publicised for four successive Sundays before the sale to attract as many buyers as possible. Further, rules were set in place to promote the sale at the highest possible price.
[126] See Steyn, LLD thesis, 50-51.

of the home, have not been adopted by South Africa. Accordingly, one may conclude that South Africa has continued to enforce harsh rules against its debtors and has afforded little or no protection to the 'home'.[127] Thus, at present, it is submitted that South African law fails to provide adequate relief to a debtor, and further fails to provide any protection to the home against execution.[128]

2.4 Constitutional implications when executing against residential property

In 1994, the dawn of a new democracy and the introduction of a new constitutional dispensation also brought about a new dynamic and revised consumer environment. A new segment of home-owners, who were previously disqualified from purchasing their own homes due to their race, entered into the credit environment. It is submitted that, with this change, which occurred over two decades ago, the need has arisen to balance, evolve and improve the foreclosure process. The preamble of the Constitution provides for the establishment of a society based on social justice and fundamental human rights. These rights and principles enshrine not only the right to have access to adequate housing, but also the sanctity of contract. Sanctity of contract is considered to be one of the most important factors in sustaining and promoting commerce in an economy.[129] In *Reddy v Siemens*,[130] the Supreme Court of Appeal held that contractual autonomy is part of freedom, informing the constitutional value of dignity, as it is by entering into contracts that one takes part in economic life. In this sense, freedom of contract is an integral part of section 10 (the right to dignity) and section 22 (the right to trade) of the Constitution. It is also incidental to section 25 (the right to acquire property) and section 18 (freedom of association) of the Constitution.[131]

Sanctity of contract is fundamental to the conduct of business and is at the heart of a free market system in every country. It therefore follows that the enforcement of contractual rights is important in developing an economy and protecting and promoting the welfare of a country and its citizens. In a mortgage context, the

[127] See also Steyn, LLD thesis, 56-59
[128] This statement will be supported in Chapters Three and Four.
[129] Juma, *Juridical Science*, para 16.
[130] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) (hereinafter referred to as '*Reddy v Siemens Telecommunications*').
[131] *Reddy v Siemens Telecommunications*, para 15

assurance that the mortgagee can rely on, and realise, his real right of security acquired against hypothecated property, is important in promoting the sanctity of contract.[132] The principle of *pacta sunt servanda* (sanctity of contract) provides that once a valid binding contract has been formed, when one party breaches the agreement, the other party is entitled to hold the former to it and enforce its terms.[133] Cameron JA confirmed the principle of sanctity of contract in *Brisley v Drotsky,*[134] in which it was held that:

> … neither the Constitution nor the value system it embodies gives the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith…. On the contrary, the Constitution's values of dignity, equality and freedom require the court to approach their task of striking down contracts or declining to enforce them with perceptive restraint…. [C]ontractual autonomy is part of freedom [and] also informs the constitutional value of dignity.[135]

Accordingly, when a mortgage agreement is signed, sanctity of contact will be protected and enforced. In other words, sanctity of contract ensures that the terms of a mortgage agreement are honoured in order to ensure contractual autonomy and contractual liability. Should the mortgagee default on the mortgage agreement, the mortgagor is entitled to hold the mortgagee to the terms of the mortgage, and execute against the hypothecated immovable property. Several courts have held that the fact that the hypothecated property is one's residential premises (or home) does not in itself justify the conclusion that the Constitution, in particular section 26, will be infringed during foreclosure.[136] The question thus arises as to which circumstances must exist for execution against the home to be rendered unconstitutional. It is contended that something more is required than mere execution against the home. It is submitted that in order for a foreclosure to be deemed unconstitutional there must be infringement of other constitutional rights, in addition to section 26, such as an infringement of the right to dignity or children's rights. Historically, the execution against residential property potentially implicated three important sets of constitutional rights, namely, the right to have access to adequate housing (section

[132] Steyn, LLD thesis, 126.
[133] See Christie, *The Law of Contract*, 5ed (2006) 199, and Steyn, LLD thesis 126.
[134] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (hereinafter referred to as '*Brisley v Drotsky')*.
[135] *Brisley v Drotsky*, paras 93-94. See also *Barkhuisen v Napier* 2007 (5) SA 323 (CC), para 150, and *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC), para 70. In these cases, the court confirmed that the primary aims of the principle of *pacta sunt servanda* are legal certainty and ensuring that contacting parties honour their obligations.
[136] See Chapter Three (3.3).

26 (1)); the right to have access to the courts (section 34); and the prohibition of unlawful and arbitrary eviction (section 26 (3)). The subsections below will briefly discuss some of the main constitutional rights implicated during execution against residential property.

2.4.1 Section 34 of the Constitution – the right to have access to courts

Section 34 of the Constitution is the embodiment of the rule against ouster clauses in any contract or law. The section provides that 'everyone has the right to have any dispute that can be resolved by the application of the law to be decided in a fair public hearing before the court'.[137] The case that best demonstrates the right to have access to the courts, provided by Section 34 of the Constitution, in a matter involving execution against immovable property, is *Chief Lesapo v North West Agricultural Bank*.[138] In *Lesapo*, the Constitutional Court rejected the idea that a creditor could attach and sell a debtor's property without a court order. The court declared that section 38 (2) of the Agricultural Bank Act 14 of 1981 (hereinafter referred to as 'ABA') was unconstitutional. Section 38 (2) of the ABA allowed a creditor to seize and sell a defaulting debtor's property, without recourse to a court of law. The court found that Section 38 (2) of the ABA allowed creditors to bypass the courts and failed to provide any statutory safeguard to debtors.[139] The court confirmed that Section 34 of the Constitution embodies a fundamental rule of natural justice which provides that everyone should have the right to have a dispute settled by a court of law, and further prescribes that nobody is allowed to take the law into their own hands and usurp the functions of the court.[140] Mokgoro J confirmed that judicial process guaranteed by Section 34 of the Constitution also applied to attachments and sales in execution, even where no dispute existed.[141] The court confirmed that the ordinary way of securing execution of debts was via court process, and the seizure of property without a court order amounted to self-help and an infringement

[137] The importance of this right will be discussed in Chapter Three which will consider the importance of judicial oversight during the foreclosure process.
[138] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (hereinafter referred to as '*Lesapo*')
[139] *Lesapo*, para 10.
[140] *Lesapo*, para 5.
[141] *Lesapo*, para 15.

of Section 34.[142] Accordingly, a creditor's action of executing against immovable property must be heard before a court of law, and any provision allowing otherwise is unconstitutional. The court confirmed that:

> … access to courts is indeed foundational to the stability of an orderly society. It ensures that parties to a dispute have an institutionalised mechanism to resolve their differences without recourse to self-help…. The right of access to court is indeed foundational to the stability of an orderly society. It ensures the peaceful, regulated and institutionalised mechanisms to resolve disputes, without resorting to self help. The right of access to court is a bulwark against vigilantism, and the chaos and anarchy which it causes. Construed in this context of the rule of law and the principle against self help in particular, access to court is indeed of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.[143]

Section 34 of the Constitution therefore demands that everyone has a right to access to courts, and a right to have a dispute resolved by a court of law. The court in *Lesapo* confirmed that execution against immovable property must follow due court process, and that such execution without court process amounted to an infringement of Section 34. In a foreclosure context, Section 34 ensures that a mortgagor has the constitutional right to have the foreclosure proceedings heard by a court of law. However, it will be noted in Chapter Three (3.3) that the foreclosure process, at one stage, failed to make any provision for judicial oversight. This might have been an infringement of Section 34 of the Constitution. This position has now been corrected by the *Gundwana* decision, where the Constitutional Court confirmed that judicial oversight is required in every application for execution against immovable property.[144]

2.4.2 Section 26 of the Constitution – the housing clause

Section 26 (1) of the Constitution provides that everyone has the right to have access to adequate housing, and this right was affirmed by the Constitutional Court in *Grootboom*.[145] Although Section 26 (1) may seem to oblige the State with a positive duty to provide access to adequate housing, several academics and courts have held that Section 26 (1) also imposes a negative duty on all persons not to limit

[142] *Lesapo*, para 19.
[143] *Lesapo,* para 22.
[144] Chapter Three (3.3) will discuss the requirement of judicial oversight in more detail.
[145] See *Grootboom*, para 21-24, where the court held that the State was obliged to take positive steps to meet the needs of section 26.

another's existing right to have access to adequate housing.[146] Therefore, Section 26 (1) also aims to prevent the loss of existing adequate housing. During foreclosure, Section 26 (1) may be implicated as the mortgagor's right to have access to adequate housing may be infringed if his home is sold in execution.[147]

Section 26 (3) of the Constitution provides that no one may be evicted from their home, or have their home demolished, without a court order and after considering all relevant circumstances. This Section requires a substantive judicial enquiry, and Brits believes that this enquiry is applicable for both evictions and foreclosures.[148] Section 26 (3) provides that any proceedings that might lead to a person being evicted must be authorised by the court after taking into consideration 'all relevant circumstances'. There has, however, been a high degree of confusion as to exactly what this enquiry entails (what is meant by the term 'all relevant circumstances'). Thus, although there is now wide acknowledgement given to the protection of housing rights, there is uncertainty as to how these rights are protected in practice due to lack of uniformity and clarity.[149]

It is well known that constitutional litigation usually involves a two-step approach. First, the claimant must show that he is a beneficiary of the right and that his right has been infringed. Secondly, the defendant has to show that if any infringement exists, such infringement is justifiable in terms of Section 36 of the Constitution. During foreclosure, the mortgagor is required to show that his right to have access to adequate housing will be limited if execution against his home proceeds.[150] If there is an infringement, the mortgagee must prove that any limitation of the mortgagor's Section 26 rights is justifiable. In defense, the mortgagee will usually use the existence and terms of the mortgage agreement as justification of any limitation of

[146] See *Grootboom*, *Jaftha*, *Saunderson* and *Gundwana*, See also Brits and Van der Walt, 'Application of the housing clause during mortgage foreclosure' (part 1), *TSAR* (2014-2), 304 (hereinafter referred to as 'Brits and Van der Walt, *TSAR* (2014-2), and Brits and Van Der Walt, 'Application of the housing clause during mortgage foreclosure' (part 2), *TSAR* (2014-3), 508 (hereinafter referred to as 'Brits and Van Der Walt, *TSAR* (2014-3)'), and Currie and De Waal, *Bill of Rights Handbook* (2005).
[147] Chapter Three will consider the foreclosure process and section 26 in more detail.
[148] See Brits LLD thesis, 63-64, and Juma, *Juridical Science*, 5. See also Chapter Three and Rule 46A of the Uniform Rules of Court.
[149] See Chapter Three (3.3).
[150] See Brits and Van Der Walt, *TSAR* (2014-2), 292, for a more detailed debate on this issue.

Section 26.[151] The court will thereafter have to undertake a proportionality exercise by balancing the mortgagor's and mortgagee's rights against each other. This balancing exercise will usually involve an analysis of Section 36.

2.4.3 Section 36 of the Constitution – the limitation clause

Section 36 of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on dignity, equality and freedom. Section 36 lists five factors that must be considered when testing an infringement:

1) the nature of the right;
2) the importance of the purpose of the limitation;
3) the nature and extent of the limitation;
4) the relationship between the limitation and its purpose; and
5) less restrictive means to achieve the purpose.

Section 36 requires that the impact of the infringement must be proportionate to the purpose of the limitation.[152] This requires consideration and application of the 'proportionality test'. During foreclosure, the proportionality test requires an evaluation of the justifiability of execution when balancing the mortgagee's and mortgagor's rights. The cases of *Jaftha* and *Absa Bank v Ntsane*[153] are prime examples where the proportionality test was applied.[154] In these cases, the impact of the limitation, namely, the possibility of the mortgagors being without a home, far outweighed the purpose of the limitation, which was enforcement of trivial debts/arrears of not more than R 200. In both cases, it was held that such a limitation was unjustifiable, and the courts confirmed that it would not enforce a menial collection of debts to override one's access to adequate housing, especially in circumstances where there are alternative means to satisfy the debt. The potential prejudice and hardship to be suffered by the mortgagor far outweighed, and was disproportionate to, the mortgagee's right to debt recovery.

[151] See *Standard Bank of South Africa Ltd v Bekker and Another* 2011 (6) SA 111 (WCC).
[152] Brits and Van Der Walt, *TSAR* (2014-2), 293.
[153] *Absa Bank Ltd v Ntsane and Another* 2007 (3) SA 554 (T) (hereinafter referred to as '*Ntsane*'). Chapter Three (3.3) will discuss the decisions of *Jaftha* and *Ntsane* in greater detail.
[154] See Chapter Three (3.3).

The application of the proportionality test requires the courts to balance the purpose of execution with the social and economic effects on the home-owner.[155] It is submitted that some of the factors that must be considered by the court during the application of the proportionality test are, *inter alia*, the amount outstanding under the mortgage agreement, the arrear amount due, and alternatives sought to avoid a sale in execution - such as the private marketing of the property, entering into a payment arrangement, and executing against the mortgagor's movable property. However, it must be remembered that mortgage is a limited real right and there is no duty on the mortgagee to seek execution against other assets.[156]

2.4.4 Comments on the constitutionality of foreclosure

From the above, it is concluded that foreclosure against a home has the potential to infringe certain fundamental constitutional rights. However, it is unclear whether the infringement of these rights is justifiable in terms of Section 36 of the Constitution. Brits and Van Der Walt comment that it would be helpful if there were guidelines to indicate the degree to which Section 26 (and other constitutional rights) are limited and under what circumstances infringement will not be justifiable during execution against the home.[157] Van Heerden and Boraine suggest that the only question that must be asked when considering a foreclosure application is whether the execution will render the mortgagor homeless. The issue of whether alternative accommodation is available is important in answering whether the mortgagor will have access to adequate housing. However, it will be noted that it appears that foreclosure may only be considered unconstitutional if the result of the process is 'disproportionate' to the means, or the action amounts to an 'abuse of process'.[158] These are 'non-exacting' or 'unclear' factors and courts and creditors have struggled

[155] Brits and Van Der Walt, *TSAR* (2014-2), 297.
[156] Brits and Van Der Walt, *TSAR* (2014-3), 508. See also *Standard Bank v Molwantwa* (unreported – 15043/2009 GPPHC) and *Changing Tides v McDonald* (unreported-GNP 05052011), and *FirstRand Bank Ltd v Maleke* 2010 (1) SA 143 (GSJ) (hereinafter referred to as '*Maleke*'). The *Maleke* case is an example of disproportionality and also an example of where debt review could have been used to avoid limitation of the debtor's rights. The court in *Maleke* held that the prejudice that would be suffered by the debtor would be disproportionately large when compared to the minor prejudice that would be suffered by the bank in being denied immediate payment (of arrears of between R 2000 and R 5000). Postponing payment to the bank would not have prejudiced the bank in any way, however, if execution was granted, the debtors could have suffered a permanent set back.
[157] Brits and Van Der Walt, *TSAR* (2014-2), 294.
[158] See Chapter Three (3.3.3).

to determine what amounts to a 'disproportionality' or an 'abuse of process'. It is submitted that the only way in which clarity can be achieved is by implementing legislation which specifically regulates foreclosure process. It is submitted that the enactment of a Foreclosure Act could create clarity by providing proper guidelines for the balancing of mortgagor and mortgagee rights. A Foreclosure Act would further set out exact instances that would amount to an infringement of each parties' rights, and factors to be considered by the courts when applying the proportionality test.[159]

2.5 Conclusion

The home is a significant element of every individual's life. The home is much more than just an economic asset or a means of shelter. It is uniquely connected to personhood and thus should be recognised for both its economic (the monetary value of the home) and non-economic values (the emotions and sentiments that attach to the home). The home is a special type of property to which its occupants develop a special attachment. The home provides a range of functions including shelter, security, freedom, privacy and identity. It is also central to the development and maintenance of family and culture. English law has accordingly recognised the significance of the family home and has provided protection to the family home in its law and policy.

As indicated above, there have been strong arguments in favour of developing a legal definition of the concept of the 'home'. However, attaching meaning to the intangible sentiments that relate to the home has proven difficult. When the home is subject to foreclosure and the sanctity of the home is threatened, a complex balancing of interests ensues between the home-owner and the mortgagee. It is therefore of paramount importance that the value and significance of each party's interests be fully understood in order that they may be appropriately balanced. Historically, during foreclosure, the fact that a mortgagor and his family reside in the home, and have a personal attachment to the property, has carried little weight in preventing a mortgagee from subjecting the home to foreclosure. This may be due to the fact that mortgagee rights are easily definable when compared to mortgagor

[159] See Chapter Seven which will include some provisions to be included in the Foreclosure Act.

rights. It is therefore suggested that a clearer understanding of the meaning and value of the home could result in a stricter consideration of home-owner interests during foreclosure proceedings. Accordingly, in Chapter Seven, it will be recommended that a legal definition for the home be provided in the proposed Foreclosure Act. Further, it will be recommended that a proportionality test also be implemented in order to balance the rights of mortgagors and mortgagees in the foreclosure process and to establish clarity in practice.

The following chapter will consider how the rights of mortgagees and mortgagors are balanced during the foreclosure process and will expose how the lack of clarity in the current foreclosure process creates uncertainty in practice.

CHAPTER THREE

FORECLOSURE PROCESS AND PRACTICES

> It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life. It is only when there is disproportionality between the means used in the execution process to exact payment of the judgment debt, compared to available means to attain the same purpose, that alarm bells should start ringing. If there is no other proportionate means to attain the same end, execution may not be avoided.[160]

3.1 Introduction

In this chapter, various aspects of the law relating to execution against residential property will be considered. In particular, the chapter will consider the history of cases relevant to execution against a debtor's home, and the legal process leading up to a sale in execution. During the past decade, the foreclosure process has become more intricate, mainly due to the introduction of the NCA and conflicting judicial precedents.[161] This chapter will discuss, in chronological order, the most important judgments relating to execution against immovable property since the implementation of the Constitution, and will consider the jurisprudence that these decisions have added to South African law. The principles that have stemmed from these judgments have translated into new rules of practice and procedure. The required processes, judgments and academic commentary will be analysed with a view to establishing the level of clarity and adequacy of the current laws relating to foreclosure, as well as the extent to which there is a need for these laws and policies to be reviewed and developed. In the light of this analysis, suggestions will be made for improvement of the current position. It will be submitted that government, the legislature and financial institutions all need to rethink the management of mortgages and defaulting debtors. In particular, there is a need for the legislature to provide clarity as to the application and alignment of mortgagor and mortgagee rights during foreclosure. To this end, it is submitted that a 'Foreclosure Act' is required to specifically regulate and balance mortgagor and mortgagee rights during foreclosure.

[160] *Gundwana*, para 54.
[161] Du Plessis, 'Judicial oversight for sales in execution of residential property and the National Credit Act', (2012), *De Jure*, 532, 533 (hereinafter referred to as 'Du Plessis, *De Jure"*).

3.2 The right to execute against immovable property under a mortgage

As mentioned in Chapter Two,[162] the overall value of mortgage relies on the foundation of its enforcement. Under South African law, security rights which inure debtors to foreclosure under mortgage fall into the category of limited real rights and are created by registration.[163] The security rights which flow from a mortgage underwrite the mortgagee's entitlement to direct execution against the hypothecated immovable property in the event of the mortgagor defaulting on the agreement. The strength of the mortgage was best rationalised in *Gerber v Stolze*,[164] where the court held that:

> Where a monetary judgment is obtained by a mortgagee, then in the normal course of execution, the court is asked to dispense with the circumlocution of taking execution against movables. When immovable property is specially hypothecated, it allows the creditor to take execution straightaway against the immovable property. However, the mortgagee's real right of security does not provide him with an inherent right to sell the property privately. The mortgagee is required to employ the mechanisms under the law to give effect to his right to sell the property after the fulfillment of several legal provisions.[165]

The *Gerber* case confirmed that, although mortgagees have the right to direct execution against the hypothecated immovable property, this right is subject to law of general application. Thus, a mortgagee who wished to enforce his right to execute against the hypothecated property has to follow certain rules and laws, *inter alia*, Section 27A of the Supreme Court Act 59 of 1959, Rule 31 (5), Rule 45 (1) and Rule 46 (1) of the Uniform Court Rules, or Section 66 and Section 67 of the Magistrates' Courts Act 32 of 1944.[166] These provisions (some of which have been amended) permitted the registrar or clerk of the court to grant default judgments and orders of executability against immovable property. The main concern with these provisions was that they allowed for direct execution against one's home without any court supervision.

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[162] See Chapter Two (2.2).
[163] See Juma, *Journal for Juridical Science*, 1, and Maasdorp, 'The law of mortgage', 237.
[164] *Gerber v Stolze* 1951 (2) SA 166 (T) (hereinafter referred to as '*Gerber*').
[165] *Gerber*, paras 171-172.
[166] Kindly note that at the time of writing this thesis Rule 46 of the Uniform Rules of Court had been recently amended. Rule 46A came into effect on 22 December 2017. The changes effected by this amendment will be discussed in this chapter and Chapter Four, while bearing in mind that the rule has not yet been fully applied in practice at the time of writing of this thesis.

Much debate arose around the application of Rules 31 (5), 45 and 46, and the registrar's powers to grant judgments and orders of executability of immovable property. The powers granted by these provisions had the potential to counteract certain constitutional rights, in particular Section 26 and Section 34 of the Constitution.[167] Rules 31 (5), 45 and 46 potentially infringed Section 34, as it allowed for execution against immovable property without any judicial oversight. Section 34 of the Constitution provides everyone with the right to have a dispute resolved by a court of law. Thus, any law that allows for a limitation of this right or resolution of a legal dispute without any court intervention may be unconstitutional. However, the rationale behind Rule 31 (5) was articulated in *Standard Bank v Ngobeni*,[168] where the court held that:

> The purpose of the amended Rule (Rule 31 (5)) was clearly to relieve the burden resting on the Judges of the Supreme Court by delegating to the Registrar the right (and duty) to grant or refuse judgment in uncomplicated default matters where he simply checks that all administrative and formal steps have been taken to justify a judgment. He is not expected to decide extraordinary or obscure points of law or fact. The golden rule is: if the Registrar has any legitimate doubt whether judgment should be granted or not, it is his duty to refer the matter for hearing in terms of Rule 31(5)(b)(vi)).[169]

In practice, the general proposition has always been that the courts will grant a warrant of attachment against a debtor's immovable property, only if a Sheriff has issued a *nulla bona* return in respect of the debtor's movable assets. The purpose of this rule is to ensure that one's home is not sold in execution where there are other assets, such as movables, to satisfy the debt. This principle serves to avoid any abuse of process, as it prevents unscrupulous creditors from selling a debtor's home for menial debts. However, when the debt relates to mortgage, the creditor is entitled to direct execution against the hypothecated immovable property, even if there are sufficient movable assets available to satisfy the mortgage debt. This is an exception to the normal rule of debt enforcement, which requires execution against movables first.[170]

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[167] Juma, *Journal for Juridical Science,* 4, and Currie and De Waal, *The Bill of Rights Handbook* (2005) 5th ed, 708. See Chapter Two (2.4) for a consideration of section 26 and section 34 of the Constitution.

[168] *Standard Bank of South Africa Ltd v Ngobeni* 1995 (3) SA 234 (V) (hereinafter referred to as '*Ngobeni*').

[169] *Ngobeni*, para 235.

[170] See Brits, LLD thesis, 88, and Brits, *Real Security,* 1st ed (2016), Chapter Two.

The mortgagee's right to direct execution against hypothecated immovable property has, however, not involved a clear and precise procedure. The case analysis below will highlight the conflicting judgments by the courts when executing against immovable property. The main controversy on the subject of direct execution has been whether an order of executability could be granted by the registrar or the clerk of the court, or whether an order of executability could only by granted by a court of law. The judgments discussed below further considered the question as to whether the creditor still enjoys the right to direct execution against the hypothecated immovable property, despite the fact that there may be sufficient movable property, or alternative methods, to settle the full outstanding debt (or the arrears on the mortgage agreement). Although the controversy of judicial oversight was resolved by the Constitutional Court in the *Gundwana* decision, and the amended Rule 46 came into effect on 24 December 2010, the various court decisions highlight the continued need for certainty during execution against residential property. Moreover, it is contended that the further amendment to Rule 46, namely Rule 46A, which came into effect on 22 December 2017, has not created any clarity in the foreclosure process. In fact, Rule 46A can be seen to have created more uncertainty.[171] Hence, it is submitted that the enactment of specific legislation is required to create clarity in the foreclosure process. The case analysis below will discusses the lack of clarity in the foreclosure process.

3.3 An analysis of cases relating to execution against immovable property

As indicated above, the case analysis below will provide a historical overview of several foreclosure judgments that were decided after the implementation of the Constitution. While some of the issues considered in these cases have been resolved, it should be noted that there is still much inconsistency in practice. Clarity is urgently needed and this can only be established by the implementation of a Foreclosure Act.

[171] Some of the uncertainty in Rule 46A will be discussed in this chapter. It must be noted that at the time of writing this thesis, several creditors had approached the full bench of the South Gauteng High Court to provide clarity on certain provisions of Rule 46A, in particular, whether or not an application for monetary judgment in terms of Rule 31 (5) had to be brought simultaneously with an order of executability in terms of Rule 46A, and whether or not a court had to set a reserve price for a property that was set down for a sale in execution. See *Mokebe,* which will be discussed later in this chapter.

Jaftha v Schoeman

The *Jaftha* case was the first case in South African law that questioned the constitutionality of execution against residential property. The case centred around the issue of whether Section 66 (1)(*a*) and Section 67 of the Magistrates' Courts Act violated a citizen's right to have access to adequate housing.

Jaftha and Van Rooyen were both poor women suffering from ill health. They each possessed a basic level of education and had each acquired a home via state housing subsidy projects.[172] Jaftha and Van Rooyen each borrowed small amounts of money (R 250 and R 190, respectively) from a community member and agreed to repay this money in instalments. These transactions were totally unrelated to the purchasing of their homes. Jaftha and Van Rooyen fell into default of their payments, and default judgment was taken against each of them.[173]

Litigation continued against Jaftha and Van Rooyen, and their properties were sold in execution for R 5 000 and R 1 000 respectively.[174] Jaftha and Van Rooyen launched an application to the High Court seeking to set aside the sales and interdicting the buyers at auction from taking transfer of the property.[175] The debtors contended that Section 66 (1)(*a*) and Section 67 of the Magistrates' Courts Act were invalid as these provisions contravened Section 26 of the Constitution by allowing for a sale in execution to take place without any judicial oversight.

The High Court's decision

The High Court considered the ambit of Section 26 and found that the right to have access to adequate housing does not provide that everyone has an entitlement to the ownership of property.[176] Accordingly, the High Court found that the Section 66 execution process did not violate Section 26 of the Constitution as Section 26 did not

[172] *Jaftha*, para 3.
[173] *Jaftha*, para 4.
[174] *Jaftha*, para 4.
[175] *Jaftha*, para 6.
[176] *Jaftha*, para 13.

provide for the right to ownership.[177] The court held that the lack of judicial oversight in Section 66 was not unconstitutional, and despite the fact that Section 66 could be used to sell houses at insubstantial amounts for trivial debts, this state of affairs in itself did not render the Section unconstitutional.[178] The High Court dismissed each of Jaftha's and Van Rooyen's claims.

Appeal to the Constitutional Court

Jaftha and Van Rooyen were not satisfied with the High Court's decision and took the matter on appeal. In addition to the arguments posed at the High Court, Jaftha and Van Rooyen argued that, in terms of Section 26 (1) of the Constitution, both the State and private persons had a duty not to interfere unjustifiably with another's existing right to have access to adequate housing. They contended that Section 66 (1)(*a*) infringed upon this right, as it allowed for the unjustifiable removal of their right to have access to adequate housing.[179] They further contended that Section 67 of the Magistrates' Courts Act was also unconstitutional as it limited the range of assets that were exempt from the execution process. In particular, it was argued that Section 67 was unconstitutional as it failed to exempt the home of the debtor from execution. The debtors proposed that homes below a certain value should be exempt from creditor execution.

With regard to the argument that Section 67 was unconstitutional, in that it failed to provide protection to a home from creditor execution, the court held that such a blanket prohibition would be inappropriate. The court held that a blanket prohibition against sales in execution below a certain value would create a poverty trap preventing the poor from obtaining credit and would also be contrary to the interests of creditors.[180] Accordingly, the court found that Section 67 was not unconstitutional to the extent that it did not provide a blanket prohibition against the forced sale of a home. The court thereafter analysed the constitutionality of Section 66 and held that:

[177] See *Jaftha*, paras 13 and 47.
[178] *Jaftha*, para 25.
[179] *Jaftha*, para 17.
[180] *Jaftha*, para 51.

> The importance of access to adequate housing and its link to the inherent dignity of a person, has been well emphasised by this Court…. Relative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience. The impugned provisions (section 66) have the potential of undermining that experience. The provisions take indigent people who have already benefited from housing subsidies and, worse than placing them at the back of the queue to benefit again from such subsidies in the future, put them in a position where they might never again acquire such assistance, without which they may be rendered homeless and never able to restore the conditions for human dignity. Section 66(1)(a) is therefore a severe limitation of an important right.[181]

Mokgoro J held that any measure which permits one to deprive the existing right to have access to adequate housing limits the rights protected in Section 26 (1). Whether a measure is justifiable or not requires the balancing of the various interests and the qualifying of any limitation under Section 36 of the Constitution.[182] During the Section 36 enquiry, the importance of the limitation must be weighed against the nature of the right and the nature and extent of the limitation. During foreclosure, the importance and nature of debt enforcement and an enhanced credit market must be considered against the right to have access to adequate housing. In the current case, the objective of debt enforcement was diminished by the fact that the enforcement of trifling debts (of not more than R 250) could be executed against homes without court supervision.[183] Accordingly, it was held that there was insufficient proportionality between the purpose of the limitation and the effect of the limitation. However, this did not mean that every sale in execution for a trifling debt would be unreasonable and unjustifiable. Each case must be decided on the facts of the matter, and the legitimacy of a sale in execution must involve a balancing process.[184] The court held that it would be inappropriate to delineate all the circumstances in which a sale in execution would be unjustifiable, but held that several factors should be taken into account when exercising judicial oversight. These factors included, *inter alia*:

- the circumstances in which the debt was incurred;
- the attempts made by the debtor to pay off the debt;
- the financial situation of the parties;
- the amount of the debt;
- the debtor's source of income;
- alternative debt recovery methods; and

[181] *Jaftha*, para 39.
[182] *Jaftha*, para 34.
[183] *Jaftha*, paras 40-42.
[184] *Jaftha*, paras 40-57.

- any other relevant factor before the court.[185]

The court found that Section 66 (1)(*a*) was unconstitutional to the extent that it allowed for sales in execution in unjustifiable circumstances without judicial oversight.[186] It further held that the most appropriate way to remedy the defect was to provide for judicial oversight of the process. The court remedied the lack of judicial oversight by adding into Section 66 (1)(*a*) the sentence: 'a court after consideration of all relevant circumstances, may order execution against immovable property of the party'.

Comments on the *Jaftha* case and its aftermath

The overall effect of the *Jaftha* case was to introduce judicial oversight into the process of execution against immovable property.[187] The introduction of judicial oversight was seen as a mechanism to protect persons who lacked knowledge of the legal process and who were ill-equipped to avail themselves of the legal remedies.[188] In *Jaftha*, the creditor argued that judicial oversight was not required in every case as the purpose behind Section 66 of the Magistrates' Court Act was to assist the courts by allowing clerks to attend to regulatory matters and prevent court overload. The court found that this purpose was outweighed by the potential prejudice that could be caused against the debtor in losing her home. This argument brings into question the capacity of courts to hear foreclosure matters, and it will be suggested that the need has arisen for specialised foreclosure courts to be established.[189]

It is important to remember that the *Jaftha* decision did not diminish the value and significance of mortgage as the decision did not place homes beyond the scope of

[185] *Jaftha*, para 60.
[186] *Jaftha*, para 61.
[187] Kelly-Louw, 'The right of access to adequate housing', *The Quarterly Law Review for People in Business*, (2007) Vol 15, part 1, 35 (hereinafter referred to as 'Kelly-Louw, 'The right of access to adequate housing''). See also Du Plessis, *De Jure*, 539, Du Plessis submits that section 66 allowed a sale in execution to take place once the creditor had simply complied with all the procedural formalities. Therefore, it could be possible that a sale in execution could occur without the debtor even being aware of it. This position has been changed by the NCA and section 129 (this Act will be discussed in more detail in Chapter Four (4.2)).
[188] *Jaftha*, para 55.
[189] See Chapter Seven (7.3) for a consideration of specialised foreclosure courts in more detail.

execution.[190] The *Jaftha* case endorsed the principle that, where there is an infringement of a right, the limitation must be proportionate to the means. In *Jaftha*, the purpose of the sale in execution, which was the enforcement of a trivial debt, was held to be disproportionate to the consequence of execution, which was the potential homelessness of the debtors.[191] Du Plessis has interpreted the *Jaftha* case to mean that the right to have access to adequate housing during execution weighs more in favour of the debtor than the right of a creditor to enforce a small trivial debt.[192] This highlights the importance of the balancing exercise undertaken by the courts in ensuring a proportionate relationship between the effect of the limitation and the purpose of the limitation.[193] The court in *Jaftha* laid down certain factors that must be considered when undertaking an analysis of Section 36, applying the proportionality test, for execution purposes.[194] Despite the fact that the court indicated that the factors laid down were not hard and fast rules, it was a starting point to assist courts in making these decisions. Nevertheless, it is submitted that there is still a need for a clear set of rules to be established to provide a more streamlined process in the course of which courts may decide whether or not execution against a home is within the bounds of constitutionality. In this respect, it is argued that a Foreclosure Act is required to establish a clear set of rules to govern the foreclosure process, as the current laws lack clarity. It is submitted that a Foreclosure Act would provide an exact set of factors for consideration by the courts during a foreclosure application, and that this would eradicate the uncertainty that currently exists in the foreclosure process.[195]

After the *Jaftha* judgment a period of uncertainty arose.[196] In particular, mortgagees were uncertain as to whether they had a right to execute directly against hypothecated property and what they had to allege in their summons and affidavits.

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[190] Brits, LLD thesis 76.
[191] See Brits LLD thesis, 76, and Kelly-Louw, 'The right if access to adequate housing', 36.
[192] See Du Plessis, *De Jure*, 542, and Hamese, 'Attachment of immovable property in the execution of a debt', available at ul.netd.ac.za.
[193] The *Jaftha* case is also an example of the irregularities that may occur at a sale in execution. The court held that there was a possibility that there may have been some collusion at the Sheriff's sales as the properties were sold for ridiculously low prices. In Chapter Three (3.4), the sale in execution process will be discussed in more detail.
[194] *Jaftha*, paras 40-57.
[195] See Chapter Seven for a recommended list of factors that a court must consider during a foreclosure application.
[196] See Steyn, LLD thesis, 190.

The *Jaftha* case dealt with an extraneous debt unrelated to the purchasing of the immovable property. Therefore, there was confusion as to whether the registrar could grant a warrant of attachment against hypothecated immovable property pursuant to judgment in terms of Rule 31 (5). The requirement of judicial oversight created a sense of fear that such oversight might diminish the security value of mortgage.[197] Much controversy ensued and there were several conflicting approaches adopted. The inconsistency in court decisions exacerbated the situation and, for a period, creditors did not know what to expect when applying for an order of executability against immovable property. This position will be explored in the cases discussed below.

Standard Bank v Snyders[198]

The *Snyders* case was the first reported decision which related to execution against immovable property after the *Jaftha* judgment. This case involved an action by Standard Bank against nine debtors for monetary judgment and orders declaring the hypothecated immovable property executable.[199] Eight of the nine debtors failed to enter a notice to defend and Standard Bank applied for default judgment, in terms of Rule 31 (5)(*a*) of the Uniform Court Rules, before the registrar of the High Court. The registrar referred the matter to open court as he was of the opinion that, after the *Jaftha* decision, he did not have the power to grant an order of executability against immovable property.[200]

Amici curiae were appointed to protect the interests of the home-owners. They advanced two main grounds as to why the court should refuse the orders sought by Standard Bank. First, they argued that the court did not have any power in terms of Rule 31 to grant the relief sought. Secondly, they contended that the debtors should have been informed of their Section 26 constitutional rights before action was taken against them.[201]

[197] See Brits LLD thesis, 77 and Steyn, LLD thesis, 190.
[198] *Standard Bank of South Africa Ltd v Snyders and Others* 2005 (5) SA 610 (C) (hereinafter referred to as '*Snyders*').
[199] *Snyders*, para 2.
[200] *Snyders*, para 3.
[201] *Snyders*, para 8.

The court assumed that each of the immovable properties in question were the primary residences (homes) of the debtor, and confirmed that an order for executability against a home was subject to Section 26 (3) of the Constitution.[202] The court considered the contention by the *amici curiae* that the debtors should have been notified of their Section 26 constitutional rights before litigation, and found that the summons served on the debtors made no mention of Section 26. In *Jaftha,* the court found that Section 26 (3) was introduced as a pre-requisite for the court to consider all relevant circumstances before granting an order.[203] Therefore, in the present case Standard Bank had to comply with Section 26 (3) of the Constitution. The court held that without express reference in the summons to the debtor's Section 26 constitutional rights, the debtor would not be aware of this protection. The court accordingly held that the creditor's summons should contain an indication to the effect that the facts alleged by it were sufficient to justify an order in terms of Section 26 (3).[204] In the current matter, the creditor's summons lacked this, and therefore the creditor's plea could not succeed. The court dismissed the creditor's claim to execute against each immovable hypothecated property. However, it held that there was no reason why default judgment could not be ordered for the monetary value of the creditor's claims. The court accordingly ordered monetary judgment in favour of the creditor.[205]

Comments on the *Snyders* case

In *Snyders*, the court had to consider whether *Jaftha*, which related to execution against immovable property in the Magistrates' Courts process, was applicable in the current matter, which related to a High Court claim arising out of mortgage debt. The court in *Snyders* disagreed with the *Jaftha* decision, as it held that the registrar did have the power to hear and decide on default judgment and attachment applications by virtue of Rule 31 (5), whereas, in *Jaftha*, the court had held that the clerk did not possess the power to hear default judgment and attachment applications and held that Section 66, which provided the clerk with such powers, was unconstitutional.

[202] *Snyders*, paras 13-17.
[203] *Snyders*, para 22.
[204] *Snyders*, paras 24-25.
[205] *Snyders*, para 30.

One of the main contributions made by the *Snyders* case was the finding that the creditor's summons was required to draw the debtor's attention to his Section 26 constitutional rights.[206] In *Snyders*, none of the summonses issued by Standard Bank made any reference to the debtor's constitutional right to have access to adequate housing. This meant that the debtors were unaware of the protection enjoyed by them.[207] A question that naturally follows is: if Standard Bank had issued and served correctly worded summonses upon the debtors, would the court have granted monetary judgment in favour of the creditor and an order declaring the property executable? Logically, it seems that it would indeed have been so.

Nedbank v Mortinson[208]

The *Mortinson* case involved an application by Nedbank seeking default judgment in terms of Rule 31 (5), and an order declaring hypothecated immovable property executable.[209] The registrar doubted his competence to declare the property executable and referred the matter to open court in terms of Rule 31(5)(*b*)(*vi*).[210] The court held that:

> [Although] the *Jaftha* judgment did not deal with section 27(A) of the Supreme Court Act and Rule 31(5) of the Rules. It dealt, with section 66(1)(a) of the Magistrates' Court Act. That section is analogous to Rule 45(1) of the Rules of Court. Accordingly the *Jaftha* judgment is distinguishable. The ratio of the judgment is however of great persuasive authority in any consideration of the constitutionality of section 27(A) of the Supreme Court Act and Rule 31(5) of the Rules. It establishes the principle that a scheme which permits execution against immovable property without judicial sanction is a limitation of the rights contained in section 26 of the Constitution.[211]

The court found that the current case was distinguishable from the *Jaftha* case. It held that the *Jaftha* judgment did not concern Rule 31 (5) of the High Court Rules. Most applications in terms of Rule 31 (5) dealt with debts above R 100 000. Thus, where there was a small amount being claimed (like the situation in *Jaftha*) there was a greater need for scrutiny.[212] Further, Rule 31 (5)(*d*) contained a safeguard, unlike that of the Magistrates' Court, which allowed for the reconsideration of a

[206] Kelly-Louw, 'The right of access to adequate housing', 36.
[207] Kelly-Louw, 'The right to access to adequate housing', 37.
[208] *Nedbank Limited v Mortinson* 2005 (6) SA 462 (W) (hereinafter referred to as '*Mortinson'*).
[209] *Mortinson*, para 1.
[210] *Mortinson*, para 3.
[211] *Mortinson*, para 21.
[212] *Mortinson*, para 24.

judgment given by a registrar within twenty days of the party having acquired knowledge of the order.[213] For these reasons, the *Jaftha* judgment did not apply to enforcement of a mortgage agreement in the High Court. It was, however, questionable whether a layperson would be aware of Rule 31 (5)(*d*). Hence, the court set down a rule of practice, which prescribed that the writ presented to the registrar for signature must contain a note advising the debtor of the Rule 31 (5)(*d*) provisions.[214]

The court also considered whether the limitation of Section 26 during execution against immovable property was reasonable and justifiable in terms of Section 36 of the Constitution. It found that where a debtor specially hypothecates immovable property, and where there is no abuse of process, such limitation is reasonable and justifiable in terms of Section 36. Rules of practice were required to alert the registrar to any potential abuses. Accordingly, the court held that the following factors should be considered during this assessment:

- In all applications for default judgment, where the creditor seeks an order declaring specially hypothecated immovable property executable the creditor shall aver in an affidavit, *inter alia*: the amount of the arrears; whether the immovable property was acquired via state subsidy; whether the immovable property is occupied or not; whether the immovable property is utilised for residential purposes; and whether the immovable property was used as security for the debt.
- In all applications for default judgment where the creditor seeks executability against hypothecated immovable property, where the amount claimed falls within the jurisdiction of the Magistrates' Court, shall be referred to the registrar in terms of Rule 31 (5)(b)(vi).
- A further rule of practice is laid down that a warrant of execution which is presented to the Registrar for issue, pursuant to an order made by the Registrar declaring immovable property executable, shall contain a note advising the debtor of the provisions of Rule 31(5)(d).[215]

<u>Comments on the *Mortinson* case</u>

The court in the *Mortinson* case rejected the position adopted by the court in the *Jaftha* case and found that the registrar did have the power to grant an order of executability against immovable property. It further disagreed with the *Snyders* judgment and held that the creditor's summons did not have to refer to the Section 26 constitutional rights nor justify any limitation of Section 26. The court held that

[213] *Mortinson*, para 26.
[214] *Mortinson*, para 27.
[215] *Mortinson*, paras 33 - 34.

even though this may limit the right provided for in Section 26, the presence of a mortgage justified any limitation of the right, provided this did not amount to an abuse of process.[216] The court further disagreed with the *Jaftha* and *Snyders* judgments, by holding that it was impractical for the courts to hear 300 to 400 default judgment applications in open court per week, as, if this were the case, a specialised court would have to be devoted to these applications alone. The concept of specialised foreclosure courts will be discussed in later chapters.

Standard Bank v Saunderson

This case was an appeal, by Standard Bank, against the *Snyders* judgment.[217] On appeal, the Supreme Court of Appeal distinguished the facts of the *Jaftha* case from the facts of the current case. It found that in *Jaftha*, the debt in question was of a trifling nature and was not related to a mortgage. In the current matter, the debt arouse out of a mortgage agreement, where the debtors had willingly hypothecated their property to obtain capital. The debt was not extraneous, but was fused into the title of the property.[218] In *Jaftha*, the court did not consider Section 26 (1) of the Constitution. In the current case, the court found it unnecessary to consider Section 26 (1) as it accepted that, in the absence of abuse of process, a sale in execution should be ordinarily permitted against hypothecated property.[219] The court held that:

> The present case does not require us to decide whether s 26(1) may be compromised when the rights conferred by a mortgage bond are sought to be enforced in cases where the property concerned does in fact constitute 'adequate housing'. But even accepting for present purposes that execution against mortgaged property could conflict with s 26(1) such cases are likely to be rare. It is particularly hard to conceive of instances where a mortgagee's right to reclaim the debt from the property will be denied altogether; and it is therefore not surprising that the Constitutional Court noted in *Jaftha* that in the absence of abuse of court procedure – and none is alleged here – a sale in execution should ordinarily be permitted against even a home bonded for the debt sought to be reclaimed. Nor can the approach differ depending on the reasons the property owner might have had for bonding the property, or the objects on which the loan was expended.[220]

[216] See Van Heerden and Boraine, *De Jure* (2006) 342, and Brits LLD thesis, 78. This interpretation is based on the 'voluntary placing of risk principle'. It implies that since the debtor willingly places the property as security for the debt, he agrees that the property may be executed against in the event of default. See also *Nedbank Ltd v Mashiya and Another* 2006 (4) SA 422 (T), which followed the *Mortinson* judgment.
[217] See Chapter Three (3.3.2).
[218] *Saunderson*, para 18.
[219] *Saunderson*, para 19.
[220] *Saunderson*, paras 19-20. It is a common principle that a party will only be called to justify an infringement of a right once it has been proved that an infringement has occurred. Naturally, until the mortgagors could prove that the execution orders would infringe their section 26 (1) rights, Standard

The court further confirmed that Rule 31 (5) permitted the registrar to grant an order for the executability against immovable property. It found that the constitutionality of an execution against a home will only arise when the mortgagor defends the matter. In such cases, the registrar is obliged to refer the matter to open court. If there is no dispute as to the constitutionality of execution, the registrar is entitled to enter judgment in terms of Rule 31 (5).[221] In the current matter, since none of the defendants contested the constitutional validity of execution, there were no proper grounds to withhold the order declaring the properties executable and the registrar was entitled to issue such an order.[222]

Comments on the *Saunderson* case

Throughout the *Saunderson* judgment, the Supreme Court of Appeal affirmed the power of the security rights provided by mortgage, and emphasised the fact that creditors and investors place increased confidence in mortgage agreements and rely on courts to uphold the terms of these transactions. The court held that in the absence of any abuse, the mortgagee's real right of security to direct execution against hypothecated property will generally be enforced. The *Saunderson* judgment thus acknowledged the economic realities of South Africa and realised the importance of protecting commercial interests while balancing them with Section 26 of the Constitution.

With regard to whether judicial oversight was required in an application seeking execution against immovable property, the court held that judicial oversight is only required if there is an indication that the sale in execution might threaten the right to have access to adequate housing.[223] In the absence of this threat, the registrar was entitled to grant an order of executability against immovable property. The Supreme Court of Appeal, however, did accept the possibility that a sale in execution may limit one's Section 26 (1) rights and held that it would be preferable for the mortgagor to

Bank was not required to justify the granting of the orders. See also Van der Walt, '*Constitutional Property Law'* (2006) 1 *JQR*, paras 2.3, and Van der Merwe, Case Review (2006) Vol 7 No 3, *ESR Review*, 26.

[221] *Saunderson*, paras 23-24.

[222] *Saunderson*, para 26.

[223] Brits, LLD thesis, 80.

be informed of his Section 26 (1) rights. Accordingly, the Supreme Court of Appeal confirmed the High Court's decision to lay down a rule of practice that the mortgagee must inform the mortgagor of their Section 26 constitutional rights in the summons. It is submitted that this was one of the most important contributions of the *Saunderson* decision.

Campus Law Clinic v Standard Bank[224]

The University of KwaZulu-Natal's Campus Law Clinic[225] launched an appeal to the Constitutional Court against the *Saunderson* judgment.[226] The Campus Law Clinic argued that Section 27A of the Supreme Court Act and Rule 31 of the Uniform Rules of Court were unconstitutional as they allowed the registrar to grant an order of executability against immovable property.[227] It also sought an order declaring that a court could declare immovable property executable only if the summons included a warning informing the debtor of his constitutional rights. The Campus Law Clinic submitted that the Practice Note issued after the *Saunderson* judgment was inadequate as it failed to inform the debtor of the relevance of the interests of dependents, and it failed to provide information on how to place information before the court.[228]

The Campus Law Clinic claimed that Section 28 of the Constitution imposed an obligation on the State to protect and shelter the children of the nation. They contended that the courts, not registrars, were the upper guardians of children. Hence, judicial oversight was required in execution against residential property when children were involved. The Campus Law Clinic further argued that an execution order against the debtor's home had the potential to infringe the right to human

[224] *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC) (hereinafter referred to as '*Campus Law Clinic*').
[225] The University of KwaZulu-Natal's Campus Law Clinic is a voluntary association with the main object to promote and protect the needs and interests of indigent persons. The Campus Law Clinic was not a party to the proceedings at the Supreme Court of Appeal, but sought to appeal that judgment as *amicus*.
[226] *Campus Law Clinic*, para 2.
[227] *Campus Law Clinic*, para 23.
[228] Steyn, LLD thesis, 211.

dignity (section 10 of the Constitution) of not only the debtor, but also the innocent children, spouse, and dependents who resided in the property.[229]

The Constitutional Court acknowledged the importance of the issues raised by the Campus Law Clinic. However, before these issues could be addressed, the court had to decide whether the Campus Law Clinic could seek direct access to the Constitutional Court. The court found that the application for direct access had to be dismissed.[230] It held that it was important for the Minister, lending institutions, and other interested parties to have an opportunity to lodge their arguments against this claim. Further, with regard to the constitutional challenge against Section 27A of the Supreme Court Act, the court found that, since this issue was not before the High Court or the Supreme Court of Appeal, the Constitutional Court could not grant leave to appeal.

Comments on the *Campus Law Clinic* case

The *Campus Law Clinic* case was the first case to raise the possible infringement of other constitutional rights, namely, sections 10 and 28, besides section 26 during execution against residential property. The case highlighted the fact that execution against a home not only had the potential to infringe the right to have access to adequate housing, but it also had the potential to infringe the right to dignity and the rights of children and other occupants of the home. These contentions were not made in the lower courts and it is unfortunate that these issues were not addressed by the Constitutional Court. The questions posed by the Campus Law Clinic in respect of the possible infringement of section 10 and section 28 of the Constitution therefore remain unanswered, and it would be interesting to see how courts would deal with this issue if it were posed today.

Another interesting argument made in this case was that the contention by the Campus Law Clinic that the ruling in *Saunderson* of developing a Practice Note, to include a statement relating to Section 26 rights in the summons, was inadequate. It

[229] See Steyn LLD thesis, 211, referring to the affidavit of Sarah Linscott representing the Campus Law Clinic.
[230] *Campus Law Clinic*, para 28.

is submitted that more information should indeed have to be provided to the debtor to enable him to understand the nature and consequences of foreclosure, and how he might avoid the forced sale of his home. The Practice Note failed to alert the debtor to all the rights that may be threatened during foreclosure and the possible defenses to the creditor's action. Thus, the Practice Note's requirement of merely alerting the debtor to his Section 26 constitutional rights is inadequate. It is submitted that the debtor should be provided, in the summons, with more information as to his rights and remedies and how these rights and remedies can be enforced.[231]

ABSA v Ntsane

In this case, the Ntsanes defaulted on their mortgage repayments. Absa initiated litigation and, relying on the acceleration clause in the mortgage agreement, claimed the full outstanding debt owing of R 62 042, 43.[232] In compliance with the practice laid down in *Mortinson*, Absa filed an affidavit setting out their cause of action. The affidavit indicated that the arrear amount owing at that stage was R 18, 46. The affidavit further revealed that the mortgage had been in existence for a period of eight years and the Ntsanes has been in default intermittently. Absa submitted evidence showing that they had assisted the Ntsanes with several payment arrangements and showed that, over the period of eight years, there were 110 computer recordings indicating the arrear status of the mortgage.

Despite a history of erratic payments, the court was concerned with the insistence upon the part of the bank to proceed with litigation in light of the low arrears. No explanation had been provided by Absa as to why they sought execution while the arrear amount was so small.[233] Absa's conduct in persisting with litigation gave the impression that their application was unjust, and the court found the hard-heartedness of the bank very difficult to accept.[234] The court held that there would be irreversible prejudice caused to the debtors if execution were granted, as they would

[231] Chapter Seven will provide a detailed list of information that should be made available to a debtor, and how a debtor can exercise his rights.
[232] *Ntsane*, paras 10-12.
[233] *Ntsane*, para 18. Bertelsmann J held that the insistence by the bank to proceed to deprive the debtors of their home for arrears of R 18, 46 could only be described as 'piffling', when taking into account that Absa was a multi-million rand financial conglomerate.
[234] *Ntsane*, para 24.

potentially suffer loss of their home for the non-payment of a minute amount.[235] Taking heed of the case precedents, the court took guidance from the *Jaftha*, *Saunderson* and *Mortinson* judgments and found that:

> The *Jaftha* case confirmed that execution against a home would not be justifiable if the debt owed was of a trifling nature to the creditor and would result in a disastrous dispossession of one's home. A court when making its decision must consider the circumstances in which the debt arose and the interests of both the debtor and creditor.
>
> In *Saunderson*, the court held that it was particularly hard to conceive of instances where a mortgagee's right to execution of the property would be denied altogether:… it was more easily possible to contemplate a court delaying execution where there was a real prospect that the debt may be repaid.[236]

The court found that none of the previous judgments dealt with the question of whether the right to enforce an acceleration clause could be refused or reviewed.[237] However, guidance could be sought from the *Mortinson* judgment in which it has held that if a small amount of arrears triggered the action against the debtor, the possibility of infringement against Section 26 rights is increased.[238]

In the current matter, the interests of the mortgagor and mortgagee had to be balanced. These included Absa's rights to commercial activity and the right to enforce its agreements, and the debtor's right to have access to adequate housing. The proportionality of the harm caused to the debtor, in losing his property, had to be weighed against the harm that Absa would suffer if their agreements were commercially ineffective.[239] If Absa was denied its right to enforce valid contractual agreements, this would not only create uncertainty, but it would also create distrust and lack of faith in commercial activities. Accordingly, Bertelsmann J identified the following factors as important to consider when balancing the interests of both parties:

- the amount of the outstanding mortgage;
- the value of the property;
- the history of payments;
- the debtor's movable property;
- the other debts of the debtor;
- the arrear municipal rates and taxes; and

[235] *Ntsane*, para 22.
[236] *Ntsane*, para 65, referring to *Jaftha*, para 58, and *Saunderson*, para 19.
[237] *Ntsane*, para 66.
[238] *Ntsane*, para 68.
[239] *Ntsane*, para 71.

- the debtor's income.[240]

The court held that it would be difficult to imagine a ground where a creditor's election to enforce acceleration would be unlawful.[241] However, even if the terms of the loan agreement allowed for acceleration of the debt, a court would be entitled to refuse to grant an order of execution against the immovable property if the result would be seemingly iniquitous or unfair and amount to abuse of process. The court held that enforcing the right to execute against immovable property, when the arrears due were minute, would conflict with Section 26 of the Constitution.[242] The court therefore refused the application to declare the immovable property executable and further refused to grant default judgment for the full outstanding debt due on the mortgage agreement. It did, however, grant judgment for the arrear amount due, namely an amount of R 18, 46.[243]

Bertelsmann J expressed concern that courts would not be able to undertake such detailed investigations as the one held in this case and suggested that there was a need for compulsory arbitration proceedings to be introduced to resolve matters of this nature, informally and speedily.[244] Such arbitration forums could be used as a platform to resolve mortgage disputes and ensure that poor home-owners are not deprived of a roof over their heads. The idea of compulsory mediation forums will be considered in Chapter Seven.

Comments on the *Ntsane* case

The main issue in the *Ntsane* case was whether the court was entitled to refuse a creditor enforcement of its right to acceleration and its real right of security to execute directly against the hypothecated immovable property. The court held that the decision by Absa to proceed to execute against the debtor's immovable property, where the arrears amount was merely R 18, 46, constituted an infringement of the

[240] *Ntsane*, para 73.
[241] *Ntsane*, para 68.
[242] *Ntsane*, paras 80-84. The court also held that it was grossly unfair to proceed with a sale in execution which would obtain a price lower than the market value, when a controlled private sale would obtain a fair value for the property.
[243] *Ntsane*, paras 93-94.
[244] *Ntsane*, para 97.

debtor's right to have access to adequate housing. The court found that Absa's decision to proceed with litigation was morally questionable and amounted to an abuse of process. The *Ntsane* case thus illustrates a circumstance, namely abuse of process, when a court may deny enforcement of the mortgage agreement and deny the creditor his right to security.[245] This can be seen as a departure from the *Saunderson* judgment in which it was found that 'it would be hard to find instances where a mortgagee's right to direct execution against immovable property would be denied altogether'.

The *Ntsane* case also emphasises the need for creditors to seek alternative methods, such as executing against the debtor's movable assets, prior to executing against the home. This can be seen as a change to the established position which entitled a mortgagee to seek direct execution against the hypothecated property. Brits and Van Der Walt claimed that this change has become necessary in light of our constitutional dispensation and the need to protect the right to have access to adequate housing.[246] On the other hand, it is submitted that a mortgagee's right to direct execution against the hypothecated property is fundamental to the value of mortgage as security and any interference with this right dilutes its function in our legal system. Courts should not overlook the mortgagee's rights during foreclosure, and it is submitted that in *Ntsane* the court failed to give full effect to Absa's rights. In *Ntsane*, despite the recurring defaults by the debtors, the court did not find any prejudice or loss suffered by the creditor.[247] It is submitted that the court failed to take a detailed look into the prejudice that would be suffered by Absa. As previously mentioned, the refusal to enforce a mortgagee's right to acceleration and direct execution would have a significant impact on the value and confidence of mortgage agreements as an instrument of security and investment. Creditors also have the potential to suffer harm if their rights are not protected, and courts must equally balance both debtor and creditor rights during foreclosure against a home. The

[245] See Brits, LLD thesis 230, and Brits and Van der Walt, *TSAR* (2014-2) 303.
[246] Brits and Van Der Walt, *TSAR* (2014-2), 304. See also See Steyn, LLD thesis, 226.
[247] See Steyn, 'Safe as houses', 118. Steyn submits that the court should have applied more consideration to the fact that the debtor had committed numerous payment breaches. In agreement, it is submitted that the creditor might have suffered economic disadvantage due to the recurring defaults by the debtor. Some creditors have investors and investment agreements demand that the creditors should not allow a certain percentage of their mortgage debt to be in arrears. Further, some investment agreements demand that the creditor must litigate in the event of mortgage breach and must recover capital expeditiously.

Ntsane judgment highlights the importance of the balancing and proportionality exercise required by the courts and is a prime example of how the lack of judicial oversight can result in abuse of process.[248] In the *Ntsane* judgment, despite the court ruling that the execution process must be guided by a proportionality test in order to balance the rights of the parties, the court did not go far enough to set out a detailed proportionality test which would assist courts in making these decisions. It is submitted that this once again exposes the uncertainty and lack of guidelines in foreclosure litigation, and the undesirable effect of developing the law on a case by case basis alone. A clear and uniform set of rules is urgently required.[249]

It is submitted that another valuable insight gained from the *Ntsane* judgment is the importance placed on the role of alternative dispute resolution during the foreclosure process. It is contended that, given the small arrear amount, alternative methods of resolution should have been considered to assist the debtor, such as assisting the debtor with the private marketing of the property, or entering into a payment arrangement with the debtor. These options were mentioned by the court as alternatives to execution and, in particular, arbitration and the need for this medium to be expanded in the South African foreclosure process. It is interesting to note that, internationally, banks and home-owners are responding to the mortgage crisis by engaging in mediation.[250]

Various South African laws recognise mediation as an important tool for remedying disputes. The Companies Act 71 of 2008 and the King Code III acknowledge mediation as a vital tool to be employed before litigation, and the social responsibility placed on companies may require them to affect a reaction plan to the foreclosure crisis by creating mediation houses for mortgage disputes. The NCA affords the debtor an opportunity to consider mediation and arbitration as a means of dispute resolution and as an alternative to debt counseling. However, many debtors are

[248] Liebenberg, *Socio-economic rights: Adjudication under a transformative constitution* (2010) 357.
[249] The *Ntsane* case was decided before the implementation of the NCA. The NCA may now provide a solution for matters such as that of *Ntsane*. If the NCA had been applicable at the time of the *Ntsane* decision, the court would have been empowered by section 85 of the NCA to refer the matter to a debt counsellor. Further, section 129 (3) of the NCA, the right to reinstatement, would also have been available to the debtor. See Chapter Four (4.4) for a consideration of section 129 (3).
[250] See Joubert, 'Foreclosure mediation offers banks and homeowners the high way', available at www.usb.ac.za. See also Chapters Six and Seven which will provide a brief foreign analysis of foreclosure law.

ignorant of the mediation rules and processes. It is submitted that mediation could play an indispensable role in saving home-ownership in South Africa. Not only will it serve as a quicker alternative to resolving the dispute between the debtor and creditor, but it is also an inexpensive remedy that will be to the benefit of both parties.

Gundwana v Steko Development

After the *Saunderson* decision, registrars of the High Court continued to grant orders of executability against homes, without any judicial oversight occurring.[251] This was concerning, especially in light of the *Jaftha* decision and the amendment to section 66 of the Magistrates' Courts Act, which prohibited the clerk of the court from granting an order of executability against immovable property. As a result of these concerns, Rule 46 (1) of the High Court Rules was amended on 24 December 2010 to restrict the registrar's power to grant default judgment and to make orders as to the executability of immovable property.[252]

Prior to the Rule 46 amendment, courts were left with two conflicting approaches. The first followed the *Jaftha* decision, which provided that execution against residential property could not occur without judicial oversight. The second followed the *Mortinson* and *Saunderson* decisions, which provided that judicial oversight was not required in the foreclosure process. This set the scene for the *Gundwana* judgment to become a vital case in settling this conflict.

Gundwana had fallen into default on her mortgage repayments. Nedbank instituted foreclosure proceedings, and the registrar granted default judgment against Gundwana, together with an order declaring the immovable property executable. Nedbank did not take further legal action against Gundwana for approximately four years, and Gundwana remained in occupation on the property and made payments to the account, albeit irregularly.[253] Several years later, Gundwana discovered that

[251] Brits, LLD thesis, 83.
[252] This amendment was published in Government Notice R 981 of 19 November 2010 and came into effect on 24 December 2010. A further amendment was implemented by Rule 46A and become effective on 22 December 2017.
[253] *Gundwana*, para 6.

the property was set down for sale in execution. She contacted Nedbank and they advised her that the mortgage was R 5 268, 66 in arrears. The outstanding balance owing at that stage was R 23 779, 13. Gundwana was unable to settle the arrears and the property was sold in execution to Steko Development CC ('Steko').[254] Gundwana refused to vacate the premises and Steko was forced to obtain an order for her eviction. After the eviction order was granted, Gundwana sought rescission of the default judgment taken against her by Nedbank and also sought leave to appeal against the eviction order.

The main issue before the court was whether the registrar was empowered to grant a declaration of executability against a person's home, in the general course of granting default judgment in terms of Rule 31 (5) of the High Court Rules. Nedbank argued that the present case did not fall within the ambit of the *Jaftha* case and did not require judicial oversight.[255] They based their arguments on the following grounds:

- In the current case the nature of the person and the nature of the property fell outside the *Jaftha* scope; and
- Mortgaged property fell outside the reach of the *Jaftha* judgment, because mortgagors willingly accept the risk of losing their property when they fall into default.[256]

Froneman J rejected the mortgagee's argument and confirmed that in every case an enquiry was required to determine whether the facts fell within the scope of *Jaftha*. This enquiry fell beyond the registrar's powers, and could only be carried out by a judge.[257] Accordingly, the court made an order referring the rescission application back to the High Court and granted leave to appeal against the eviction order. The court confirmed that it was unconstitutional for the registrar to declare immovable property specially executable when ordering default judgment under Rule 31 (5). Judicial oversight is a 'must' in the execution process.

[254] *Gundwana*, paras 5-7.
[255] *Gundwana*, para 42.
[256] *Gundwana*, para 42.
[257] *Gundwana*, paras 43-49. Froneman J found that even though the mortgagor provided the immovable property as security for the loan and accepted that the property would be executed upon in the event of breach, this in itself did not mean that the mortgagor accepted that: the execution would be enforced without court sanction; nor did it mean that the mortgagor waived their section 26 constitutional rights; or that the mortgagee was entitled to enforce the agreement in bad faith.

Comments on the *Gundwana* case

Before the *Gundwana* case was decided, there was an expectation that the judgment would resolve the conflict surrounding the earlier decisions, and resolve the constitutional issues and disputes surrounding execution against residential property. However, the Constitutional Court delivered a relatively short judgment in which it unequivocally affirmed the need for judicial oversight in the execution process. The court did not deal with any issues relating to its role in assisting parties during foreclosure and balancing the rights of contract and security with the right to dignity and access to adequate housing,[258] nor did it consider the impact of execution on other constitutional rights referred to in the *Campus Law Clinic* case.

The *Gundwana* case strongly confirmed that judicial oversight was required in every case relating to execution against immovable property. The fact that judicial oversight was required did not mean that creditors were no longer entitled to execute against hypothecated immovable property. The introduction of judicial oversight merely meant that execution against immovable property must be balanced with the debtor's Section 26 constitutional rights and that reasonable alternatives must be considered before execution is implemented. Brits submits that the requirement of judicial oversight does not diminish the value of mortgage, but merely serves to ensure that the execution process is not abused, and that a sale in execution is used only as a last resort. Brits contends that none of this is contrary to the traditional principles of mortgage law.[259]

First Rand Bank v Folscher[260]

The *Folscher* case was the first case to be heard after the *Gundwana* judgment. The *Gundwana* judgment was not decided on the amended Rule 46,[261] therefore it was necessary for the *Folscher* case to consider the application of the amended rule. The full bench in the *Folscher* case considered the application between the *Gundwana*

[258] Juma, *Journal for Juridical Science*, (2012), 11.
[259] See Brits, LLD thesis, 87.
[260] *FirstRand Bank Ltd v Folscher and Another* 2011 (4) SA 314 (GNP) (hereinafter referred to as '*Folscher*').
[261] Rule 46 was amended with effect from 24 December 2010, and on 11 April 2011, the Constitutional Court delivered its judgment in *Gundwana.*

judgment and Rule 46 and found that the requirement of judicial oversight was limited to cases where execution was sought against the debtor's primary residence (home).[262] Additional dwellings such as holiday homes did not fall within the ambit of Rule 46. The court also found that the term 'judgment debtor' referred to a natural person, and not a legal entity such as a company or trust. Further, the court held that the phrase 'all relevant circumstances' in Rule 46 (1) referred to 'legally relevant circumstances'.[263]

The court held that although it was impossible to provide a complete list of factors that the court must consider when hearing a foreclosure application, it laid down some circumstances that should be taken into account, *inter alia*:

- whether the mortgaged property is the debtor's primary residence;
- the circumstances under which the debt was incurred;
- the outstanding mortgage arrears;
- the total amount owing on the mortgage;
- the debtor's payment history;
- the financial strengths of the debtor and creditor;
- the possibilities of the debt being paid within a reasonable time;
- the proportionality of prejudice between the debtor and creditor;
- whether a section 129 notice was sent and the debtor's reaction to the notice;
- whether the property is occupied or not;
- whether the property was acquired by State subsidy; and
- whether the creditor instituted action with an ulterior motive.[264]

The court emphasised that not every case will require consideration of every factor, as each case must be looked at individually. The court confirmed that abuse of process will be a clear circumstance to persuade the court not to grant executability against the immovable property. The court also held that:

> It is obviously impossible to provide a list of circumstances that might be regarded as extraordinary which would persuade a court to decline a writ of execution. They would usually consist of factors that would render the enforcement of the judgment debt an abuse of process, which the court is obliged to prevent. An abuse of process takes place where the procedures permitted by the Rules of the Court to facilitate the pursuit of the truth are used for a purpose extraneous to that objective…. [T]he creditor's conduct need not be willfully dishonest or vexatious to constitute an abuse. The consequences of intended writs against hypothecated properties, although *bona fide*, may be iniquitous because the debtor will lose

[262] *Folscher*, para 15.
[263] *Folscher*, para 46. It is interesting to note that during the course of arguments it was suggested that a practice directive be adopted to ensure the personal service of summons. The court found this argument to be unwarranted as it would create uncertainty and cause delay and additional costs that would eventually be borne by the debtor.
[264] *Folscher*, para 41.

his house while alternative modes to satisfy the creditor's demands might exist that would not cause any significant prejudice to the creditor.[265]

Comments on the *Folscher* case

The *Folscher* judgment confirmed that the *Gundwana* judgment and Rule 46 were applicable only to immovable property that was the primary residence of the debtor, and only applied to debtors who were natural persons. The court also considered the concept of 'all relevant circumstances' within Rule 46. Rule 46 did not provide a definition for the term 'all relevant circumstances' nor did it give any indication as to which circumstances must be taken into account by the courts (the term 'all relevant circumstances' is wide and could potentially include a vast array of factors). The court concluded that 'all relevant circumstances' must be interpreted to mean 'all *legally* relevant circumstances'. It is thus questionable whether the debtor's personal circumstances could be taken into account in terms of Rule 46 (1).

Juma submits that the term 'all relevant circumstances' in Rule 46 refers to the circumstances of the debtor (personal circumstances) rather than to the equity and fairness of the execution.[266] Juma argues that focus on the personal circumstances of the debtor is important, as the debtor enjoys more legal protection than the creditor and the position of the debtor should be evaluated as a relevant circumstance. On the other hand, it is submitted that subjective factors should not be considered during the foreclosure process. It is submitted that an assessment of subjective factors will create inconsistency in the law and will delay and complicate proceedings. The *Folscher* case confirmed that the concept of 'all relevant circumstances' means 'all *legally* relevant circumstances'. Thus, according to this judgment, circumstances do not become relevant simply for a reason that has a subjective effect on the debtor. It must pertain to a legal right and be legally relevant. The failure by the legislator to provide a definition for the term 'all relevant circumstances' once again demonstrates the lack of clarity in the foreclosure

[265] *Folscher*, para 40. See also *Beinash v Wigley* 1997 (3) SA 721 (SCA), and *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
[266] See Juma, *Journal for Juridical Science*, 19 and Steyn, LLD thesis.

process, as it is unclear which factors should or should not be considered by the courts.[267]

It is submitted that another important finding made by the court in the *Folscher* case was in relation to abuse of process. One of the most common grounds for refusing an order of executability against immovable property will be abuse of process. This will usually occur when the creditor acts in bad faith and enforces the mortgage for an ulterior motive (as seen in *Jaftha* and *Ntsane*). However, in the *Folscher* case, the court found that the creditor need not act *mala fide* for there to be an abuse of process. The court found that if the consequences of execution are severely disproportionate, this will also result in an abuse of process.[268] According to this interpretation, a *bona fide* creditor who complies with all the current foreclosure rules may be denied his right to acceleration and right to direct execution should the foreclosure result in disproportionality. It is submitted that this is an unfair approach, as a *bona fide* creditor should not be denied his rights merely due to the fact that the debtor suffers hardship should his home be sold. Abuse of process should be limited to instances where a party acts in bad faith. If a creditor complies in good faith with all the foreclosure rules, he should not be denied the opportunity to enforce his rights.

Nedbank v Fraser

The main issues before the court in *Fraser* were the interpretation of the term 'all relevant circumstances' in Rule 46 and the application of the acceleration clause in a mortgage agreement.[269] The court considered the term 'all relevant circumstances' in Rule 46 and held an evaluation of the facts of each case to be required.[270] Neither the Constitution nor the Rules of Court provided any definition for the term 'all relevant circumstances'. The court held that it would be unwise to set out exact factors for courts to consider in the exercise of their judicial oversight, as circumstances, and the weight to be attached to each circumstance, vary from case

[267] See Chapter Three (3.3.10) for a discussion of Rule 46, Rule 46A and 'all relevant circumstances'.
[268] See Van Heerden, 'Warrant of execution against immovable property', *Guide to the National Credit Act* (loose leaf) Lexis Nexis.
[269] *Fraser*, paras 1-12.
[270] *Fraser*, para 14.

to case. The most important factors to consider will always be the circumstances under which the debt was incurred and the existence of other alternatives to execution against the home.[271] The existence of reasonable alternatives will be determined by the attempts made by the debtor to pay the debt and the debtor's resources. Although the court must safeguard against abuse, it should not impose too great a burden on the creditor to obtain evidence as to the debtor's financial ability. The court confirmed that residential property is not placed beyond the scope of execution. The creditor's right enjoys relative primacy, as, if this were not the case, debtors could borrow money and subsequently defeat creditors' legitimate claims.

The court thereafter considered the application of the acceleration clause and held that the mortgage agreement provides two rights to a creditor. The first is the right to acceleration. The second is a procedural right to execute its claim directly against the hypothecated immovable property.[272] The court held that Section 26 of the Constitution applies to an 'executive' right of the creditor and not the right to acceleration. The court confirmed that the creditor's contractual right to acceleration could not be interfered with. However, the right to direct execution could be limited to protect another's constitutional housing rights. If courts possessed discretion to deny the creditor his right to acceleration, it would create uncertainty and distrust in commercial activities.[273] Accordingly, the court found that the creditor's right to acceleration is absolute and will go unchecked, despite the disproportionate results it may have. The court held that when a court considers a judgment and execution application, it must first ascertain the amount to which the creditor would be entitled, that is, the amount of the accelerated debt, and not just the arrear amount.[274] The court criticised the *Ntsane* judgment and held that the court in *Ntsane* incorrectly focused on the arrear amount as opposed to the full outstanding amount owing.[275] The court held that the arrear amount and the full outstanding amount are two conceptually different figures and must not be confused.[276] In the *Ntsane* case, the

[271] *Fraser*, para 28.
[272] *Fraser*, para 32.
[273] *Fraser*, para 33.
[274] *Fraser*, paras 36-37.
[275] *Fraser*, paras 29-31.
[276] *Fraser*, para 28.

decision by the court to redefine a creditor's entitlement to accelerated payment went beyond the court's powers and beyond the role of judicial oversight.[277]

Comments on the *Fraser* case

The *Fraser* judgment sought to give content to the requirements of Rule 46. The court emphasised the importance of considering the context and purpose of judicial oversight and the apparent tension of balancing two competing social values,[278] one being the value to ensure that persons have access to adequate housing and the other being the value to society that valid contracts are enforced. The court held that the process of execution is essential to secure social order and the value of security rights. The existence of court structures subsist to give effect to Section 34 of the Constitution.[279]

The case further confirmed that a court has discretion to prevent execution if it would amount to an abuse of process. However, it rejected the view that the courts had discretion to deny a creditor the right to acceleration. The court criticised the *Ntsane* judgment and rejected the view that judicial oversight grants the court the power to redefine contracts and deny a creditor his right to acceleration.[280] Brits and Van Der Walt agree with the *Fraser* decision and submit that a creditor could be accused of abusing their right to direct execution, however, a creditor cannot be accused of

[277] *Fraser*, para 37. The court held that when a creditor seeks judgment and execution and if the accelerated balance is sufficiently substantial to justify execution against a home, there is no scope to deny the creditor his right to acceleration, irrespective of the arrear amount. Moreover, the court found that it does not have the discretion to interfere with the creditor's right to acceleration, but only has the discretion to intervene with the right to direct execution against the hypothecated property. The court found that any interference with the right to acceleration could only be changed by the legislature.
[278] *Fraser*, paras 16-17.
[279] *Fraser*, paras 18-24. The court confirmed that the right to execute debts is not absolute and has its limitations which are necessary for the sustenance of the debtor. Thus, certain assets are exempt from execution. The debtor's home, however, is not an asset that is placed beyond execution, and when considering the competing rights, the creditor's right to execute enjoys primacy over the debtor's housing interests. The court found that the two values and rights are not so much juxtaposed, as symbiotic. The protection of the social value of contract and the execution by creditors provides protection to the value of housing, as the argument goes that, the right of creditors to execute their debts against immovable property facilitates credit and promotes home-ownership. The court held that to put immovable property beyond the reach of execution would sterilise commerce and render immovable property useless as a means to raise credit. This would lock capital and would severely prejudice poor communities. The court emphasised that although execution is necessary, it must not be abused, thus the context of judicial oversight becomes vital in preventing abuses. Judicial oversight acts as a filter to ensure that all checks have been cleared, there is no abuse of process and it is constitutionally justifiable to proceed with the execution.
[280] *Fraser*, paras 34-35.

abusing their right to acceleration.[281] In agreement, it is submitted that the right to acceleration is a legal, *bona fide,* contractual right which has long existed in our law, and any interference by the court to limit this right would amount to the court redefining contracts and overstepping its powers. Nevertheless, the *Ntsane* case is a prime example of abuse or misuse of the acceleration clause. The enforcement of an acceleration clause should not be upheld if it results in the unjustifiable infringement of Section 26. Brits and Van Der Walt are of the view that the best approach to deal with these matters lies somewhere in between the *Ntsane* and *Fraser* approaches. They submit that in cases where the creditor seeks judgment and execution where the arrears are low, courts should postpone the matter and allow the debtor an opportunity to settle the arrears and reinstate the agreement.[282] In concurrence, it is suggested that in circumstances such as *Ntsane*, the court should postpone the matter and inform the debtor of section 129 (3) of the NCA and any other alternatives, such as debt review, marketing and selling the property privately, or entering into a payment arrangement with the creditor.[283] It is further suggested that guidelines be established to create clarity as to when foreclosure will or will not be justifiable. In this respect, it is argued that a Foreclosure Act is required to provide rules indicating when a creditor is entitled to initiate foreclosure proceedings.[284]

Summary of cases relating to execution against immovable property and consideration of the current position: *Absa Bank v Mokebe*

The primary issue in all of the cases discussed above was whether judicial oversight was required during execution against immovable property. The cases also considered the rights of the mortgagor and mortgagee during the execution process and whether the mortgagee's right to execution could ever be limited or refused. In *Jaftha,* the Constitutional Court considered the constitutionality of section 66 of the Magistrates' Courts Act and found that the section was unconstitutional to the extent that it allowed execution against a person's home without judicial oversight. The lack

[281] Brits and Van Der Walt, *TSAR* (2014-2), 304.
[282] Brits and Van Der Walt, *TSAR* (2014-2), 305.
[283] See also Chapter Four (4.4).
[284] See Chapter Seven. It is recommended that foreclosure should be initiated only once the arrear amount is equivalent to 3-5 months of missed instalments, and after the creditor and debtor have engaged in pre-litigation negotiations. This rule will ensure that the application of the acceleration clause in not abused.

of judicial oversight led to the position where execution could result in disproportionate consequences and possibly infringe upon the debtor's constitutional rights.

In the *Saunderson* and *Mortinson* cases, the courts acknowledged the practical burden of requiring all warrants of execution for immovable property to be heard by the courts and held that this would over-extend the capabilities of the courts. In *Mortinson*, the court held that the limitation of Section 26 with regard to Rule 31 (5), which allowed the registrar to order execution against a debtor's home, was reasonable and justifiable in light of Section 36 of the Constitution.[285] Although the court held that the registrar possessed the power to declare hypothecated property specifically executable, a rule of practice was laid down requiring the creditor to file an affidavit setting forth several averments when applying for default judgment.[286] This rule was established to alert the registrar and assist him in determining whether there was any abuse of process. A further rule of practice was laid down requiring that the warrant of attachment must contain a note alerting the debtor to Rule 31 (5)(*d*) and the right to set down the matter to be reconsidered by a court of law.

The court in *Saunderson* confirmed the *Mortinson* judgment and held that registrars did possess the power to grant orders of executability, except where there were allegations of infringement of Section 26. In such cases the matter had to be referred to a judge.[287] In *Saunderson*, another Practice Directive was set out requiring the creditor's summons to alert the debtor to his Section 26 constitutional rights.[288] Despite acknowledging the importance of housing rights, and their possible implications for the creditor's right to direct execution against the home, the court in *Saunderson* found it unlikely that such implication would ever defeat a mortgagee's claim.[289] Nevertheless, subsequent cases, namely the *Ntsane* and *Folscher* judgments, showed that it may be possible to limit the creditor's rights were there is

[285] Els, 'An insolvent's right to access to adequate housing', *De Rebus*, (October 2011), 20, 21.
[286] See 'The South Gauteng High Court Practice Directives No. 01/2013 and 06/2013', entitled 'Foreclosure and execution when property is, or appears to be, the defendant's primary residence'.
[287] Brits and Van Der Walt, *TSAR* (2014-2), 289.
[288] See *Nedbank v Mashiya* 2006 (4) SA 422 (T), paras 29-34, where the court held that the spirit of the Constitution would not be served by allowing a home to be declared executable on information that is superficial. The cause of action must be properly established and the right to housing is not a right that should be trifled with.
[289] Brits and Van Der Walt, *TSAR* (2014-2), 289.

an abuse of process and an unjustifiable or disproportionate infringement of the home-owner's rights.

The *Gundwana* decision, and the amended Rule 46, which became effective on 20 December 2010, settled the conflict between *Jaftha* and *Saunderson*, and confirmed the position that judicial scrutiny is required during execution against all residential property. The decision in *Gundwana* ensures that the creditor's right to direct execution is not unbridled or unassailable, but is subject to the scrutiny of the courts based on the debtor's substantive housing rights. The purpose of judicial oversight is to ensure that all alternatives are pursued and that the decision reached is justifiable.[290] It is the courts' duty to ensure that all foreclosures remain within the bounds of justifiable limitation of Section 26 and Section 36 of the Constitution.

The *Folsher* and *Fraser* cases confirmed that the necessity for judicial oversight applied only in cases where execution was sought against the principal residence of the debtor. The *Fraser* case also considered the application of the acceleration clause in a mortgage agreement. In *Fraser*, the court found that the creditor could not be restrained from exercising his/her right to acceleration as this was a valid, *bona fide,* contractual right. The court could not prevent a creditor from exercising these acceleration rights, and any order by a court which had such an effect would amount to the court overstepping its powers. The only right that the court could limit was the creditor's right to execute against the hypothecated property, as this related to a constitutional right. It is still unclear, however, whether the creditor has an absolute right to acceleration, as several cases have found in the negative.[291] Chapter Four (4.4) will discuss the creditor's right to acceleration in more detail and will consider the application of the NCA with the right to acceleration.

The *Folsher* and *Fraser* judgments also found that the term 'all relevant circumstances' in Rule 46 was not defined by the legislature and confusion once again arose as to what factors must be taken into account when a court is

[290] Brits, LLD thesis 91.
[291] See *Combined Developers v Arun Holdings* 2015 (3) SA 215 (hereinafter referred to as '*Arun Holdings*'), *and FirstRand Bank Ltd v Mdletye and Another* 2016 (5) SA 550 (KZD) (hereinafter referred to as '*Mdletye'*).

considering a foreclosure application.[292] It is submitted that the concept of 'all relevant circumstances' in Rule 46 is vague and confusing. Accordingly, it is submitted that this concept should be done away with, as there is no need for the court to consider all and wide ranging facts and circumstances. The main factor that the court should consider when hearing a foreclosure matter is the *bona fides* of each party. From the debtor's perspective, the court must consider his conduct to maintain the mortgage, the number of times he has been in default, and the alternatives he has sought, such as, *inter alia*, debt counselling, mediation, and marketing the property privately. From the creditor's perspective, the court must consider its actions in assisting the debtor with payment arrangements, and assisting him in private marketing. The court should also consider the extent of the arrears and the total debt still owing. The consideration of any other factor is irrelevant and brings into the law a subjective element with broad ranging negative consequences and responsibilities.

It is submitted that another important factor that must be taken into account when considering executability against immovable property is whether execution will result in an abuse of process. This may occur from *mala fide* behaviour by the creditor, or where there will be a disproportionate relationship between the purpose of execution and the impact on the debtor.[293] Wilful abuse of process usually occurs where the outstanding balance or arrear amount owing is small, as seen in the *Jaftha* and *Ntsane* cases, or where there are several alternative ways to extinguish the debt, as opposed to selling the debtor's home. However, abuse of process does not only entail procedural abuses, irregularities and ulterior motives.[294] In *Folscher,* the court held that the creditor's conduct need not be dishonest or vexatious to constitute an abuse. Execution against hypothecated property, although *bona fide*, may be iniquitous if the debtor will lose his home while alternative modes exist to satisfy the outstanding debt.[295] It is submitted that, in practice, this may be very confusing for mortgagees and the above circumstances emphasise the need for clear rules to be

[292] Brits and Van Der Walt, *TSAR* (2014-2), 288.
[293] Brits, 'Sale in execution of property at unreasonably low prices indicates abuse of process: *Nxazonke v Absa Bank* (2012) ZAWCHW 184' *THRHR* (2013) 76, 451 (hereinafter referred to as 'Brits, *THRHR*').
[294] Brits and Van Der Walt, *TSAR* (2014-2), 295.
[295] *Folscher*, para 40.

established to enable mortgagees to ascertain under what circumstances execution will, or will not, be justifiable.

Rule 46A, which came into effect on 22 December 2017, has not provided any clarity on the above issues. Rule 46A fails to provide any definition for the term 'all relevant circumstances', and fails to indicate what circumstances the court should take into account when considering execution against immovable property. Therefore, confusion continues as to what 'circumstances' a court can or cannot take into account. It is submitted that the amendment by Rule 46A was an opportunity lost as it could have created clarity as to the exact circumstances a court must consider during foreclosure.

As a result of the inconsistencies and lack of clarity, during September 2018, the Van der Linde J referred several foreclosure matters to the full bench of the South Gauteng High Court, in the matter of *Absa Bank v Mokebe*, to hear several concerns with Rule 46A, in particular, whether an application for monetary judgment and an order of executability must be brought simultaneously or separately, and whether a court was required to set a reserve price for a sale in execution.[296] The full bench in *Mokebe* considered the history of the foreclosure process and expressed concern over the lack of consistency and clarity.[297]

With regard to the issue of whether an application for monetary judgment and for an order of executability must be brought simultaneously, the full bench confirmed that the monetary judgment is an intrinsic part of the cause of action in foreclosure cases and is inextricably linked to the claim for an order for execution.[298] The court found that it was both necessary and desirable for these issues to be heard simultaneously and not piecemeal.[299] Such a process will reduce the litigation costs of hearing the

[296] See *Mokebe,* paras 5 - 6. Kindly note that this decision was granted at the time of writing this thesis, and it must be noted that several creditors have expressed their intention to appeal this decision to the Supreme Court of Appeal.
[297] *Mokebe*, paras 7 - 12.
[298] *Mokebe*, para 14. See also *First Rand Bank v Stand 949 Cottage Lane Sundowner (Pty) Ltd and Another* (2014/10545) ZAGPJHC 117, and *Barclays Nasionale Bank v Registrateur van Aktes Transvaal en 'n Ander* 1975 (4) SA 936 (T). In these cases the court held that it is a longstanding practice for a creditor to claim for the monetary debt and for executability of pledged goods in one action.
[299] *Mokebe*, para 13.

matters separately.[300] The court further confirmed that it was the duty of the creditor to bring its entire case, including monetary and executability claim, before the court in one proceeding. Should the matter require a postponement, the entire matter falls to be postponed.[301]

With regard to the issue of whether the court is required to set a reserve price for a sale in execution, the full bench held that, in all circumstances, the court should set a reserve price in all matters where the facts indicate it[302] (the following section be consider the sale in execution process in more detail).

The decision in *Mokebe* once again exposes the lack of consistency in the foreclosure process. It has been a long established practice over the decades that a creditor must first seek monetary judgment against a debtor, and only thereafter is the creditor entitled to seek execution against the debtor's immovable property. The *Mokebe* judgment seems to have changed this practice as this ruling requires both monetary judgment and execution orders to be brought simultaneously before the court. It, however, must be noted that this judgment is only binding in the Gauteng jurisdiction, and it is currently being appealed by several creditors. Other jurisdictions, such as KwaZulu-Natal still require two separate applications, namely separate monetary judgment and executability applications, to be brought before the court. The different approaches in the different jurisdictions have catalysed the confusion and it is currently noted that the Western Cape High Court has also referred several foreclosure matters to its full bench to provide clarity on the issue.[303]

After consideration of the case analysis above, it can be concluded that there is considerable uncertainty in the current foreclosure process. It is submitted that there is an urgent need for clarity to be established, as the current case by case

[300] *Mokebe*, paras 22 - 27.
[301] *Mokebe*, paras 29 - 32. The writer is not in favour of the approach that monetary and execution applications must be brought together. While it is accepted that this may reduce the litigation costs attached to foreclosure applications, it places the debtor at a disadvantage as the court will only hear his matter once. In other words, if monetary and execution applications are brought separately, judicial oversight takes place twice, and there is less chance of abuse of process.
[302] *Mokebe*, para 62.
[303] See *Standard Bank v Hendricks and Another* (Case No. 11294/18) WCHC. This matter is set down to be heard before the full bench on 19 November 2018.

development of foreclosure is unfavourable.[304] The lack of clarity and regulation in the foreclosure process creates the potential for abuse of process. An example of abuse of process can be seen in the sale in execution process. This process will be discussed below.

3.4 The sale in execution process[305]

Over the years there has been concern over the lack of governance in the sale in execution process. Several courts and academics[306] have expressed concern about instances where houses were sold in execution for a fraction of their true value. Hence, it is increasingly important to determine whether these sales in execution are justifiable and fair in order to satisfy a creditor's debt.[307]

The case of *Nxazonke v Absa Bank* is just one example where a sale in execution resulted in the property being sold for an unrealistically low price. In *Nxazonke*, the debtor's property was sold in execution for R 10.00 (ten rand). The outstanding debt

[304] See also Steyn, *Safe as houses*, 113-114. Steyn submits that it is becoming increasingly important for creditors to know when the enforcement of their rights will amount to an unjustifiable violation of section 26 and an abuse of process. She contends that, if clear principles are not spelt out, many lenders will be cautious and reluctant to provide finance, which will lead to increased costs in obtaining credit. Clear rules need to be established for creditors to assess precisely when the forced sale against the home will be unjustifiable and unconstitutional. The current position is far from clear and there is need for the position to be specifically regulated by appropriate legislation.

[305] As from 22 December 2017, Rule 46A came into effect and provided, *inter alia*, that the court may set a reserve price for a sale in execution. The contents in this subsection discusses the flaws of the sale in execution process prior this amendment, and some loopholes within Rule 46A. See also recent case *Mokebe* which discussed R 46A (9).

[306] See *Jaftha*, *Ntsane, Nxazonke v Absa Bank* (2012) ZAWCHC 184 (hereinafter referred to as *'Nxazonke'*), and *Baretzky and Another v Standard Bank of South Africa Ltd* WCHC 13668/2016. See also Mabuza, 'Reserve weighed for defaulter's properties', *Business Day*, (24 January 2014) (hereinafter referred to as 'Mabuza, *Business Day'*), Brits, *THRHR* (2013), and the *Report on the public hearing on housing, evictions and repossessions,* (2007) which was a report by the South African Human Rights Commission on an investigation over allegations of irregular foreclosures, evictions and sales in execution by several banks. See also Ryan, *FNB sells R 1,4m property for R 10 000*, available at www.acts.co.za. Ryan's articles highlights an incident where FNB sold a debtor's home, which was valued at R1.4 million, at a sale in execution for R 10 000.

[307] See Mabuza, *Business Day*, *Sowry v Sowry* 1953 (4) SA 629 (W), and Lombard and Ghyoot, 'Shortfalls on mortgage loans in execution proceedings', *De Rebus*, (October 2011), 28. Lombard and Ghyoot submit that there is a huge imbalance in the execution processes between movable and immovable property. They note that section 127 and section 128 of the NCA requires the creditor to give an estimated value of the executed movable goods and must sell them as soon as reasonably practicable for the best reasonable price. Should after the sale of the movable goods, the shortfall owing to the creditor be excessive, the debtor may lodge a dispute with the NCR. There is no similar provision with immovable property, and generally when a creditor executes and sells mortgaged property, the sale in execution is done without a reserve price and the debtor is liable for any shortfall after the sale of the immovable property.

due was approximately R 28 000, and the municipal value of the property was R 81 000.[308] The court held that the municipal valuation of the property, when set against the fact that it was sold for only R 10.00, pointed to an inference that there had been a stimulated transaction and that, in the absence of any plausible explanation, there had been an abuse of process.

The fact that a property can be sold for R 10.00 demonstrates a major problem in the auction process.[309] Even if the court processes of judgment and execution were followed correctly, there is still room for abuse at a sale in execution, as properties are vulnerable to being sold for unrealistically low prices.[310] Research revealed that up to 13 000 homes are sold in execution in South Africa every year, and these properties are usually sold for a third of their true market value.[311] After the sale, the debtor is possibly left homeless and becomes liable for any shortfall on the mortgage debt. If the property were sold for a higher price, the debtor could receive a surplus after the settlement with his creditor, and use these funds to acquire alternative accommodation.

Brits therefore submits that a sale in execution should seek to get as close to the market value of the property as possible, and should strive to leave the debtor in the best possible position after the sale.[312] He therefore believes that the sale in execution process is problematic and several abuses, such as stimulated sales and iniquitous parties, compromise the integrity of the system.[313] He contends that it is becoming increasingly necessary to improve the sale in execution process to avoid results which may be considered unconstitutional. Brits suggests that the auction process could be improved, and would be more constitutionally compliant, if judicial approval were added into the process. Brits suggests that, after a sale is concluded, an application be made to a court for the auction selling price to be approved before

[308] *Nxazonke*, para 8.
[309] See Brits, *THRHR* (2013), 457, and Brits, 'Purging mortgage default', *Stell LR* (2013) (1) 165-168.
[310] Brits, *THRHR* (2013) 457.
[311] See Shaw, 'Too quick to execute – how does SA's new rules on sale in execution compare internationally?' *De Rebus*, (August 2016), 32-33 (hereinafter referred to as 'Shaw, *De Rebus*'), and Ryan, *FNB sells R 1,4m property for R 10 000*.
[312] Brits, *THRHR* (2013), 457.
[313] Brits, *THRHR*, (2013), 452.

the property is transferred.[314] A judge would have to consider the value of the property and assess whether there is any indication of abuse.

As a result of all the concerns surrounding the sale in execution process, the Rules Board for Courts of Law amended Rule 46. Rule 46A (9) of the Uniform Court Rules now provides that the court must consider setting a reserve price for a sale in execution.[315] This amendment seeks to protect debtors by ensuring that homes are not sold for extremely low prices. If a property fails to reach its court-set reserve price at the sale in execution, that property will not be sold and the matter will be referred back to court to set another reserve price or consider alternatives to execution.[316] Rule 46A (9), however, fails to prescribe what factors the court should take into consideration when determining a reserve price, or how the reserve price will be calculated.[317] This, once again, exposes the failure by the legislature to provide guidance and clarity on the implementation of foreclosure rules. Further, it is submitted that while the setting of a reserve price for a sale in execution may potentially resolve the problem of homes being sold at low prices, the public disclosure or the setting of a reserve price by a court may reduce the potential selling price of the property at the sale in execution, as buyers will reduce their bidding prices in accordance with the court-set reserve price.

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[314] See Brits, *THRHR* (2013) 457, and Brits, 'The reinstatement of credit agreements: remarks in response to the 2014 amendment of section 129 (3)-(4) of the National Credit Act' *De Jure*, (2015), 75, 79 (hereinafter referred to as 'Brits, *De Jure* (2012)'.

[315] Rule 46A (5) and (9) require the creditor to apply to court for execution against immovable property supported with valuations of the property and the municipal rates amounts. This information will make buyers at the auction more aware of the status of the property and therefore provide more realistic bids at the auction. One of the reasons why sales of foreclosed properties yield low prices is because buyers are unable to view the internal condition of the property. Rule 46A allows the Sheriff to enter the property and possibly allow open viewing days for sale in execution properties. In this manner, potential buyers will be able to view the property in advance and bid more realistically for the property during the auction.

[316] See Shaw, *De Rebus*, 32 -33. Shaw has undertaken analytical research on sales in execution in South Africa and his research has revealed that South Africa has an extreme level of executions when compared to European jurisdictions. Some European States have foreclosure rates less than an eighth to a quarter of South Africa. Further, average sales are less than 60% of the true value of the property. In contrast, in countries like South Korea, Australia and America the forced sales against homes usually get up to 90% of the market value of the property. Shaw comments that Rule 46A and allowance for the courts to set a reserve price is a move in the right direction.

[317] Rule 46A (9) merely provides that the court must take into account, *inter alia,* the market value and municipal rates of the property. No mention is made of other factors applicable for a sale, such as transfer costs, eviction costs and holding costs. It is submitted that further guidance is required to enable a court to make a fair assessment and calculation of a sale in execution reserve.

In the recent judgment of *Mokebe*, the full bench of the South Gauteng High Court considered the application of Rule 46A (9) and the issue of whether a court was required to set a reserve price for a sale in execution.[318] The creditors argued that the setting of a reserve price will result in collusion in the auction process and further result in the sale of homes for lower prices. The full bench rejected this argument and held that the sale of property, in particular a primary residence, for a nominal amount due to there being no minimal reserve, was significantly detrimental to a homeowner.[319] The court further held that should any difficulties arise when a reserve is set, there is no reason why the court could not be approached for a variation of the order making it more likely to find a buyer. The court held further that:

> The courts duty and power to impose a reserve is founded, inter alia, in s 26 (3) of the Constitution. The process of granting judgment against the homeowner is the first step that may lead to his or her eviction from the property. Thus a court is to consider all relevant factors when declaring a property specially executable… It is incumbent upon the bank to place all relevant circumstance before the court when it seeks an order for execution.[320]

The court indicated that the creditor was required to provide the court with details as to the proper valuation of the property, the outstanding mortgage and municipal arrears and information alike.[321] Such information would place the court in the position to determine a reserve price that would not necessarily leave the debtor without no debt, but rather in a position resulting from a just and equitable process. The full bench held that it was not possible to set out all the factors to be considered in each case as the reserve price will depend on the facts of each matter. The court accordingly found that it was appropriate to generally order a reserve price in all matters depending on the facts of each case. The facts of a case may convince the court to depart from the general practice of setting a reserve.[322] Hence, save for exceptional circumstances, a reserve price should be set by the court in all matters where execution is sought against the primary residence of the debtor.[323] Several

[318] *Mokebe*, para 10.
[319] *Mokebe*, paras 53 - 54.
[320] *Mokebe*, para 57.
[321] *Mokebe*, para 57.
[322] *Mokebe*, para 59.
[323] *Mokebe*, para 70.

creditors were not happy with this decision, and it is noted that an appeal has been lodged against this judgment.[324]

Despite the potential gaps and concerns, general comments from the public have viewed Rule 46A in a positive light. It is submitted that Rule 46A is indeed favourable as it has the potential to remedy the current stigma attached to the auction process. The previous auction process had been tarnished with allegations and evidence of collusion and corruption.[325] In addition to the current amendments, it is recommended that further oversight is required by the courts in the sale in execution process. It is therefore suggested that all sales in execution should take place in court (a specialised foreclosure court), in partnership with the Sheriff and the Registrar of the High Court.[326] This introduction of judicial oversight in the sale in execution process will eradicate the potential for fraud, corruption and abuse of process. Further, it is contended that the Constitution and rules governing judicial oversight compel the courts to play an active role in the sale in execution process. The inclusion of the courts will allow for a more uniform process, which will prevent any potential for abuse or manipulation. However, despite the above amendments and proposals, it must be accepted that sales in execution, by virtue of their nature of being forced sales, will not always achieve market value prices. Nevertheless, it is necessary that procedural checks are in place to ensure that all outcomes of the process are in line with our constitutional values.

3.5 Conclusion

The primary goal of this chapter was to consider the flaws in the foreclosure process, and address how these flaws may be remedied by the implementation of a Foreclosure Act. This chapter considered a series of cases that dealt with execution against a home and it was noted that there were several inconsistencies in the foreclosure process. From the initial case of *Jaftha*, it was noted that the law contained several *lacunae* as it allowed creditors to obtain judgments and orders of

[324] At the time of writing this thesis, an appeal against the full bench's judgment in *Mokebe* had been lodged, but not yet heard.
[325] See Forde 'Exposed: 'Levitt's kickback racket' *Business Day*, (13 May 2016). This article exposes the collusion by many attorneys and buying syndicates during auction sales.
[326] See Chapter Seven for a more detailed recommendation of the introduction of judicial oversight in the sale in execution process.

executability against immovable property without any court oversight. This had the potential to lead to instances of abuse of process and unconstitutionality. The cases of *Mortinson*, *Snyders* and *Saunderson* found multiple gaps within the foreclosure process, thereby prompting the courts to issue several practice notes and directives as guidelines for foreclosure. The recent judgment of *Mokebe* seems to have added fuel to the fire as it appears to have changed the foreclosure process by requiring monetary judgment and executability orders to be brought in s single application. It is submitted that this development of foreclosure law on a case by case basis is unsatisfactory, as it should not be the role of the courts to set the rules for foreclosure. The role of developing the law is cast upon the legislature and consistency and clarity can only be obtained in foreclosure law if an Act is adopted exclusively to govern it.

Some scholars are of the view that there is legislation already in place, namely the NCA, which governs foreclosure law and gives effect to Section 26 of the Constitution.[327] They argue that Section 26 should be given effect, not by developing the common law, but by invoking the NCA, which was Parliament's primary measure to address the negative consequences of foreclosure. They further believe that the NCA qualifies the traditional principles of mortgage and provides constitutional compliance and alternatives to a sale in execution.[328] A contrary argument is that the NCA was never intended to govern execution against residential property.[329] The NCA is badly drafted and even if it was intended to govern the foreclosure process, a new Act should still be created to deal with the NCA's shortfalls. Some of the flaws in the NCA, and a number of judgments relating to the execution against a home after the coming into operation of the NCA, will be discussed in the following chapter.

[327] Brits and Van Der Walt, *TSAR* (2014-2). 290.
[328] Brits and Van der Walt, *TSAR* (2014-3), 512.
[329] See Steyn, LLD thesis, and Steyn, *Safe as houses*, 114.

CHAPTER FOUR

THE NATIONAL CREDIT ACT

> [When interpreting the NCA] a court is forced to go round and round in loops from subsection to subsection, much like a dog chasing its tail. Indeed, the language used in the Act suggests that foreign draftspersons rather than South African lawyers had a strong hand in preparing the text. Nevertheless, it is clear from reading s 3 of the NCA, which sets out the purposes of the Act, that it pursues varied objectives which must be held in balance. Certainly, the NCA is designed to protect consumers but it was not intended to make of South Africa a 'debtors' paradise'.[330]

4.1 Introduction

Before the coming into operation of the NCA, the credit industry was regulated by the Usury Act[331] and the Credit Agreements Act.[332] During this time, the only debt relief mechanisms available to an over-indebted consumer were sequestration under the Insolvency Act and administration under the Magistrates' Courts Act. The lack of appropriate debt relief measures left a large portion of society without adequate debt relief options. The NCA provided much needed relief to South African debtors, and many academics have hailed it as one of the most important pieces of legislation passed by Parliament since the Constitution.[333] The NCA embodied a major legal development in credit law and added a new dimension to the foreclosure process.[334] The new legislation sought to curb the unregulated and harsh exercise of creditor rights and to achieve a realm of protection for debtors by levelling the playing field between the contracting parties.[335] The NCA provided debtors with a framework which, up to that time, had not existed in South Africa, to mediate, negotiate, rearrange and resolve conflicts with creditors. This framework introduced a unique

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[330] *FirstRand Bank v Seyffert and Another and Similar Cases* 2010 (6) SA 429 (GSJ), para 11 (hereinafter referred to as '*Seyffert*').
[331] See the Usury Act 73 of 1968.
[332] See the Credit Agreements Act 75 of 1980.
[333] See Otto, 'Over-indebtedness and application for debt review in terms of the National Credit Act', (2009) 21 *SA Merc LJ,* 272, (hereinafter referred to as 'Otto, *SA Merc LJ*'), Brits, LLD thesis, Boraine and Van Heerden, 'To sequestrate or not to sequestrate in view of the NCA' (2010) *Potchefstroom Law Journal,* 841 (hereinafter referred to as 'Boraine and Van Heerden, *Potchefstroom Law Journal*'), and Kreuser, 'The application of section 85 of the National Credit Act in an application for summary judgment' 45-1, *De Jure (*2012), 2 (hereinafter referred to as 'Kreuser, *De Jure*').
[334] Brits, LLD thesis, 138.
[335] See Boraine and Renke, 'Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act', (2007) *De Jure*, 222 (hereinafter referred to 'Boraine and Renke, *De Jure*").

system of debt relief into South African law by way of the debt review mechanism. Debt review sought to address the problem of over-indebtedness through the consensual restructuring of debts, which ultimately required full satisfaction of the debtor's financial obligations.[336]

One of the main advantages of debt review, for the debtor, is that it places a *moratorium* on creditor debt enforcement. In other words, while a debtor is under debt review, a creditor is prohibited from enforcing any debt collection rights in terms of the credit agreement.[337] Hence, the NCA has unarguably created greater protection for debtors than existed under previous legislation. However, protection of debtors is not the sole purpose of the NCA, as the Act requires a careful balancing of debtor and creditor rights.[338] Despite the utopian intentions of the NCA, the Act has been the subject of a great deal of criticism, particularly in relation to its drafting and the different ways in which it can be interpreted. The ambiguities within the Act have led to a number of conflicting court decisions. These judgments will be discussed throughout this chapter.

Due to the numerous flaws within the NCA, there has been a growing need for its shortcomings to be addressed. As a result, the National Credit Amendment Act 19 of 2014 (hereinafter referred to as 'NCAA') was implemented on 13 March, 2015. While some of the contradictions contained in the NCA were corrected by the NCAA, ambiguity and inconsistency still remains. Accordingly, the main focus of this chapter will be to consider some of the inconsistencies within the NCA, in particular sections 129 and 86 (10), before and after the amendments implemented by the NCAA, and to determine whether debt review has provided any relief to a debtor seeking to protect his home from foreclosure. This chapter will further provide recommendations as to how the current flaws in the NCA may be resolved.

[336] See Van Heerden and Coetzee, 'Perspectives on the termination of debt review in terms of s 86 (10) of the National Credit Act', *PELJ* (2011) (14) 2, 37 (hereinafter referred to as 'Van Heerden and Coetzee, *PELJ*'), and Roestoff, Haupt, Coetzee and Erasmus, 'The debt counselling process – closing the loopholes in the National Credit Act', *PELJ* (2009) (12) 4, 247 (hereinafter referred to as 'Roestoff, Haupt, Coetzee and Erasmus, *PELJ*').
[337] Section 80 of the NCA.
[338] Kreuser, *De Jure*, 3.

4.2 Lack of clarity within the NCA: The section 129 notice

It was not very long after the NCA came into operation that various problems were encountered in its interpretation and application.[339] Approaches advocated by courts and academics were at variance with one another, leading to much controversy.[340] Several courts have held that the task of interpreting the NCA is a trying exercise, and they have spent many hours attempting to give proper meaning to the Act.[341] The inconsistencies which were identified prompted the NCR to apply to the court for a declaratory order to provide clarity on certain provisions of the Act, *inter alia*, Section 129.[342]

Section 129 (1)(*b*) of the NCA provides that a creditor may not start legal proceedings to enforce an agreement before first providing the consumer with a Section 129 (1)(*a*) notice. Therefore, debt enforcement, including foreclosure, may only proceed once a Section 129 (1)(*a*) notice has been delivered to the debtor and the debtor has failed to respond to the notice within the stipulated time period. Section 129 can thus be described as the gateway to debt enforcement. However, this section does not indicate *how* this notice should be delivered to the debtor. Further, the use of the word 'may' in Section 129 (1)(*a*) brings into question whether compliance with the section is mandatory. Accordingly, although Section 129 may be considered as the most important section within the NCA, it can also be considered the most ambiguous from a legal point of view.[343] Although some of the flaws within the section have been amended by the NCAA, the amendments have also created ambiguity. It is thus necessary to consider the position before and after these amendments to understand the history of challenges associated with interpreting the

[339] Steyn, LLD thesis, 155.
[340] See Steyn, LLD thesis, 155, Boraine and Van Heerden, *PELJ,* 841, Roestoff, Haupt, Coetzee, Erasmus, *PELJ*, 276-278, and Van Heerden and Coetzee, 'Debt Counselling v Debt Enforcement: Some procedural questions answered', *Obiter* (2010), 756 (hereinafter referred to as 'Van Heerden and Coetzee, *Obiter'*).
[341] For example see *Nedbank v The National Credit Regulator and Another* 2011 (3) SA 581 (SCA) (hereinafter referred to as '*Nedbank v NCR')*, *BMW v Donkin* 2009 (6) SA 63 (KZN) (hereinafter referred to as '*Donkin'*), *Seyffert*, and *Collett v FirstRand Bank Ltd* 2011 (4) SA 508 SCA (hereinafter referred to as '*Collett'*).
[342] See *Nedbank v NCR* (which will be discussed in Chapter Four (4.2.2). See also De Villiers, '*NCR v Nedbank* and the practice of debt counselling in South Africa', *PELJ* (2010) (13) 2, 129, for a detailed commentary of this judgment (hereinafter to as 'De Villiers, *PELJ* (2010)').
[343] Fuchs, 'The impact of the National Credit Act on the enforcement of a mortgage bond: *Sebola v Standard Bank', PELJ,* 2013 (16) 3, 377 (hereinafter referred to as 'Fuchs, *PELJ'*).

NCA. The paragraphs below will consider some of the flaws within Section 129, and will also discuss the ambiguities these have created.

The use of the word 'may' in Section 129

Section 129 (1)(*a*) of the NCA provides that if a consumer is in default 'the credit provider may draw the default to the notice of the consumer in writing'. The use of the word 'may' instead of the word 'must' implies that compliance with Section 129 is not compulsory. However, Section 129 (1)(*b*) provides that legal proceedings to enforce an agreement 'may not' commence until a Section 129 (1)(*a*) notice has been provided to the consumer. This emphasises that proper despatch of the Section 129 notice is essential.[344] Most courts and academics maintain that sending the Section 129 (1) notice is compulsory.[345] However, where the court finds that the creditor has failed to send the Section 129 notice to the debtor, this will not automatically invalidate the creditor's litigation, as the courts have discretion to adjourn proceedings and make an order setting out steps for the creditor to take before the matter can be heard again.[346] Accordingly, it is submitted that the sending of the Section 129 notice is a mandatory first step to enforcing a debt. It therefore must be questioned why the legislature decided to the use the word 'may' in Section 129 (1) as this has created unnecessary confusion.[347]

Although most academics agree that it is mandatory to send a Section 129 notice, several scholars are of the view that Section 129 (1) should be given its literal meaning and submit that the word 'may' denotes that the sending of the Section 129 notice is voluntary and not mandatory.[348] They contend that the basic rules of interpretation should be used when understanding the NCA, and therefore the

[344] See subsections 129 (1) and (2), and 130 of the NCA. See also *Kubyana v Standard Bank* 2014 (3) SA 56 (CC), para 24 (hereinafter referred to as '*Kubyana*'), and *Nedbank v NCR*.
[345] See *Nedbank v NCR, Munien v BMW* 2010 (1) SA 549 (KZD) (hereinafter referred to as '*Munien*') and *Rossouw v FirstRand Bank* 2010 (6) SA 439 (SCA) (hereinafter referred to as '*Rossouw*'), and Kelly-Louw, 'The overcomplicated interpretation of the word 'may' in sections 129 and 123 of the National Credit Act', *SALJ*, (2015), 246, 249 (hereinafter referred to as 'Kelly-Louw, *SALJ*'), and Kreuser, *De Jure*, 5-7.
[346] Section 130 (4)(*b*). See also Kelly-Louw, *SALJ*, 249.
[347] Ironically, the NCAA has not affected any amendment to 129 (1). One would anticipate that if the legislature found an error in the section, it would have amended the word 'may' to 'must' in the NCAA.
[348] See Kelly-Louw, *SALJ*, 253, Kreuser, *De Jure*, 5, and Eiselen, 'National Credit Act 34 of 2005: The Confusion Continues', *Journal of Contemporary Roman-Dutch Law* (2012) Vol 75, 389 (hereinafter referred to as 'Eiselen, *Journal of Contemporary Roman-Dutch Law')*.

ordinary meaning should be given to words and phrases. They argue that it is clear from the purpose of the NCA that it was the intention of the legislature that a creditor 'must' comply with section 129. The use of the word 'may' does not refer to the creditor's decision concerning whether to meet the requirements of the section, but refers to the creditor's decision whether to enforce or terminate the agreement.[349] Therefore, a creditor is not obliged to send out the Section 129 notice upon default by the debtor. A creditor will only be obliged to send out the notice if he or she wishes to enforce the agreement and proceed to litigate against the debtor. Accordingly, a creditor 'may' elect not to issue a Section 129 notice, if he or she does not intend to enforce the agreement. However, if the intention is to enforce the agreement, the creditor must deliver the notice.

4.2.1 The prohibition against legal action

If a debtor has already applied for debt review, a creditor is prohibited from initiating any debt enforcement litigation against the debtor in relation to that credit agreement.[350] Conversely, subsections 86 (1) and (2) of the NCA provide that, if a creditor has already taken steps to enforce a credit agreement, such agreement cannot be included under debt review. There was subsequently much confusion and varying interpretations as to exactly what is intended by the time when a creditor 'takes steps to enforce a credit agreement'. Some academics and courts have held that this occurs when the Section 129 notice is delivered. Others were of the view that this occurs when the summons is issued and served. This controversy prompted Nedbank to approach the court, in the case reported as *Nedbank v NCR*, for a declaratory order to create clarity on this issue.

In *Nedbank v NCR,* the court grappled with several issues of lack of clarity within the NCA. However, for the purpose of this thesis only the court's interpretation of sections 129 (1) and 86 (2) will be considered.[351] In this regard, the court had to consider whether delivery of the Section 129 notice amounted to a step by the creditor to enforce the credit agreement. The court found that one of the objectives of

[349] See Kelly-Louw, *SALJ*, 249-256, and Kelly-Louw, 'The default notice as required by the National Credit Act', (2010) 22 *SA Merc LJ*, 570 (hereinafter referred to as 'Kelly Louw, *SA Merc LJ*').
[350] Section 129 (2) of the NCA.
[351] See De Villiers, *PELJ* (2010) for a detail commentary of *Nedbank v NCR*.

the NCA is the provision of an accessible system of consensual dispute resolution. Section 129 was a provision developed to achieve this objective as it encouraged parties to iron out their differences before seeking court intervention. The Supreme Court of Appeal confirmed that the sending of the Section 129 (1) notice is the first step prior to legal proceedings and confirmed that once the notice has been sent to the debtor, that agreement would be excluded from debt review in terms of Section 86 (2) of the Act .[352]

However, several scholars have criticised the decision in *Nedbank v NCR* and have argued that it renders the debt review process cumbersome.[353] The effect of the decision is that as soon as the creditor issues the Section 129 (1) notice, that credit agreement is excluded from debt review. It is submitted that this could not have been the intention of the legislature as the effect would be that the very act of notifying the debtor of his rights and remedies would cancel his rights and remedies. Further, the credit agreement to which the Section 129 notice relates may be the same agreement in which the debtor requires assistance with payment restructuring. Several academics are of the view that a debtor should be prohibited from applying for debt review when he is served with a summons as it is a long-established rule that a summons is the first step in litigation.[354] On the other hand, it is argued that the debtor should not be given an extended time to apply for debt review. The creditor should not be unduly prejudiced and delayed in proceeding to enforce his claim. The NCA has made the Section 129 notice the first step in debt enforcement. Thus, it is submitted that once the Section 129 notice is sent to the debtor, and once the ten-day period provided for in the notice expires, the debtor is prohibited from applying for debt review and the creditor is entitled to proceed to issue and serve summons, and to enforce his claim. However, the ten-day period provided for by section 129 may be too short to enable the debtor to find a suitable debt counsellor and apply for debt counselling. It is therefore recommended that this period be extended to fifteen business days, which amounts to a three-week period. This

[352] *Nedbank v NCR*, paras 8-14.
[353] See Otto, *The National Credit Act Explained,* and Boraine, Van Heerden and Roestoff, 'A comparison between formal debt administration and debt review', *De Jure*, 45 (1) 2012, 62, (hereinafter referred to as 'Boraine, Van Heerden and Roestoff, *De Jure*'), and Steyn, LLD thesis, 157.
[354] See Otto, *The National Credit Act Explained*, and Boraine, Van Heerden and Roestoff, *De Jure*, 62.

fifteen-day period would allow the debtor sufficient time to find a reputable debt counsellor and finalise a debt review application.[355]

4.2.2 The contents of the Section 129 notice

The Supreme Court of Appeal in *Nedbank v NCR* confirmed that compliance with Section 129 is a compulsory step prior to initiating litigation. Thus, if a debtor is in default of his credit agreement repayments, the creditor is obliged to draw the default to the attention of the debtor. Section 129 prescribes that notice must be given to the debtor in writing and briefly stipulates what the notice must contain.[356] It is submitted that the purpose of the Section 129 notice is four-fold:

- the notice serves to bring the default to the attention of the debtor;
- the notice alerts the debtor to the relief or mechanisms available to him, namely: the options to consult a debt counsellor, or to refer the matter to alternative dispute resolution; or to the Ombudsman;
- the notice serves the function of a letter of demand and as a precursor to litigation and enforcement of the debt; and
- the sending of the notice ensures adherence to the *audi alteram partem* rule, as it makes the other side aware of the action, gives that party an opportunity to respond, and requires the sender to prove compliance with the rule. In other words, the creditor must prove that the notice was correctly sent.

Accordingly, it is suggested that the contents of the Section 129 notice must provide the debtor with sufficient information to enable him or her to exercise their common law and constitutional rights. The notice must warn the debtor that judgment may be taken against him, and in the case where immovable property has been

[355] At the time of writing this thesis, the North Gauteng High Court (Pretoria) in *De Beer v Nedbank Ltd,* Case no. A431/2017 held that 'legal proceedings in terms of section 86 (2) should only be considered to have commenced once summons brought to the attention of the consumer, being the date summons is served. Hence, according to this recent judgment, a consumer may be entitled to apply to debt review up to the time summons is served. This judgment is yet to be interpreted by the other jurisdictions.

[356] Section 129 (1)(*a*) merely provides that the creditor may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution, consumer court or Ombud, with the intent to resolve the dispute or develop a plan to bring the payments up to date.

hypothecated, it must alert him to the fact that his home may be sold in execution. The notice must further provide the debtor with information about the debt relief options available to him, and information as to how he can exercise his rights. Hence, it is submitted that although Section 129 may be the first step in the litigation process, it is also the first step towards resolving the dispute between the parties and avoiding the legal costs and other disadvantages attached to litigation. Unfortunately, Section 129 fails to provide adequate detail concerning the required contents of the default notice. The legislature has provided little, if any, guidance as to the interpretation or content of Section 129 and there has been much uncertainty as to the requirements for compliance with the section. This has left both debtors and creditors in a vulnerable and difficult situation, being unaware of their exact rights and responsibilities.

The case of *FirstRand Bank v Maleke*[357] is an example of the uncertainty caused by a lack of clarity concerning the contents required in a Section 129 notice. This case involved four applications for default judgment against debtors who had fallen into default with their mortgage agreements by a few thousand rands.[358] The court found that the debtors had paid their mortgages for several years (ranging between thirteen and nineteen years) prior to falling into default, and that they had all acquired valuable equity in their properties. Most of the debtors owed amounts that were negligible and there was a huge disproportionality in the harm that would result to the debtors if the properties were sold in execution, when compared to the minor prejudice to the creditor of being denied immediate payment.[359] The court held that it was their duty to consider the constitutional implications of Section 26 of the Constitution when applying the NCA. The Section 129 notice did not explicitly warn the debtors that their homes would be sold if they failed to respond to the notice, as the NCA does not require the creditor to insert such a warning in the Section 129 notice. However, the court held that this warning was necessary since the debtors were historically disadvantaged persons who might not have appreciated the

[357] *FirstRand Bank v Maleke* 2010 (1) SA 143 (GSJ) (hereinafter referred to as '*Maleke*').
[358] *Maleke*, paras 1-3.
[359] *Maleke*, para 7.

seriousness and consequences of the notices.[360] On that basis, the debtors should have been informed of their Section 26 constitutional rights in the Section 129 notice.

The *Maleke* case also exposes the fact that Section 129 of the NCA fails to indicate the content that must be included in the default notice when the debt in question relates to a mortgage agreement. The courts have provided differing views when attempting to resolve this.[361] It has now been accepted that for the Section 129 notice to be valid for foreclosure, it must provide the debtor with sufficient information to allow him or her to exercise their rights. The mortgagee is therefore required to inform the mortgagor of their Section 26 constitutional rights and the notice must contain a warning to the mortgagor that he may lose his home by way of execution.[362] Despite this development, there is still a need for greater clarity concerning the content of the Section 129 letter.

It is therefore submitted that the current Section 129 notice does not suffice as adequate notice to the debtor facing execution against his home as it fails adequately to inform the mortgagee of his rights and remedies in the foreclosure process. It is accordingly recommended that a special 'foreclosure notice' be adopted to cater for the situation where a debtor's home is at risk of foreclosure.[363]

4.2.3 The delivery of the Section 129 notice

Section 129 requires that the notice of default must be 'delivered' to the debtor. The meaning of the word 'delivered' is of particular importance to the application of Section 129 as, if the default notice is not 'delivered' there will be non-compliance. The NCA, however, does not provide a definition of the word 'delivered' and this omission has led to a large body of litigation. Some courts have afforded an ordinary English meaning to the word 'deliver', while others have taken a more far-reaching

[360] *Maleke*, paras 5-6. The court held that historically disadvantaged debtors might often not understand that their right to protection might lapse if they failed to respond to the notice. It was possible that many debtors failed to respond to the notice out of ignorance and lack of funds to seek legal advice. The court further held that in default judgment matters, the absence of the debtors did not diminish, but rather increased the duty upon the courts.
[361] See *BMW v Mulaudzi Inc* 2009 (3) SA 348 (B), and *Standard Bank v Maharaj* 2010 (5) SA 518 (KZP).
[362] Kelly-Louw, *SA Merc LJ*, 591.
[363] Chapter Seven (7.3) will consider the idea of a specialised foreclosure notice in more detail.

approach.[364] Some of these cases will be discussed below. As indicated above, Section 129 is a pivotal provision in the NCA and the question as to whether the creditor has complied with its provisions is paramount in every case in which the creditor enforces a credit agreement.[365] Thus, the lacuna in the NCA in failing to indicate how the Section 129 notice should be delivered, is a serious one.

One of the other uncertainties within the NCA is the question of whether the Section 129 notice must in fact reach the debtor in order for there to be effective delivery. (This is linked to the failure to provide a definition for the word 'delivered'). The NCA also fails to provide any clarity on this matter. Section 129 (1)(*a*) merely provides that 'the creditor must draw the notice to the debtor's attention in writing'. It does not explicitly indicate what the notice must state, how it must be delivered, nor whether the notice must physically reach the debtor.

There has been a series of cases that have tackled this issue and it seems that each court has had its own interpretation of Section 129. Some cases have concluded that Section 129 requires the notice to reach the attention of the debtor, that is, the debtor must physically receive the notice in order for there to be compliance with the NCA. Other cases have found that the notice need not be physically received by the debtor and it is sufficient for the creditor merely to send the notice to the correct *domicilium* indicated in the credit agreement. Although this dispute was settled by the Constitutional Court in *Sebola*[366] and by the NCAA, it is worthwhile to consider the history of cases leading up to the *Sebola* decision, as it once again provides an example of the lack of clarity within the NCA.

[364] Kelly-Louw, *SA Merc LJ*, 577. See also *Starita v Absa Bank Ltd and Another* 2010 (3) SA 443 (GSJ) (hereinafter referred to as '*Starita*'), and *Rossouw*. Due to the lack of guidance in section 129 on the interpretation of the word 'deliver', other provisions of the NCA have been considered, namely, sections 65, 96 and 168.
[365] See Otto, *Recent decisions under the National Credit Act*, unpublished memorandum.
[366] *Sebola and Another v Standard Bank Ltd of South Africa* 2012 (5) SA 142 (CC) (hereinafter referred to as '*Sebola*').

a. FirstRand Bank v Ngcobo[367]

The *Ngcobo* case concerned the issue of whether Section 129 allows for the delivery of the default notice via email. The mortgage agreement provided that service of all documents could be sent by registered post to the *domicilium* address chosen by the debtor.[368] While the debtor was in default, there had been several email communications between the parties. During most of this correspondence, the creditor expressed a willingness to assist the debtor and had even set up a meeting to discuss the debtor's financial position.

The court found that since the bulk of the communication between the parties had taken place by email, the debtor was at liberty to expect that the Section 129 notice would also be sent by email.[369] In disagreement with the court's decision, it is submitted that the credit agreement should take precedence when considering the delivery of documents. If the credit agreement stipulated a specific form of delivery, this must be complied with. If the debtors wanted notices to be sent by email, they should have stipulated this in the credit agreement. In the *Ngcobo* case, the creditor complied fully with the mortgage agreement as the Section 129 notice was sent to the *domilicium* address and there was no requirement or agreement for the bank to send the notice via email.

The *Ngcobo* case thus exposes a flaw in Section 129 by not providing a specific form of delivery for the default notice. Nevertheless, and importantly, the case acknowledges that service via email may constitute valid delivery in terms of Section 129. This is a welcome interpretation by the courts, as delivery via email should probably be preferred in this age of technology. It is submitted that delivery by email or fax is more reliable than delivery by regular post as electronic communication can be easily tracked and is both a cheaper and quicker means of correspondence than use of the postal services.[370]

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[367] *FirstRand Bank v Ngcobo and Another* (24661/09) NGHC, 112 (hereinafter referred to as '*Ngcobo'*).
[368] *Ngcobo*, para 3.
[369] *Ngcobo*, para 4. See also Kelly-Louw, *SA Merc LJ,* 580.
[370] See Chapter Seven (7.3) for suggestions of delivery of the default notice. See also Rule 44 (1) of the Superior Court Practice Rules which allows for service of documents via fax or email. The Rule indicates that summons, writs and other process and notice of issuance in any civil proceedings may

b. Munien v BMW Financial Services

In the *Munien* case, the court had to decide whether a default notice is 'delivered', in accordance with Section 129, if it is sent by registered post to the chosen *domicilium*, irrespective of whether or not it comes to the debtor's attention.[371] The court confirmed that the mere sending of the notice amounted to effective delivery and there was no need for the addressee to actually receive the notice for there to be compliance with Section 129.[372] The court held that a balance had to be struck between creditors and debtors when it came to sending notices. The cost involved for creditors of ensuring that notices actually reached debtors would be substantial, and these costs would inevitably be borne by the debtor. Thus, it is not against the objectives of the NCA to hold that a creditor discharges his obligation of delivery by sending the notice to the *domicilium* address by registered post, or even by fax or email.[373]

c. FirstRand Bank v Dhlamini[374]

The *Dhlamini* case involved an application for summary judgment by FirstRand Bank. The bank had sent the Section 129 notice by registered post to the debtor's chosen *domicilium* address. The notice was never collected by the debtor. In determining whether there had been compliance with Section 129, the court looked at two conflicting preceding cases, namely, the *Prochaska* and *Munien* judgments:[375]

> [In *Prochaska,* Naidu J held that the] section 129 (1) notice represents a radical departure from its predecessor. Whereas the Credit Agreements Act 75 of 1980 merely requires the credit grantor to post by prepaid registered mail and, in this way, "has notified the credit

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be transmitted by fax, email or any other electronic medium. Accordingly, this could be interpreted to mean that section 129 notices could also be delivered by email or fax.

[371] *Munien*, para 1. The debtor alleged that the section 129 (1) notice did not come to his attention, as he no longer lived at the address where the notice and summons were served.

[372] *Munien*, para 12. The court based its decision on the reasoning that it would have been easy to formulate a rule that made it clear that the notice had to be received and come to the attention of the debtor. However, the Minister chose to provide in the regulations that the sending of the document would mean that the document was delivered.

[373] *Munien*, paras 14-22. The court further held that the risk of non-receipt of the notice lies with the debtor. Hence, it is the debtor's onus to decide on a method of delivery in which he believes is the safest to ensure successful receipt.

[374] *FirstRand Bank Ltd v Dhlamini* 2010 (4) SA 531 (GNP) (hereinafter referred to as ('*Dhlamini'*).

[375] *Absa Bank Ltd v Prochaska* 2009 (2) SA 512 (D) (hereinafter referred to as '*Prochaska'*).

> receiver" of default, the present Act in section 129(1)(a) creates an obligation on the credit provider (when it decides to take such a course) to draw the default to the notice of the consumer in writing.... The words 'draw the default to the notice of the consumer', 'providing notice' and 'delivered a notice' in the context in which these appear in the previous paragraph to my mind cumulatively reflect an intention on the part of the legislature to impose upon the credit provider an obligation which requires much more than the mere dispatching of the notice contemplated by section 129(1)(a) to the consumer in the manner prescribed in the Act and the regulations. The credit provider is required, in my view, to bring the default to the attention of the consumer in a way which provides an assurance to the court that the default has indeed been drawn 'to the notice of the consumer'.[376]

> [In *Munien*, Wallis J rejected the contention that the Section 129 (1) had to come to the attention of the consumer and] held that provided the credit provider delivered the notice in the manner chosen by the consumer in the agreement, it is irrelevant whether the notice in fact came to the attention of the consumer.[377]

In *Dhlamini,* Murphy J criticised Wallis J's interpretation in *Munien*, and held that Wallis J incorrectly considered Section 65's application to Section 129. The correct question to be asked when considering compliance with Section 129 was not whether the notice had been 'delivered', but whether 'the creditor has drawn the notice to the attention of the debtor'. In *Munien*, the court incorrectly focused on the word 'delivered' in section 130 (1), when determining whether there was compliance with Section 129 (1).[378] Murphy J therefore concurred with Naidu J's interpretation in *Prochaska,* and held that:

> Section 129(1)(*a*) does not require a letter to be "delivered" to the consumer, or a notice to be served, it requires that the consumer's default be brought to his or her notice (attention) in writing. While of necessity some form of delivery or service will be needed to draw notice to the default, such alone is not enough. There must be delivery (or service) as well as notice or attention being drawn to the default.[379]

d. FirstRand Bank v Bernado[380]

In *Bernado*, the creditor had sent the Section 129 notice via registered post and telefax to the debtors. The debtors claimed that Section 129 had not been complied with as the notice had not reached their attention. The court in *Bernado* followed the approach in *Munien* and held that the fact that the notice was not received by the

[376] *Dhlamini*, para 13, referring to *Prochaska*, paras 54-55.
[377] *Dhlamini*, para 18, referring to *Munien*, para 22. The definition of delivered suggests that a document is delivered when it has been sent to someone by any of the section 65 or regulation 1 mediums, namely, delivery by hand, fax, email or post.
[378] *Dhlamini*, para 28.
[379] *Dhlamini*, para 27.
[380] *FirstRand Bank v Bernado and Another* (608/09) ECHC (hereinafter referred to as '*Bernado'*).

debtor did not mean that the notice was not delivered.[381] The court found that the creditor had complied with his obligations by sending the notice by registered mail to the actual residential address of the debtor. Proof of delivery that the notice had been sent was sufficient to proceed with legal action. No greater onus was placed on the creditor.[382] The fact that the debtor received or read the notice was irrelevant.

e. Rossouw v FirstRand Bank

The *Rossouw* case involved an appeal against a summary judgment order granted by the High Court. The debtors claimed that they had not received the Section 129 notice and argued that the bank was not entitled to judgment.[383] The High Court followed the *Munien* judgment and held that effective delivery of the Section 129 notice occurs when the notice has been sent by registered post to the address chosen by the debtors, irrespective of whether it is actually received by the debtor.[384] The debtors appealed to the Supreme Court of Appeal.

The Supreme Court found that the creditor did not indicate in their summons or judgment application the method used in delivering the notice. FirstRand merely alleged that they had complied with Section 129 and Section 130. The bank failed to supply any evidence that the notices had been sent, and the court was left to speculate whether there had been compliance with Section 129. The court held that this was not sufficient and declined to grant the summary judgment.[385] The Supreme Court of Appeal further held that since the NCA expressly gives the debtor the option of selecting the mode of delivery of notices, it seems reasonable that the debtor should carry the risk of the notice going astray.[386] Therefore, it was not necessary for the Section 129 notice to actually reach the debtor.[387] Accordingly, the court in

[381] *Bernado*, para 14.
[382] *Bernado*, para 16.
[383] *Rossouw*, paras 6-14.
[384] *Rossouw*, para 8.
[385] *Rossouw*, para 54.
[386] *Rossouw*, paras 32-33.
[387] *Rossouw*, paras 26-30. The Supreme Court of Appeal, however, was of the view that the meaning of delivery could be found in the NCA, and this required an examination of section 65 (2). This section set out six methods of delivery. Delivery by registered post was not one of these methods, however, registered mail was a more reliable means of postage and fell within the provisions of the section. The court held that the word 'send', according to the Oxford English Dictionary means to despatch, and this did not include receipt of the sent item. The court also referred to sections 168 and 198 of the

Rossouw followed the *Munien* and *Bernado* approach and found that the creditor had complied with Section 129 if the notice had been correctly sent to the debtor. However, if the creditor failed to supply the court with any evidence that the notice had been sent, the creditor would not be successful in his/her application.[388]

f. Starita v Absa Bank

The *Starita* case dealt with rescission of a default judgment. The debtor argued that the creditor had failed to comply with Section 129 and claimed that she never received the Section 129 notice or the summons.[389] The court considered the preceding cases and the sections in the NCA relating to the delivery of documents.[390] Gautschi AJ criticised the court's interpretation in the *Dhlamini* case, and held that the court in *Dhlamini* assumed that the words in the NCA were used with precision. However, it is a generally accepted fact that the Act was badly drafted. Therefore, undue emphasis should not be placed on the actual words in the NCA. Gautschi AJ held that creditors should not be burdened by ensuring actual receipt of notices by debtors.[391] The Act does not require personal service of notices upon the debtor, and this is an indication of the legislature's desire to balance the interests of both parties. Accordingly, the Section 129 notice does not need to be actually received by the debtor. It is sufficient for the notice to be sent by registered post to the *domicilium*. To require more, places far too heavy a burden on the creditor.[392]

NCA which related to service of documents. These sections deem the sending of a document by registered mail to a person's last known address as proper service, unless otherwise provided for in the Act. The court held that this provision put beyond doubt that the legislature was satisfied that sending a document by registered mail is proper delivery.

[388] The writer disagrees with court's decision in *Rossouw* to decline summary judgment. It is submitted that the court should have followed an approach similar to *Dhlamini* and should have taken into account section 130 (4), and postponed the creditor's application to allow them to comply with section 129.

[389] *Starita*, paras 3-4.

[390] *Starita*, paras 18.4-18.8.

[391] *Starita*, para 18.10.

[392] *Starita*, para 18.11. See also Kelly-Louw, *SA Merc LJ*, 587.

g. Sebola v Standard Bank

In *Sebola*, Standard Bank sent a Section 129 notice to the debtor via registered post. However, the postal services diverted the notice to an incorrect post office, and the debtors never received the notice. Summons was served and default judgment was granted against the Sebolas. The debtors applied for rescission of the default judgment on the ground that they had not received the Section 129 notice or the summons.[393] The High Court found itself bound by the *Rossouw* decision and dismissed the rescission application. The Sebolas appealed to the Constitutional Court. The Constitutional Court confirmed that the purpose of the NCA is pursued through the consensual resolution of disputes and Section 129 plays an essential role in achieving this objective. Cameron J held that when considering Section 129:

> [T]he statute does not demand that the credit provider prove that the notice has actually come to the attention of the consumer, since that would ordinarily be impossible. Nor does it demand proof of delivery to an actual address. But given the high significance of the section 129 notice, it seems to me that the credit provider must make averments that will satisfy the court from which enforcement is sought that the notice, on balance of probabilities, reached the consumer.... Hence, when the notice is posted, mere despatch is not enough.... The statute requires the credit provider to take reasonable measures to bring the notice to the attention of the consumer, and make averments that will satisfy a court that the notice probably reached the consumer, as required by section 129(1). This will ordinarily mean that the credit provider must provide proof that the notice was delivered to the correct post office.[394]

Thus, *Sebola* added a requirement to Section 129 and placed a duty upon the creditor to prove that the notice was despatched to the debtor's *domicilium*. This was similar to the finding in the *Rossouw* case.[395] It is submitted that the court might have been inclined to add this requirement in *Sebola* as in this case the notice was sent to an incorrect post office.[396] Several academics are of the view that the Constitutional Court went too far with the additional compliance requirement in Section 129 and

[393] *Sebola*, paras 6-9.
[394] *Sebola*, paras 74-79.
[395] See also *Nedbank Ltd v Binneman*, 2012 (5) SA 569 (WCC). Griesel J held that the *Sebola* case did not overrule the *Munien* and *Rossouw* judgments. The *Sebola* case simply clarified that mere despatch *per se* was insufficient, there must also be proof that the notice reached the appropriate post office.
[396] See also Fuchs, *PELJ*, 387. If a debtor avers that he did not receive the section 129 notice, proceedings will be stayed and will resume only after the creditor has proven that he has complied with all the requirements of the NCA. Accordingly, non-compliance with the requirements will not be fatal but will only delay court proceedings.

argue that the *Sebola* judgment did not create any certainty.[397] Several scholars contend that delivery by registered mail allows the debtor to avoid receipt of the notice and to circumvent enforcement of the creditor's rights.[398] Fuchs and Otto each contend that the compliance requirement in *Sebola* is superfluous and complicates the interpretation of the NCA, as it does not take into consideration a well-balanced approach. Otto argues that the new evidentiary burden of proof is unfair and unnecessary, and does not promote an effective and accessible credit market and industry. Fuchs is of the view that the *Rossouw* judgment followed a more reasonable approach to Section 129, and suggests that all Section 129 notices must be delivered by registered post and ordinary mail to the *domicilium* address.[399] This will cater for a situation where a debtor intentionally ignores the notice. In addition, Eiselen and Otto have each made suggestions to assist creditors with the *Sebola* requirements.[400] They submit that a creditor can reduce the increased burden upon them by providing proof of delivery of the notice via alternative forms such as fax and email. In concurrence, it is submitted that it is becoming increasingly important for technology to be included within the law. Delivery via email or fax is a much quicker, cheaper and more reliable mechanism, and delivery by these media should be encouraged by the courts.

h. Kubyana v Standard Bank[401]

This case dealt with the issue of what steps the creditor must take in order to ensure that the Section 129 notice reaches the debtor before commencing litigation. In *Kubyana*, the creditor sent a Section 129 notice via registered post to the address nominated as the *domicilium* in the credit agreement. According to the post office's track and trace reports, the notice reached the correct post office, and the post office sent a notification to the debtor. The debtor failed to collect the notice and the post

[397] See Fuchs, *PELJ*, 387, and Otto and Otto, *National Credit Act Explained* (2013) 117-118 referring to *Absa Bank Ltd v Mkhize and Another* 2012 (5) SA 574 (KZD) (hereinafter referred to as '*Mkhize*').
[398] See Fuchs, *PELJ*, 389, Otto and Otto, *National Credit Act Explained* (2013) 114, and Eiselen, *Journal of Contemporary Roman-Dutch Law.*
[399] Fuchs, *PELJ*, 387.
[400] See Otto and Otto, *National Credit Act Explained* (2013) 114, and Eiselen, *Journal of Contemporary Roman-Dutch Law*.
[401] *Kubyana v Standard Bank* 2014 (3) SA 56 (CC) (hereinafter referred to as '*Kubyana*').

office returned the unclaimed Section 129 notice to the bank.[402] The bank served summons and the debtor defended the matter. The debtor claimed that the bank had failed to comply with Section 129's requirements, as the notice had been returned unclaimed, which showed that there had not been proper delivery.[403]

The High Court found that there was no obligation on the creditor to use additional means to ensure that the debtor received the notice. It was clear that the debtor did not collect the notice and the debtor had a duty to explain to the court why the notice did not reach him despite the bank's efforts.[404] The debtor was unhappy with this decision and applied to the Constitutional Court for leave to appeal. The Constitutional Court found that there were a vast number of conflicting decisions regarding the interpretation of Section 129. Therefore, it was necessary to ensure certainty and the proper functioning of the marketplace for the rights and obligations of creditors to be made clear. The court held that:

> [T]here is no general requirement that the notice be brought to the consumer's subjective attention by the credit provider, or that personal service on the consumer is necessary for valid delivery under the Act.... While the section 129 obligation on the credit provider is to draw the default to the notice of the consumer in writing, this obligation is discharged, in the words of section 65 (2), by making the document available to the debtor.[405]

> If the credit provider complies with the requirements set out in [the NCA] and receives no response from the consumer within the period designated by the Act, I fail to see what more can be expected of it. Certainly, the Act imposes no further hurdles and the credit provider is entitled to enforce its rights under the credit agreement. It deserves re-emphasis that the purpose of the Act is not only to protect consumers, but also to create a "harmonised system of debt restructuring, enforcement and judgment, *which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements*." Indeed, if the consumer has unreasonably failed to respond to the section 129 notice, she will have eschewed reliance on the consensual dispute resolution mechanisms provided for by the Act. She will not subsequently be entitled to disrupt enforcement proceedings by claiming that the credit provider has failed to discharge its statutory notice obligations.[406]

Mhlantha AJ concluded that the question whether delivery has been effected in accordance with the Act is a question that must be determined by evidence. A debtor who receives notice from the post office but decides not to collect the notice should not be permitted to frustrate the purpose of the provisions to the detriment of the

[402] *Kubyana*, paras 1-5.
[403] *Kubyana*, para 11.
[404] *Kubyana*, para 8.
[405] *Kubyana*, para 31.
[406] *Kubyana*, paras 46-47.

creditor.[407] The court was not prone to an interpretation that would make it impossible for creditors to recover their debts and create a position where debtors could escape their creditors by avoiding notices. The debtor's failure to explain why he did not respond to the post office's notice created the inference that he deliberately avoided the notice. Such a *mala fide* debtor was not entitled to any protection.

The Constitutional Court confirmed that the aim of Section 129 is to create a framework between the creditor and debtor in order to resolve mortgage arrears in an inexpensive, non-acrimonious and expeditious manner without recourse to the courts.[408] It is submitted that the object of Section 129 can only be realised if both parties work together in good faith to resolve the default. The debtor is required to collect the Section 129 notice and liaise with his creditor to rectify the default. Likewise, the creditor is required to act in good faith by assisting the debtor with payment arrangements and not proceeding hastily or prematurely with litigation. Hence, should any of the parties fail to adhere to their duties in good faith the court should not come to their protection.[409]

i. Summary of cases and comments on delivery of the Section 129 notice

Following the case analysis above, it is submitted that the NCA provides little guidance to the requirements for delivering the Section 129 notice to a debtor. First, the use in the section of the word 'may' makes it questionable whether delivery of the notice is mandatory. Secondly, the failure on the legislator to include a definition for the term 'delivered' has created unnecessary legal uncertainty. Several courts have attempted to interpret the meaning of Section 129 and differing decisions have resulted. The conflict appears to have been resolved by the *Sebola* judgment, which confirmed that Section 129 requires the notice to be delivered to the debtor by registered post and the creditor must supply proof that the notice was delivered to the correct post office.

[407] *Kubyana*, para 88.
[408] *Kubyana*, para 35.
[409] See Chapter Seven (7.3) for a suggestion of pre-litigation negotiations.

The NCAA appears to have codified the *Sebola* approach.[410] It is submitted that this is a fair approach and balances the interests of debtors, creditors and society. It does not place upon the creditor any additional requirements or a requirement for personal delivery.[411] The *Kubyana* and *Mkhize* cases cater for the situation when a *mala fide* debtor refuses to accept delivery of the notice. In such an instance, there will still be compliance with Section 129 if the notice is sent to the correct *domicilium*. The courts have confirmed that if a creditor sends the notice to the correct post office and the debtor fails to uplift the notice, the negligence or intentional default of the debtor should not be allowed to constitute a valid defence against the creditor's foreclosure.[412]

Despite the above judicial and legislative developments, it is submitted that there is still a need for clarity in respect of the Section 129 notice. In particular, it is submitted that the current Section 129 notices fail to cater adequately for foreclosure proceedings, nor do they inform a mortgagor of all his remedies, such as the right to reinstatement in terms of section 129 (3).[413] Accordingly, it is suggested that a specific 'foreclosure notice' be implemented to cater for foreclosure proceedings. The contents of this proposed foreclosure notice will be discussed in Chapter Seven.

4.3 Lack of clarity within the NCA: Section 86 (10) - termination of debt review

Another example of lack of clarity within the NCA is in Section 86 (10), which relates to the termination of debt review. The termination of debt review has serious consequences for both the debtor and creditor. Once debt review is terminated, the debtor loses his *moratorium* against debt enforcement, and the creditor is entitled to proceed with litigation against the debtor. The NCA has, however, failed to provide

[410] See section 129 (7)(a) of the NCA.
[411] See *Absa Bank Ltd v Lekuku* (32700/2013) ZAGPJHC 244, and Chapter 10.17 of the Practice Manual of the Gauteng Local Division of the High Court which now provides for the requirement of personal service of court summons in foreclosure matters.
[412] See also *Balkind v Absa Bank Ltd* 2013 (2) SA 486, wherein the court found that it would not be unreasonable to require the creditor to contact the debtor and advise him of his default prior to sending a section 129 notice. Alekma J made the recommendation that when sending off a notice, the creditor should telephonically contact the debtor and advise him of the default and imminent litigation. Whilst this may be a more time consuming and expensive route, such a practice would prevent unnecessary court delays and defences by the debtor that they never received the notice. See Chapter Seven (7.3) for a recommendation on Pre-action negotiations.
[413] The right to reinstatement will be discussed in detail in Chapter Four (4.4).

clear rules for the termination of debt review, and this has created much confusion. Some of the flaws in the termination of debt review are discussed below.

4.3.1 Contradictions in the termination process - 'termination after the lapse of sixty business days'

Section 86 (10) provides, *inter alia*, that where the creditor seeks to enforce an agreement that is under debt review, the creditor may terminate the review after the lapse of sixty business days from the date of the debt review application. The creditor is thereafter entitled to enforce the agreement once ten business days have lapsed after delivery of the Section 86 (10) notice. Section 86 (10), however, does not set out specific grounds for the termination of the debt review. The NCA merely requires that the Section 86 (10) notice must be delivered to the debtor, the debt counsellor, and the NCR, prior to enforcement (this is similar to the problems exposed with the Section 129 notice).

Due to the lack of clarity in Section 86 (10) of the NCA there have been varying interpretations of this section. Van Heerden and Coetzee believe that Section 86 (10), read together with Section 86 (6) and regulation 24 (6), provides that the debt counsellor has sixty business days to fulfil his duties in terms of the debt review application.[414] In other words, the debt counsellor has thirty business days to make a determination as to the debtor's financial status, and a recommendation to court must be made within thirty business days thereafter. It is unclear whether Section 86 (10) allows the creditor to terminate debt review after the sixty day period if the matter is pending before the court.[415] This question is particularly important when considering the backlog experienced in the Magistrates' Courts. Steyn has indicated that, given the delays and backlogs experienced at Magistrates' Courts, it is highly likely that a debt review application will take longer than sixty business days to be heard and finalised in court.[416]

[414] Van Heerden and Coetzee, *PELJ* (2011), 39.
[415] Brits, LLD thesis, 194.
[416] Steyn, LLD thesis, 160-161. Steyn comments that the backlogs in the debt review process relate to a complex set of factors ranging from capacity constraints in the judicial system, process weaknesses, inadequate operational compliance and abuse of process.

A pending debt review has serious legal consequences for both the debtor and creditor. First, debt review bars the debtor from entering into any further credit agreements. Secondly, it creates a *moratorium* on debt enforcement.[417] Several scholars submit that Section 129 (2) provides that Section 86 (10) is not applicable to proceedings in a court that can result in a debt restructuring order, and once a debt counsellor refers the matter to court, it qualifies as such proceedings. They submit that once referral to the court is made by the debt counsellor, such proceedings can no longer be construed as a Section 86 process.[418] Hence, once the matter is referred to a court in terms of Section 86 (7) and 86 (8), the creditor's opportunity to terminate debt review comes to an end, as it cannot be said that the credit agreement 'is being reviewed' in terms of Section 86.

Once again, case law has not provided any clarity on this issue – in fact it has created further confusion.[419] In *Standard Bank v Kruger,*[420] Kathree-Setiloane AJ held that:

> [O]nce a debt review is referred, by a debt counsellor with recommendations, to the Magistrate's Court for consideration, in terms of section 86(8)(b) of the Act, it falls within the ambit of section 87 of the Act and not section 86 of the Act. Accordingly, any termination of the debt review, in terms of 86(10), would be unlawfull.... [O]nce a debt review has been referred to the Magistrate's Court for consideration, the "*debt review*" process, as conducted in terms of section 86 of the Act ends, and the matter becomes, simply put, a review before the Magistrate's Court.[421]

[417] Van Heerden and Coetzee, *PELJ* (2011), 39.
[418] Van Heerden and Coetzee, *PELJ* (2011), 52.
[419] See also Boraine, Van Heerden and Roestoff, (2012), *De Jure*, 255, and Van Heerden and Coetzee, *PELJ* (2011), 60. One of the other problems that arise from the debt review process is the number of times a debtor may apply for debt review. The NCA is silent on this issue, and it appears that a debtor can apply for debt review several times and frustrate his creditors. Another gap within the NCA is the issue of whether a debtor, whose debt review has been terminated, may be able to reapply for debt review afresh, before a creditor institutes debt enforcement proceedings. Van Heerden and Coetzee submit that if such latitude where granted to debtors it would defeat the objects of the NCA and create an extended *moratorium* for the debtor. In concurrence, it is submitted that once a debt review is validly terminated by a creditor, the debtor should not be allowed to reapply for a new debt restructuring agreement. If such a practice were allowed it would unfairly prejudice the creditor. Although, there is no statutory limitation on the number of times a debtor may apply for debt review, in *Changing Tides v Grobler* (unreported) 9226/2010 (GNP), the court held that a debtor is not entitled to delay enforcement proceedings by again applying for debt review prior to enforcement after an earlier debt review was terminated. See also *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 (1) SA 310 (GSJ) and *Mercedes Benz Financial Services Ltd v Dunga* 2011 (1) SA 374 (WCC).
[420] *Standard Bank of South Africa Ltd v Kruger* 2010 (4) SA 635 (GSJ) (hereinafter referred to as '*Kruger*').
[421] *Kruger*, paras 14-15.

In the *Kruger* case, it was held that the only review process that could be terminated in terms of Section 86 (10) was the review undertaken by the debt counsellor. Any contrary interpretation which allowed the creditor to terminate debt review after sixty days, despite the matter being referred to the magistrates' court would lead to absurdity as it would deprive the debtor of the opportunity to have the matter properly determined by the court.[422] However, in the case of *SA Taxi Securisation v Nako,*[423] Kemp AJ criticised the *Kruger* judgment and held that during the debt review process the rights of both the debtor and creditor must be balanced.[424] He criticised the reasoning in *Kruger* and held that the court had failed to take into account the provisions of Section 86 (11) of the NCA which allow the court to order the resumption of debt review.[425] Kemp AJ therefore found that Section 129 (2) did not preclude the creditor from instituting legal proceedings where the debt counsellor had referred the matter to court.[426] In *FirstRand Bank v Evans*,[427] the court considered the conflicting judgments of *Kruger* and *Nako.* The court followed Kemp AJ's interpretation in *Nako* and found that the duty of the debt counsellor in terms of Section 86 is not extinguished by referral of the debt restructuring proposal to the creditor and the court. Thus, the creditor's right to terminate debt review in terms of Section 86 (10) continues until the court has made an order in terms of Section 87.[428]

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[422] See *Kruger*, paras 16-18, *FirstRand Bank Ltd v BL Smith* 24208/08 WLD and *Pelzer v Nedbank Ltd* 2011 (4) SA 388 (GND). See also *Changing Tides 17 (Pty) Ltd v Erasmus* 18153/09 (WCC), which held that any legal proceedings whilst an application for debt review was pending before a magistrate were strictly prohibited. See also Brits, LLD thesis, 194. Brits submits that if the debt review process is not completed within sixty business days and the matter has not been set down, before the Magistrates' Court, it would be inappropriate to terminate the debt review.

[423] *SA Taxi Securitisation (Pty) Ltd v Nako and Others* 2010 ZAECBHC 4 (19/2010) (hereinafter referred to as '*Nako'*).

[424] *Nako*, para 44.

[425] *Nako*, para 42.

[426] See *Nako*, para 10, wherein the court held that section 129 (2) renders redundant the provision of a notice recommending a debtor to refer the matter to a debt counsellor, as the matter has already been referred to a debt counsellor. In agreement, it is submitted that it is not necessary for a creditor to send out a section 129 notice when debt review has been terminated. However, it is submitted that it is unfair to terminate debt review while the matter is still to be heard. The *Nako* decision allows for the premature termination of debt review, and is thus contrary to the objects of the NCA. See also *SA Taxi Securitisation v Matlala* 2010 ZAGPJHC 70 (6359/2010) wherein the court disagreed with Kemp AJ.

[427] *FirstRand Bank Ltd v Evans* 2010 ZAECPEHC 55. (1693/2010) (hereinafter referred to as '*Evans'*).

[428] *Evans*, para 20-30.

In the subsequent case of *Collett v FirstRand Bank*,[429] the Supreme Court considered a number of judgments in making its decision whether the creditor could terminate debt review prior to the matter being set down before a magistrate. The court considered the decision of *FirstRand Bank v Papier,*[430] which held that:

> [T]he right of a credit provider to terminate the debt review is forfeited once the debt counsellor brings an application to the Magistrate's Court in terms of ss 86(7) and 87**.** The argument was that because the debt counsellor has a period of 30 days within which to determine whether the consumer appears to be over-indebted, and the consumer a further 20 days, in the event of a finding that he is not over-indebted, to apply directly to the Magistrate's Court in terms of s 86(9) for an order contemplated in s 86(7)(c)**,** the 60 day period was introduced to allow either the debt counsellor or the consumer sufficient time to approach the Magistrate's Court as aforesaid. I do not think that s 86 requires the consumer or his debt counsellor to 'approach the court' within the period of 60 days. Indeed no time period is specified within which the debt counsellor must make application to the Magistrate's Court. Nor does the NCA require the process of debt re-structuring to be complete within the period of 60 days after the application was made. To do so would obviously be unrealistic.[431]

The Supreme Court of Appeal in *Collett* confirmed the *Papier* judgment and held that the NCA did not require the debt restructuring to be complete within a sixty day period after application to the debt counsellor.[432] Section 86 (5) requires the creditor and the debtor to act in good faith during debt review negotiations and this places a duty on the creditor not to terminate the debt review prematurely while the matter is pending at court.[433] A debtor would have good reason to raise the termination of the debt review as evidence of the creditor's bad faith. This fact would not be a defence, but it may be sufficient for the court not to grant judgment and to exercise discretion.[434]

Brits submits that the most important principle developed in *Collett* was the Supreme Court of Appeal's confirmation that the creditor has a duty to participate in good faith

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[429] *Collett v FirstRand Bank Ltd and Another* 2011 (4) SA 508 (SCA) (hereinafter referred to as '*Collett*').
[430] *FirstRand Bank Ltd v Papier* 2011 (2) SA 395 (WCC) (hereinafter referred to as '*Papier')*.
[431] *Collett*, para 12, referring to *Papier*, paras 26-28.
[432] *Collett*, para 12.
[433] *Collett*, paras 13-14.
[434] *Collett*, para 18-19. In *Collett*, the court found that the debt restructuring proposal made by the debt counsellor reduced the debtor's monthly instalment by 50%. This severely prejudiced the creditor and was not in accordance with the NCA. Under these circumstances, the termination by the creditor was understandable, and the court dismissed the debtor's application. See also Van Heerden and Coetzee, *PELJ* (2011), 57, Brits LLD thesis, 240-242, Steyn, *De Jure*, (2012), 639 and *Seyffert*. In *Seyffert*, the court found that the creditor was at liberty to terminate debt review that was pending before the court, if the proposal submitted by the debt counsellor lacked any economic rationality and left a substantial part of the debt unpaid. The court found that even though the debtors may indeed be over-indebted, this was no reason for the bank to accept an unreasonable proposal.

during debt review negotiations. The conduct of the parties is an important factor that the court would take into consideration when determining whether judgment should be granted or whether the court should exercise discretion in terms of Section 86 (11), and allow for the resumption of debt review.[435] Therefore, although over-indebtedness cannot be regarded as a *bona fide* defence to a foreclosure application, it can be used as an opportunity for the court to exercise discretion in terms of Section 85 and 86 (11).[436] When exercising discretion, the court will take into account the conduct, *bona fides*, of the parties and the economic reality of debt review being a relief to a debtor. Once again, the NCA does not indicate the exact factors the court must consider when exercising its discretion. Section 86 (11) merely indicates that the court may order resumption if it is deemed just in the circumstances. Hence, it appears that even if the creditor lawfully terminates debt review, the court may order the debt review process to resume. It is submitted that this may be an incorrect approach, as it affords the debtor a second opportunity of debt review, which may be prejudicial to the *bona fide* creditor. It is submitted that the main aim of Section 86 (11) is to assist a debtor where termination has occurred unlawfully, incorrectly or where the creditor has acted *mala fide*, and not when the termination was valid.

[435] See also Boraine, Van Heerden and Roestoff, 'A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (part 1 and 2)' (2012), *De Jure*, 80, 100. See also *Nedbank v Swartbooi* 708/2012 (ECP) unreported (hereinafter referred to as '*Swartbooi*'). The case of *Swartbooi* followed the *Collett* decision. In this matter, Nedbank had terminated the debt review, after the initial debt review application was postponed by the court. The debtors argued that the bank did not act *bona fide* during the debt review process and claimed that they wished to bring an application in terms of section 86 (11) for the resumption of debt review. The court confirmed that creditors are obliged to act *bona fide* in the debt review process. Although debt review can be terminated whilst referral to the magistrate is pending, the matter does not end there as the court may order the debt review to resume in terms of section 86 (11) where justice requires. See also Roestoff and Van Heerden, 'Termination of debt review in terms of the National Credit Act – not the end of the road for over-indebted consumers: Recent case law *Nedbank Ltd v Swartbooi* Unreported Case No 708/2012 (ECP)' (2014) 47.1 *De Jure*, 140, 153-157 (hereinafter referred to as 'Roestoff and Van Heerden, *De Jure*'), Roestoff and Van Heerden disagree with the decision in *Swartbooi* and submit that the court should not have refused summary judgment, instead it should of postponed the application, subject to the resumption of the debt review. Roestoff and Van Heerden submit that it appears that section 86 (11) has created a new *bona fide* defence to summary judgment. In concurrence with Roestoff and Van Heerden, it is submitted that section 86 (11) should not be exercised to dismiss a judgment application, it could only be used to postpone the matter pending the outcome of the debt review proceedings.

[436] See *FirstRand Bank Ltd v Olivier* 2009 (3) SA 353 (SEC), *Standard Bank of South Africa v Panayiotts* 2009 (3) SA 363 (W), *Standard Bank of South Africa v Hales* 2009 (3) SA 315 (D), and *FirstRand Bank Ltd v Olivier* 2008 JOL 22139 (SE), which considered the application of section 85 of the NCA.

In summary, the court in *Kruger* initially held that the creditor was not entitled to terminate debt review while the matter was pending before the court. However, in the subsequent cases of *Nako, Evans, Seyffert,* and *Collett* it was held that the creditor was not precluded from terminating debt review while the matter was pending before the court. These cases found that any termination by the creditor did not prejudice the debtor as the debtor could still refer the matter to court in terms of Section 86 (11) of the NCA. The interpretations in *Nako, Evans, Seyffert,* and *Collett* led to a situation where a debtor may be deprived of exercising his right to debt counselling by premature termination by the creditor. The NCAA has remedied this situation by amending Section 86 (10)(*b*) to the effect of providing that 'no creditor may terminate an application for debt review in terms of the Act, if such application for review is already filed in court or in a tribunal'. This seems to have resolved the problem of creditors terminating pending debt review applications.[437] While this amendment may resolve the problem of premature termination by creditors, it creates another loophole in the debt review process. In practice, a debt review application can take up to three to four months before being heard in court, and according to the NCAA a creditor is not allowed to terminate the debt review, or proceed with debt enforcement litigation, even if no payments are being received from the debtor. This appears to be an anomaly created by the NCAA, and it is suggested that exact time lines be put in place to protect the interests of creditors.

4.3.2 Termination of debt review without sending the Section 86 (10) notice

Section 86 (10) provides that the creditor 'may' give notice to terminate the debt review. As indicated earlier, the use of the word 'may' is susceptible to more than one interpretation, which is similar to the problem exposed in relation to Section 129.[438] Further, Section 86 (10) may be interpreted to mean that the sending of the Section 86 (10) notice does not actually terminate debt review, but merely serves as a notice of the intended termination. Case law and academia have provided different views on this issue, as some courts and academics have held that Section 86 (10)

[437] Section 86 (10)(*b*) of the NCAA.
[438] Roestoff and Van Heerden, *De Jure*, 140-147.

merely serves as a notice of intention to terminate,[439] while others have held that the notice itself terminates the debt review.[440]

Another issue is whether or not the creditor is compelled to issue a Section 86 (10) termination notice before initiating debt enforcement. This is linked to use of the word 'may'. In *Ferris v FirstRand Bank,*[441] the Constitutional Court considered the issue of whether the creditor is required to send a section 86 (10) when a debtor has defaulted on a debt rearrangement order. The court found that the creditor was not required to send a Section 86 (10) when terminating debt rearrangement order and held that:

> ... a court may rescind a default judgment if it is erroneously sought or erroneously granted. But there is no error in the default judgment. Mr and Mrs Ferris breached the debt-restructuring order. Once the restructuring order had been breached, FirstRand was entitled to enforce the loan without further notice. This is clear from the wording of the relevant sections of the Act. Section 88 (3)(b)(ii) does not require further notice – it merely precludes a credit provider from enforcing a debt under debt review unless, amongst others, the debtor defaults on a debt-restructuring order. Moreover, section 129 (2) expressly stipulates that the requirement to send a notice under section 129 (1) is not applicable to debts subject to debt-restructuring orders. The wording of the debt-restructuring order itself indicates that the original loan will be enforceable without more notice if the debt-restructuring order is breached .[442]

The Supreme Court of Appeal in *Jili v FirstRand Bank*[443] followed the *Ferris* judgment and held that the breach of a debt restructuring order entitles the creditor to enforce the credit agreement without further notice.[444] The Supreme Court of Appeal in *Jili* found that if every creditor were required to give notice to the debtor, or rescind the debt rearrangement order, for breach of the debt rearrangement order

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[439] See Roestoff and Van Heerden, *De Jure* 147-148, and Van Heerden and Coetzee, *PELJ* (2011), 40. Roestoff and Van Heerden submit that section 86 (10) does not terminate debt review as soon as the notice is sent. They submit that the debtor may still approach the magistrate to hear the matter up to the stage the creditor actually proceeds to enforce the agreement. The wording of section 86 (10), 'notice to terminate', as opposed to 'notice of termination', indicates that the notice does not itself terminate the debt review. Roestoff and Van Heerden submit that the actual enforcement of legal action, and not the section 86 (10) notice, terminates debt review.

[440] See *Seyffert*, paras 13-14, wherein the court found that on a plain reading of section 86 (10) and section 86 (11), these sections do not necessarily terminate debt review, however, it may have this consequence.

[441] *Ferris v First Rand Bank Ltd and Another* 2014 (3) SA 39 (CC) (hereinafter referred to as '*Ferris'*).

[442] *Ferris*, paras 13-16.

[443] *Jili v FirstRand Bank Ltd* 2015 (3) SA 586 (SCA (hereinafter referred to as '*Jili'*). The court in *Jili* confirmed *FirstRand Bank Ltd v Fillis and Another* 2010 (6) SA 565 (ECP) (hereinafter referred to as '*Fillis'*) which held that once a debtor defaulted on a debt rearrangement order, the order is automatically terminated and termination enables the creditor to proceed to obtain judgment against the debtor.

[444] *Jili*, para 12.

before applying for judgment, it would create a potentially never ending 'merry go round'. Therefore, a debt rearrangement order that had been breached did not need to be set aside before the creditor could seek to enforce its claim.[445]

Van Heerden and Coetzee agree with the decisions in *Ferris* and *Jili* and submit that, where the debtor defaults on the debt restructuring order, a Section 86 (10) notice is not required prior to debt enforcement.[446] On the other hand, it is submitted that the debtor must be provided with the Section 86 (10) notice upon termination of debt review. The Section 86 (10) notice informs the debtor of the creditor's intention to terminate debt review and initiate litigation. The termination notice further makes the debtor aware of his rights, remedies and options to rectify his default. Hence, it is submitted that the termination of debt review without providing the debtor with a Section 86 (10) notice, should be considered to be an unlawful termination. Legislative intervention is required to correct this position.

4.4 Subsections 129 (3) & (4) of the NCA: the right to reinstatement

4.4.1 An overview of the right to reinstatement

As indicated in Chapter Two, the application of the law of contract and general mortgage practice allows for the mortgagee, upon default by the mortgagor, to claim the entire debt outstanding in terms of the mortgage agreement. This claim and the amount are stipulated in the mortgagee's summons and are initiated by enforcement of the acceleration clause.[447] The acceleration clause in the mortgage agreement allows the creditor to obtain judgment against the defaulting debtor for the full outstanding debt, and not just the arrear amount.[448]

The enforcement of the acceleration clause has, however, become much stricter since implementation of the NCA, as there have been instances where the creditor

[445] *Jili*, para 25.
[446] Van Heerden and Coetzee, *PELJ* (2011), 48-50. See also Roestoff and Van Heerden, *De Jure,* 153-157.
[447] Brits, 'Purging Mortgage Default: Comments on the right to reinstate credit agreements in terms of the National Credit Act', *Stell LR* (2013) (1), 165, 168 (hereinafter referred to as 'Brits, *Stell LR* (2013)'), and Brits, *Real Security* (2016).
[448] See Brits, *Stell LR* (2013), and Steyn, *Stell LR*, (2015) 144-145, 167. See also *Boland Bank v Pienaar* 1988 (3) SA 618 (A), *Fraser* and *Ntsane*.

may be denied his right to acceleration.[449] The debtor's right to reinstatement, provided for in Section 129 (3) of the NCA, may be seen to be in conflict with the creditor's right to acceleration. A debtor may dilute the force of the acceleration clause, by settling the arrears, default and enforcement costs due in terms of Section 129 (3), and defeat the creditor's accelerated claim. In other words, once an agreement is reinstated by the debtor settling the arrears, default and enforcement costs due, the debtor's record is wiped clean, and any judgment taken against the debtor for the outstanding balance in consequence of the acceleration clause is of no force and effect.[450] Reinstatement thus allows the debtor to escape the full consequences of the acceleration clause by simply settling the arrears, default and enforcement costs. Brits has contended that once an agreement is reinstated any judgment or execution order taken against the debtor or the property falls away, and the agreement will continue to operate as if no default occurred. Should the debtor default after reinstatement, the creditor is required to initiate fresh proceedings, and issue a new Section 129 (1) notice, summons and judgment.[451] Brits therefore contends that the right to reinstatement is a specific form of debt relief introduced by the NCA, as it provides a way to prevent and even reverse debt enforcement.[452] Brits believes that the right to reinstatement fills the current gap in the system as it reverses the socio-economic effects of the creditor's enforcement action.

The right to reinstatement in the NCA involves two aspects. Section 129 (3) allows the debtor to reinstate the agreement subject to the fulfilment of certain requirements, namely, settlement of the arrears, default and enforcement costs. Section 129 (4) delineates the limits of the right and the stages at which reinstatement is no longer available. As with many of the sections within the NCA, subsections 129 (3) and (4) have been the subject of much controversy. The two main aspects of this controversy are: when is the debtor entitled to exercise the right

[449] See Brits, 'The reinstatement of credit agreements: Remarks in response to the 2014 amendment of section 129 (3)-(4) of the National Credit Act' (2015) *De Jure*, 48.1,75, 79 (hereinafter referred to as "Brits, (2015) *De Jure*"), and Accelerated claims in Notes and Mortgages, *University of Pennsylvania Law Review* (November 1939) 94. See also *Arun Holdings*, and *Mdletye*. In *Mdletye*, the court held that where there is a potential or possibility of the loan agreement being reinstated, the court would not grant an order of executability against immovable property, but rather adjourn the matter and allow the debtor the opportunity to reinstate the agreement. See Chapter Four (4.4.3).
[450] Brits, *Stell LR* (2013), 165-169.
[451] See Otto, *The National Credit Act Explained* (2006) 98, and Brits, *Stell LR* (2013) 176.
[452] Brits, *Stell LR* (2013), 165.

to reinstatement? and, does the right to reinstatement overturn all litigation taken by the creditor?

With regard to the uncertainty over a debtor's right to reinstatement, Section 129 (3) provided that a debtor may at any time, before the creditor has cancelled the agreement, reinstate the agreement by paying all amounts overdue, together with default and enforcement charges.[453] The effect of Section 129 (3) is to permit reinstatement even after judgment.[454] Section 129 (4), however, does not permit reinstatement after 'execution'. There have been varying interpretations as to when 'execution' takes place. However, it is now confirmed that execution occurs 'after the sale and transfer of ownership and receipt of the proceeds from the sale of the property.'[455] Thus, it appears that the purchaser at the sale in execution purchases the property subject to the debtor's statutory right of reinstatement.[456] It is submitted that this interpretation is unfavourable as the application of Section 129 (3) should be limited to prior to the sale in execution. In other words, once the property is sold in execution, in particular, upon the fall of the hammer at the Sheriff's sale, the debtor should lose his right to reinstatement. The innocent buyer who purchases the property at the sale in execution should not be subject to Section 129 (3) as, if this were so, it would have the negative effect of deterring bidders at the sale in execution and reducing even further the prices obtained at auction.[457]

With regard to the issue of whether reinstatement has the effect of overturning litigation taken by the creditor, it has become accepted that reinstatement does have

[453] Please note that section 129 (3) has been amended. The amended subsection will be discussed in Chapter Four (4.4.3).
[454] See also *Dwenga v FirstRand Bank Ltd and Others* (EL 298/11) (hereinafter referred to as '*Dwenga*'). In *Dwenga*, the court held that the right to reinstatement ends at the time judgment is granted.
[455] *Nkata v FirstRand Bank Ltd and Others* 2016 (4) SA 257 (CC) (hereinafter referred to as '*Nkata*'). See also Van Heerden, *Guide to the National Credit Act*, (loose leaf) Lexis Nexis.
[456] See *Sedibe v United Building Society* 1993 (3) SA 671 (T) which held that a purchaser at a sale in execution buys the property subject to the debtor's right to redemption.
[457] See Brits, *Stell LR* (2013) 177. See also *FirstRand Bank v Nkata* 2015 (4) SA 417 (SCA) (hereinafter referred to as '*Nkata* SCA'). The Supreme Court of Appeal held that allowing reinstatement after a sale would render sales in execution insecure and unpopular and cause great inconvenience to third parties. The public auction process would not be able to fulfil its purpose as a debt recovery mechanism. This would inevitably cause higher risks and properties being sold for lower prices which will prejudice debtors even further. The court held that public confidence in the sale in execution is fundamentally important and its confidence should not be stirred by extension to the right to reinstatement (this decision was overruled by the Constitutional Court).

the effect of reversing legal process. However, in practice, there has been criticism about this approach and the consequence that reinstatement invalidates any judgment or attachment lawfully granted in favour of the creditor. In *Nkata*, the Constitutional Court considered the application of subsections 129 (3) and (4) and cleared up the contradictory interpretations of these sections. This case will be discussed in detail below.

4.4.2 Nkata v FirstRand Bank

In *Nkata*, the mortgagor defaulted on her mortgage repayments and FirstRand sent two Section 129 (1) notices to her. Both these notices were posted to incorrect addresses, thus none of the notices reached Nkata. FirstRand obtained default judgment against Nkata. Nkata thereafter settled the arrear amount on the mortgage. However, over the ensuing years, she fell in and out of arrears. FirstRand scheduled an auction for the property and the property was sold in execution.[458] Nkata argued that Section 129 (1) had not been complied with as the notices were served at an incorrect address. She further argued that she had reinstated the agreement by settling the arrears.[459]

The High Court's decision[460]

The High Court found that subsections 129 (3) and (4) could be interpreted in various ways and this led to much uncertainty. Depending on the interpretation of Section 129 (3), the mortgage agreement might have been reinstated. If this was so, execution could no longer be levied, and FirstRand Bank would be required to obtain a fresh judgment and authority to execute after complying with Section 129 (1).[461]

FirstRand Bank argued that although the debtor settled the arrears, she failed to settle the enforcement costs due in terms of Section 129 (3) of the NCA. FirstRand had debited approximately R 28 000 in respect of legal fees to the mortgage

[458] *Nkata*, paras 2-13. At the time of the Sheriff's auction, Nkata's full outstanding debt was approximately R 1 400 000, and the arrear amount was R 33 716.
[459] *Nkata*, para 16.
[460] *Nkata v FirstRand Bank and Others* 2014 (2) SA 412 (WCC) (hereinafter referred to as '*Nkata* WCC').
[461] *Nkata*, para 34.

account. They argued that these legal costs had to be paid before Nkata could reinstate the agreement. The court rejected this contention and held that such an approach would be inconsistent with the ethos of the Act. The court held that:

> If the credit provider wants to recover the costs of enforcing the agreement from the consumer, the credit provider must take the appropriate steps. If the credit provider does not do so, and if in the meanwhile the consumer pays the full amount of the overdue instalments and any other amounts already due and payable, the agreement would be reinstated in terms of s 129(3).[462]

The court confirmed that Section 129 (4)(*a*) provides that a consumer may not reinstate a credit agreement after the sale of the executed property. The court further confirmed that execution is a process and requires money to have been raised from the sale of the property and paid to the creditor. The court found that execution of the default judgment had not occurred by the time Nkata brought the arrears up to date, therefore the agreement had been validly reinstated.[463] Once the agreement had been reinstated, the judgment ceased to operate and had no force or effect. Accordingly, the subsequent sale in execution was invalid and was set aside. FirstRand Bank appealed to the Supreme Court of Appeal.

Appeal to the Supreme Court of Appeal

The Supreme Court of Appeal overruled the *court a quo's* judgment. A significant part of the Supreme Court of Appeal's judgment considered the interpretation of Section 129 (4) and the meaning of 'execution'. The court analysed several judgments which considered the meaning of 'execution' and found that execution is a process rather than an event. The Supreme Court of Appeal found that execution is the process of giving effect to the creditor's right and claim, and held that the High Court's interpretation, that execution only takes place when the proceeds of the sale in execution are paid to the creditor was erroneous.[464] The court confirmed that the Rubicon for the right to reinstatement was the sale in execution. Therefore, a debtor

[462] *Nkata* WCC, para 43. FirstRand did not present the legal costs to Nkata or invite her to pay these costs. The bank unilaterally debited the legal costs to the mortgage. The court held that this action by the creditor indicated that the creditor was content to lend this amount to this consumer and receive repayment via instalments. Therefore, even though Nkata had not paid any of the legal costs, the payment of the arrear amount sufficed to meet the requirements of section 129 (3).
[463] *Nkata*, paras 54-55.
[464] *Nkata*, SCA, para 45.

could not reinstate a credit agreement after the sale in execution.[465] The Supreme Court of Appeal found that the bank had already executed the default judgment in terms of Section 129 (4), when the property was sold at the sale in execution, and therefore Nkata was not entitled to reinstate the agreement.

Appeal to the Constitutional Court

Nkata appealed the Supreme Court of Appeal's decision to the Constitutional Court. One of the reasons why the Supreme Court of Appeal decided in FirstRand Bank's favour was that it found that Nkata could not have reinstated the agreement as the creditor had executed on the default judgment and the property had already been sold in execution. The Constitutional Court found that this reasoning was incorrect. The sale in execution took place on 24 April 2013, whereas Nkata had settled her arrears in March 2011. Therefore, it was clear that Nkata had reinstated the agreement before the sale in execution.[466] However, while it was common cause that Nkata settled the arrears due, Section 129 (3) provided that in order for the debtor to exercise her right to reinstatement, the debtor was required to settle (1) the arrears owing, (2) default charges, and (3) enforcement or legal costs. Nkata had only settled the arrears and not the legal costs. Therefore the main issue before the Constitutional Court was whether the right to reinstatement was still available to the debtor.

The Constitutional Court was divided on the interpretation of Section 129 (3). The majority found that Nkata had reinstated the agreement by settling the arrears, and as a result the default judgment and writ was of no legal force. The minority found that Nkata had not reinstated the agreement as she had not settled the legal costs as required by Section 129 (3). The majority found that Section 129 (3) does not preclude reinstatement where the debtor has paid the arrear amount but had not been given due notice of the reasonable legal costs. FirstRand Bank had not demanded payment of the legal fees from the debtor and unilaterally debited these costs to the mortgage account. The court found that the bank could not unilaterally

[465] *Nkata* SCA, para 34.
[466] *Nkata*, para 28.

impose the legal costs upon the debtor without them being reasonable, taxed or agreed upon. Moseneke DCJ held that:

> [T]he consumer could not be expected to take proactive steps to find out what the costs would be for reinstatement to be effected. Neither could a consumer be expected to start taxation or agree with the credit provider on the quantification of these costs. The credit provider is required to take the appropriate steps if it wants to recover the costs for enforcing an agreement with the consumer.... [S]ection 129(3) does not preclude the reinstatement of a credit agreement where the consumer has paid all the amounts that were overdue but has not been given due notice of the reasonable legal costs, whether agreed or taxed, of enforcing the credit agreement. The legal costs would become due and payable only when they are reasonable, agreed or taxed, and on due notice to the consumer.[467]

With regard to the contention that Section 129 (4) precluded Nkata from reinstating the agreement, the court held that there was no compelling reason why the meaning of 'execution' should be given an extended meaning. The bank contended that execution was a process that occurred when the property was attached.[468] The Constitutional Court declined to follow this line of reasoning and found that the barrier for the right to reinstatement was only when the proceeds of the sale in execution were realised. Once an agreement is reinstated, the judgment and attachment is rendered without force and effect.[469]

On the other hand, the minority found that Nkata had not reinstated the agreement and held that the default judgment that was granted stood valid.[470] Cameron J relied on the plain language of Section 129 and held that since Nkata had not paid the legal fees as required by the NCA, the agreement had not been reinstated. Cameron J disagreed with the majority judgments findings that the creditor was required to take proactive steps to recover the legal fees. Cameron J held that the NCA placed the responsibility of paying all the costs upon the debtor, and not the creditor. The

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[467] *Nkata*, paras 122-123. Moseneke DCJ held that it was the duty of the creditor to take proactive steps to recover their legal costs, and the costs only become due and payable when they were reasonable, agreed or taxed and on due notice to the debtor. He based this reasoning on the interpretation that if a creditor was not obliged to quantify and notify a debtor of the legal costs, the relief afforded by section 129 (3) could be frustrated and open to the creditor to thwart a reinstatement.

[468] *Nkata*, para 130.

[469] *Nkata* CC, paras 131, 170-171. Jafta J agreed with the majority, however, reached this decision on a different reasoning. Jafta J found that since there had been non-compliance with section 129 (1), namely, the notice was delivered to an incorrect address, the legal fees that flowed from that action were not due and unreasonable. Therefore, the debtor was not required to pay those legal costs, as those legal proceedings were irregular. Jafta J therefore found that the default judgment granted by the High Court was null and void and the sale in execution was equally invalid.

[470] *Nkata* CC, para 35.

fact that the bank had not presented these fees to Nkata did not mean that the fees were not due. Nugent J concurred with Cameron J, and held that it was impractical to expect the creditor to attend to the taxation and to demand the costs for enforcement every time the debtor fell into default.[471]

Comments on the *Nkata* case[472]

The Constitutional Court in *Nkata* confirmed the principle that if the debtor is not provided with the creditor's enforcement and legal costs, and settles the arrears due, the credit agreement will be reinstated and any legal action taken against the debtor will be overturned. This is based on the reasoning that the creditor has a duty to notify the debtor of the legal costs due.

It is submitted that the most important issue with Section 129 (3) is whether reinstatement has the effect of overturning litigation taken by the creditor. In *Nkata*, the Constitutional Court found that once an agreement is reinstated, any judgment taken against the debtor is of no force and effect. It is submitted that the court's finding that the right to reinstatement lapses or cancels any judgment is unsatisfactory. While it is accepted that the right to reinstatement does have the effect of bringing any enforcement action by the creditor to an end, this should not mean that any valid legal action already taken against the debtor is overturned. It is submitted that in cases where the debtor falls into default again after reinstatement, the creditor should be entitled to revive any judgment taken against the debtor. The creditor should not need to start legal action afresh, as it is clear that any judgment validly granted by the court does not lapse until it is rescinded by the court or the debt is settled in full.

Accordingly, it is submitted that reinstatement does not overturn legal action taken by the creditor, and should a debtor default again after reinstatement, the creditor can resume legal action from the last legal step and need not start legal action afresh. The reasoning for this interpretation is substantiated by the difference in the majority

[471] *Nkata* CC, paras 54-58.
[472] It is important to note that *Nkata* was decided before the amendments effected by the NCAA. These amendments will be discussed in the forthcoming subsection.

judges' findings in *Nkata*. In *Nkata*, Moseneke DCJ held that the debtor had reinstated the agreement by settling the arrear amount and found that the judgment taken by the creditor was 'no longer of any force and effect'. However, Jafta J found that since there had been non-compliance with Section 129 (1) – as the notices were incorrectly served, the judgment obtained was '*null* and *void'*.[473] It is submitted that there is a substantial difference in the terms 'no longer of any force and effect' and '*null* and *void'*. It is well understood that the term '*null* and *void'* means that the subject never existed or is invalid. Thus, in *Nkata*, the judgment obtained against the debtor never existed and was invalid (was *null* and *void*) as Section 129 had not been complied with. Moseneke DCJ held that the judgment was of no force and effect after reinstatement. It is submitted that this means that the judgment taken against Nkata was valid, however, once Nkata settled the arrear amount and reinstated the agreement, the judgment was no longer of any force and effect. In other words, after reinstatement the effect of the judgment was suspended and ineffective. It is submitted that the judgment could become effective again should the debtor default again. Therefore, it is argued that reinstatement does not lapse or rescind any valid judgment obtained. Once the debtor settles the arrear amount, the judgment can no longer be enforced and is no longer effective. However, should the debtor default after reinstatement, the judgment can be revived and become effective again.[474]

Accordingly, it is submitted that an undesirable effect of the *Nkata* judgment is that it overturns legal action taken by the creditor. The interpretation in *Nkata* allows debtors to fall continually into default and to reinstate the agreement.[475] According to this approach, if a creditor wishes to resume foreclosure where the debtor had previously defaulted and reinstated the agreement, the creditor would not be able to

[473] *Nkata*, paras 166-176.
[474] See Mohale, *De Rebus*, 23. Mohale submits that when a debtor settles the arrear amount of an agreement, the creditor is required to rescind any judgment taken against the debtor. If the debtor falls into default again, the creditor is required to issue a new section 129 notice and start legal action afresh. Mohale submits that the creditor's refusal or failure to rescind the default judgment after reinstatement will be in conflict with section 3 of the NCA. In disagreement, it is submitted that such an interpretation is detrimental to creditors' rights. Such an approach increases the legal costs incurred by the creditor, and also delays its right to direct execution against the hypothecated property and erodes the right to acceleration. Further, this creates administrative challenges for creditors and credit bureaus. See also Circular No. 090916 by the NCR on 9 September 2016, which provides that 'judgments should only be removed once the capital sum of the judgment has been paid up'.
[475] See Brits, *Stell LR* (2013), 169.

commence foreclosure proceedings from the stage at which he previously pended litigation. If the previous default had been remedied, the creditor would be required to institute fresh foreclosure proceedings, starting with the Section 129 (1) notice. This has the potential to create administrative challenges for creditors, as every time a debtor falls into default, the creditor would be required to start litigation afresh and further attend to the taxation of his enforcement costs. It is submitted that such an interpretation could not have been the intention of the legislature. Brits, however, believes that this is a reasonable compromise between the parties. Although a creditor who has undertaken enforcement proceedings may be slightly inconvenienced, he is compensated for this as reinstatement demands that the debtor pay all enforcement charges.[476] Further, the administrative inconvenience experienced by the creditor will surely be outweighed by the need to protect one's home. Brits therefore submits that subsections 129 (3) and (4) must be interpreted in a manner that avoids unconstitutional results and avoids instances of disproportionate debt enforcement proceedings.

Historically, if a debtor fell into default, the creditor would enforce the acceleration clause in the mortgage agreement and obtain judgment for the full outstanding debt. Only upon settlement of the full outstanding debt would the judgment obtained against the debtor lapse.[477] The right to reinstatement and the *Nkata* judgment seem to have done away with this long established principle as it appears to allow the debtor to cancel or rescind judgment upon settlement of the arrear amount. This diminishes the power and force of the acceleration clause, and further diminishes the value of a valid judgment granted in favour of the creditor. It is submitted that this could not have been the intention of the legislature, and if it was, legislative intervention is urgently required to clarify the current uncertainties, in particular, whether reinstatement has the effect of overturning litigation taken by the creditor. Amendments to subsections 129 (3) and (4) were recently implemented by the NCAA to resolve these conflicts. However, it will be noted below that these amendments have in fact created more uncertainty.

[476] Brits, (2015) *De Jure*, 81.
[477] See also section 11 of the Prescription Act 68 of 1969, which provides that prescription of any judgment debt on a mortgage bond is thirty years.

4.4.3 NCAA changes to subsections 129 (3) and (4)

As a result of the lack of clarity in subsections 129 (3) and (4), the NCAA amended these sections. The crucial difference in the amended Section 129 (3) is that the phrase 'reinstate a credit agreement' has been deleted and replaced with 'the consumer's right to "remedy a default" under such credit agreement'. The amendment no longer uses the words 'reinstate', therefore it has become debatable whether the terms 'reinstate' and 'reinstatement' are still applicable.[478] However, the term 'reinstatement' is still used in Section 129 (4), hence, this indicates that the mechanism and term is still used in the NCA.[479] The amendment, however, does not state what the consequence of remedying the default would be. In particular, it does not provide any clarity as to whether reinstatement has the consequence of overturning litigation already taken by the creditor.[480]

The amendment to section 129 (4) sought to clarify the exact stage of which the debtor's right to reinstatement lapses. The amended section replaced reference to the 'consumer' with 'creditor provider'. The section now appears to refer only to the creditor's rights and not the debtor's rights. Brits submits that on a literal interpretation the amendment is nonsensical as it now affords the creditor the right to reinstate the agreement[481] This could be interpreted to mean that the creditor has the right or discretion to accept the debtor's reinstatement and payment of the arrear amount. However, such an interpretation appears to be contrary to the NCA, as it allows for a position after the debtor having settled the arrears, default and enforcement charges, being left at the mercy of the creditor who has the choice as to whether to allow the reinstatement.[482] Brits submits that this position is illogical, and recommends that the section should not be afforded a literal meaning and should still be interpreted as if no amendment occurred.

[478] See Brits, 'The reinstatement of credit agreements: Remarks in response to the 2014 amendment of section 129 (3)-(4) of the National Credit Act', (2015), *De Jure*, 48.1, 75, and Brits, *De Jure*, 84-85.
[479] Brits, *De Jure*, 83.
[480] Steyn, *Stell LR* (2015) (1), 148.
[481] See Brits, *De Jure*, 88, and Brits, Coetzee and Van Heerden, 'Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: *Quo Vadis*?' (2017), 980, *THRHR*, 177, 178.
[482] Brits, *De Jure,* 89.

Several academics have submitted that the overall state of affairs is inadequate and unsatisfactory. Accordingly, there has been a call for the complete redrafting of subsections 129 (3) and (4) as the current concept of reinstatement is muddled and rife with contradictions.[483] It is submitted that it is unfortunate that one must go through such mental gymnastics and creative interpretations to enable a clear understanding of the Act, and it is even more disappointing that the amendments to the Act, which sought to create clarity, have only created more confusion. It is submitted that legislative intervention is required to clarify the position and provide guidance, and in particular, as to whether reinstatement reverses all previous legal action taken by the creditor, including judgments.[484] In this regard, it is submitted that a total redrafting of subsections 129 (3) and (4) is required to create clarity on all the aspects discussed above.[485]

The judgments of *FirstRand Bank v Mdletye*[486] (hereinafter referred to as '*Mdletye*') and *FirstRand Bank v Zwane*[487] (hereinafter referred to as '*Zwane*') were the first reported cases to interpret the *Nkata* decision and the legislative amendments to section 129 (3).[488] In both matters, the mortgagors were three months in arrears on their mortgage payments, and the mortgagee sought to obtain default judgment and an order of executability against the hypothecated immovable property.

In *Mdletye*, the court considered the *Nkata* judgment and found that:

> .... if the arrears can be eliminated and other amounts referred to in s 129 (3) paid, the agreement will be reinstated. From the date of reinstatement, the default will have 'no force and effect'. If the property is sold by virtue of an attachment following a declaration of executability, the agreement will not be capable of being reinstated and the respondents (mortgagors) will lose their home. The potential for this to occur must therefore be a factor to be taken into account in an application to declare the property executable.[489]

In *Mdletye*, the mortgagors had provided the mortgagee with a reasonable payment proposal indicating how they intended to settle their default. The mortgagors had made payments in terms of their proposal and had reduced the outstanding balance

[483] Brits, Coetzee and Van Heerden, (2017), *THRHR*, 179. See also Steyn and Sharrock, 'Remedying mortgage default: *Nkata v FirstRand Bank Ltd'*, (2017) *SALJ* 498.
[484] See also Brits, Coetzee and Van Heerden, (2017), *THRHR*, 191.
[485] See also Brits, Coetzee and Van Heerden, (2017), *THRHR*, 191.
[486] *FirstRand Bank Limited v Mdletye* 2016 (5) SA 550 (KZD).
[487] *FirstRand Bank Limited v Zwane* 2016 (6) SA 400 (GJ).
[488] See also Steyn, *Fundamina*, (2017), 111-112.
[489] *Mdletye*, para 11.

and arrear amount. Gorven J accordingly held that there was a reasonable prospect that the agreement could be reinstated within a short period of time,[490] and held that proper judicial oversight would not be served if an order of executability were granted, as this would amount to disproportionality between the means used to exact payment of a judgment debt and other available means to obtain the same purpose.[491] Gorven J granted default judgment in favour of the mortgagor for the full outstanding debt. However, the court adjourned the application to declare the property executable, and directed that the matter be set down after a period of six months. This six month period was intended to provide the mortgagor with an opportunity to remedy the default in terms of Section 129 (3).

In *Zwane*, the court adjourned both the judgment and executability applications for a period of four months. In *Zwane*, the court made reference to the Chapter 10.17 of the Gauteng Practice Manual. The Practice Manual proposed the postponement of a judgment application to allow a consumer the opportunity to take advice and seek arrangements to bring the arrears up to date.[492] The court, however, did find that the declining of a judgment may be viewed as being contrary to the principle of honouring agreements, and further, could render meaningless the effect of an acceleration clause.[493] This result could be avoided if the immediate enforcement of the agreement could be deferred by postponing declarations of executability for a few months and allowing the debtor the opportunity to pay his arrears.[494] The court accordingly postponed the judgment and executability applications for four months.

In the most recent case of *Mokebe*, the full bench of the South Gauteng High Court held that the right the reinstatement must be interpreted to promote the principles of the NCA and the Constitution, and balance the interests of debtors and creditors.[495] The court in *Mokebe* concurred with the findings the *Nkata* that held that 'it is only when the mortgage property has been sold and the proceeds of the sale have been

[490] *Mdletye*, paras 13-14.
[491] *Mdletye*, paras 16-17. The court, however, held that this did not mean that the mortgagee will never be entitled to such an order. Much will depend on the track record of the mortgagor and his payments during the ensuing period.
[492] *Zwane*, para 7.
[493] *Zwane*, para 18
[494] *Zwane*, paras 19-21.
[495] *Mokebe*, para 35.

realised that there can no longer be reinstatement. Accordingly, the granting of monetary judgment and execution order is not a bar to reinstatement'.[496] The court further acknowledged that amendments to subsections 129 (3) and (4) were nonsensical and adopted Brits reasoning that the amendments should not be taken literally and should be ignored.[497]

While the courts in both *Mdletye*, *Zwane* and *Mokebe* did not provide any clarity on the issue of whether reinstatement has the effect of rescinding the previous legal action taken by the creditor, the postponing of applications in both *Mdletye* and *Zwane* brought to light the need for a formal *moratorium* to be established in a foreclosure process to provide the mortgagor a short period of time to either remedy the default, or consider alternatives to foreclosure. It is therefore suggested that a foreclosure *moratorium* be implemented to assist mortgagors who find themselves in situations such as *Ntsane*, *Mdletye* and *Zwane*, where the arrear amount is low.[498] In Chapter Seven the idea of introducing a foreclosure *moratorium* will be considered in more detail.

In sum, the right to reinstatement is an important remedy that is fundamental not only to the achievements of the NCA, but also to the Constitution, and the right to have access to adequate housing. The proper interpretation of subsections 129 (3) and (4) has been the cause of much debate, and clarity from the judiciary and legislature is therefore required to clarify the effect of reinstatement on judgment and orders of executability. Nevertheless, it can be seen that the right to reinstatement is of immense value to a debtor who is facing execution against his home. A prime example of where it could be used is in the *Ntsane* case.[499] The *Ntsane* case illustrated how a creditor could abuse use of the acceleration clause, and emphasised the value to the debtor of being given the opportunity of exercising the right to reinstatement by simply paying the arrear amount R 18.46,[500]. In *Mdletye*,

[496] *Mokebe*, para 43.
[497] *Mokebe*, para 49.
[498] See also *Mokebe*, para 32.
[499] See *Ntsane* in Chapter Three (3.3).
[500] See also *Arun Holdings,* where Davis J refused to enforce the acceleration clause in the loan agreement. In this case, the debtor fell into default and a short while thereafter settled the arrear amount. The debtor, however, failed to pay the default interest of R 86. The creditor invoked the acceleration clause on this basis and called for payment of the full loan amount which was R 7.6 million. The court found that enforcement of the acceleration clause under these circumstances would

Zwane and *Mokebe* the courts held that where there is a possibility of the agreement being reinstated, it would not grant an order declaring immovable property executable, but rather adjourn the matter and allow the debtor the opportunity to reinstate the agreement. The court held that proper judicial oversight would not be served if it allowed execution to proceed where there was a reasonable prospect of reinstatement. Thus, the right to reinstatement has thrown debtors a lifeline as it allows them an opportunity to postpone a mortgagee's foreclosure where there is a possibility of the arrear and default amounts being settled. However, in order for the right to reinstatement to be given full effect, there is still a need for further clarity to be established, and it is therefore submitted that there is a need for the legislature to clarify the current uncertainty in subsections 129 (3) and (4).

4.5 Conclusion

For decades, academics and the general public have called for the revision of South African consumer laws and the need for the law to provide an effective, easily accessible, debt relief mechanism. It was hoped that this call had been answered by the enactment of the National Credit Act. However, from the above analysis, it can be concluded that the NCA has, on the contrary, created further unnecessary problems and has failed to provide clarity for either debtors or creditors. As discussed above, there are several interpretational gaps within sections 129 and 86 (10) of the NCA. While some of these loopholes have been addressed by the NCAA, there are still several problems with the NCA's application and interpretation. These legislative flaws are without doubt the greatest defect in the debt review and reinstatement process.

In addition to its interpretational flaws, the NCA has failed to provide any workable solution to mortgage debt, and it appears that the NCA was never intended to serve as a debt relief mechanism for mortgage debt.[501] A mortgage debt runs a term of twenty to thirty years. Therefore it would be unrealistic to extend the term of this

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be *contra bonos mores*, draconian and unfair, and held that enforcing the acceleration clause for such a measly amount was against the concept of *ubuntu*.

[501] See *Standard Bank of South Africa Ltd v Hales and Another* 2009 (3) SA 315 (D) and *FirstRand Bank Ltd v Meyer and Another* (3483/10) ZAECPEHC.

credit agreement, especially when considering that mortgage is the largest expense in the debtor's estate. Hence, it is submitted that the NCA has not provided adequate relief for a mortgagor seeking to protect his home from foreclosure. It is therefore concluded that the NCA has failed in its objective of serving as an effective debt relief mechanism in South Africa.[502] Accordingly, there is still a need for a debt relief mechanism that fairly balances the interests of debtors, creditors and society, in particular during foreclosure against a home. Debt review has failed as a workable solution to resolving mortgage debt, and the plight of debtors who are too poor to go through sequestration, and who cannot succeed in obtaining alternative debt relief measures, has not been adequately addressed by the NCA. The NCA has also failed to provide clarity as to its relationship with insolvency, and this has created more uncertainty. The interaction between the NCA and insolvency will be discussed in the following chapter.

[502] See Kreuser, *De Jure (*2012), wherein Kreuser notes that from 2007 to 2012, 184 000 people had applied for debt review. This reflects the significant need for debt relief and effective credit regulation. According to statistics provided by the NCR, approximately 42 percent of credit active South Africans have impaired credit records. Statistics reveal that as from December 2008, over 42 000 debtors had applied for debt review, however, only 1600 cases proceeded to court. These statistics may tend to indicate that the debt review process is not functioning effectively.

CHAPTER FIVE

THE FORCED SALE OF A HOME IN INSOLVENCY LAW[503]

> The machinery of voluntary surrender was primarily designed for the benefit of creditors, and not for the relief of harassed debtors....The law of insolvency exists primarily for the benefit of creditors and a court will not sequestrate a debtor's estate unless it is shown that sequestration will be to the advantage of creditors. [504]

5.1 Introduction

One of the key building blocks in any country's economic, social and political framework is the existence of a modern and effective insolvency system.[505] The significance of a modern insolvency system has been widely acknowledged by several international institutions, including the World Bank and the United Nations Commission on International Trade Law (hereinafter referred to as 'UNCITRAL'). These organisations have confirmed that insolvency law is a fundamental developmental institution and is a cornerstone for the enhancement of a country's credit market, and for its international growth.[506]

In South Africa, consumer insolvency is governed by the Insolvency Act 24 of 1936, and is utilized by many mortgagors as a debt relief mechanism. The Insolvency Act is eighty years old, dating back long before the enactment of the South African Constitution and the NCA. The question therefore arises as to whether the policies of the Insolvency Act are in line with the Constitution, the NCA, and the needs of the current South African consumer. This chapter will briefly consider the law of insolvency and, in particular, its relationship with the NCA and the protection, or lack of protection, it affords to the home of the mortgagor. The chapter will also briefly

[503] This chapter will not provide a detailed exposition of Insolvency law, but will briefly consider the flaws in the insolvency process and the important characteristics relevant to the sale of the home during insolvency process.
[504] *Ex Parte Pillay* 1955 (2) SA 309 (N) 311.
[505] See Calitz, 'Some thoughts on State regulation of South African insolvency law' (2011), *De Jure*, 290 (hereinafter referred to as 'Calitz, *De Jure*') and Millman, *Personal Insolvency Law* (2005), 2. See also *Holomisa v Argus Newspapers Ltd* 1996 (2) SA 588.
[506] See World Development Report 2017: Governance and the law, available at www.worldbank.org.

consider the fundamental principles governing South African insolvency law and discuss how the strict requirements of the Act create a hurdle to debtors who seek relief under these laws.

5.2 The interface between the Insolvency Act and the NCA

The relationship between the NCA and the Insolvency Act has been the subject of much academic discussion over the past decade.[507] Neither the NCA nor the Insolvency Act make reference to each other, and the question arises whether there is a relationship between the two Acts. Some academics have submitted that since none of the sections in the NCA specifically mention any provisions of the Insolvency Act, the two Acts have separate application.[508] However, it is submitted that a relationship does exist between insolvency and debt review as they are both debt relief mechanisms available to a mortgagor. A person who is overburdened with debt has the option to choose either debt review or the sequestration of his estate as a mechanism to relieve his financial troubles.[509]

When considering the relationship between the NCA and the Insolvency Act, one of the controversial issues has been whether an application for debt review amounts to an act of insolvency in terms of section 8 (g) of the Insolvency Act. Several scholars have argued that it is nonsensical to hold that a debtor who applies for debt review commits an act of insolvency.[510] Such an interpretation would frustrate the aims of the NCA which hold the debtor responsible for meeting all debts in full. However, several courts have found that an application for debt review does satisfy the

[507] See Boraine and Van Heerden 'The interaction between debt relief measures in the National Credit Act 34 of 2005 and aspects of Insolvency Law (2009) *Potchefstroom Law Journal* 22, Boraine and Van Heerden, 'To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: A tale of two judgments, *PELJ* (2010) 13, 3 (hereinafter referred to as 'Boraine and Van Heerden, *PELJ* (2010)') and Roestoff and Renke, 'Debt relief for consumers – The interaction between insolvency and consumer protection legislation' (part 2), *Obiter* (2006), 98, 99 (hereinafter referred to as 'Roestoff and Renke, *Obiter*').

[508] Ibid.

[509] See *Ex Parte Ford* 2009 (3) SA 376 (WCC) (hereinafter referred to as '*Ex Parte Ford*'). See also Boraine and Roestoff, 'Revisiting the state of consumer insolvency in South Africa after twenty years: The court's approach, international guidelines and an appeal for urgent law reform' (part 1 and 2) 2014 (77) *THRHR*, 351 - 527, 362 (hereinafter referred to as 'Boraine and Roestoff, *THRHR*').

[510] See Steyn, 'Sink or Swim? Debt reviews ambivalent lifeline – A second sequel to ... A tale of two judgments', *PELJ*, (2012) (15) 4, 190, 191 (hereinafter referred to as 'Steyn, *PELJ* (2012)'), Boraine and Roestoff, *THRHR*, Otto and Otto, *The National Credit Act Explained*, 134, and Maghembe, *PELJ*, 177.

requirements of section 8 (g) and therefore does amount to an act of insolvency.[511] This interpretation seems to be contrary to the aims of the NCA, as it deprives the debtor of the right to exercise his remedies under the NCA and places him in a position, under insolvency, which he may have intended to avoid.[512] Thankfully, the NCAA has resolved this controversy. The NCAA now provides that an application for debt review does not amount to an act of insolvency.[513] However, the NCAA has failed to provide any clarity as to the relationship between debt review and sequestration, and uncertainty therefore still remains.

Another issue of controversy with the relationship between debt review and sequestration is whether debt review serves as a bar to sequestration. In other words, it is unclear whether a creditor is permitted to bring an application for the compulsory sequestration of the debtor's estate while the debtor is under debt review. It is submitted that the sequestration of the estate of a debtor who is under debt review may deprive the debtor of the opportunity of exercising his remedies under the debt review and enjoy the advantages of the NCA, outside the realms of insolvency. This appears to be contrary to the objectives of the NCA. Nevertheless, several judgments have found that a debtor is not immune from being sequestrated while he is under debt review.[514]

5.3 An overview of South African Insolvency law

The main objective of South African insolvency law is to ensure the orderly and equitable distribution of a debtor's estate where his assets are insufficient to meet the claims of all his creditors.[515] The sequestration of a debtor's estate may occur via two mediums – voluntary surrender[516] or compulsory sequestration.[517]

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[511] See *FirstRand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) (hereinafter referred to as '*Evans*'), *FirstRand Bank Ltd v Janse Van Rensburg* (2012) 2 All SA 186 (ECP), and *Nedbank v Andrews and Another* (240/2011) ZAECPEHC 29.
[512] See Steyn, *PELJ* (2012), 204-216, and Maghembe, *PELJ*, 177-179.
[513] See Schedule to the NCAA which provides for the amendment of section 8 (g) of the Insolvency Act. See also *De Klerk v Griekwaland Wes Korporatief Bpk* 2014 (8) BCLR 922 (CC), and Boraine and Van Heerden, *PELJ* (2010) 841.
[514] See *Investec Bank Ltd v Mutemeri* 2010 (1) SA 265 (GSJ), *Naidoo v Absa Bank Ltd* 2010 (4) 597 (SCA), and *FirstRand Bank Ltd v Kona and Another* 2015 (5) SA 237 (SCA).
[515] See Sharrock, *Hockly's Insolvency Law* (2016) 3-4.
[516] See sections 4 and 6 (1) of the Insolvency Act.

One of the essential requirements for both forms of sequestration is the 'advantage to creditors' requirement. The requirement of advantage to creditors in a voluntary surrender application is more onerous than a compulsory sequestration application. One of the reasons for the increased onus is to prevent an abuse of process by enabling debtors to use sequestration as a means to defeat the claims of creditors. The 'advantage to creditors' requirement and the abuse of the sequestration process will be considered in the subsections below.

5.3.1 The 'advantage to creditors' requirement

The prevailing policy in South African insolvency law has always been that debt collection is for the benefit of creditors and not for the assistance of debtors.[518] The 'advantage to creditors' requirement is the most decisive factor considered during a sequestration application as, if this advantage is not proven, a sequestration order will not be granted.[519] A debtor who is unable to prove that sequestration will be to the advantage of creditors will be denied the relief provided by insolvency law, such as a stay in creditor enforcement proceedings (foreclosure), the ability to retain certain exempt assets, and the possibility of enjoying a discharge from liability. The strict application of the 'advantage to creditors' requirement has been criticised by many academics. Rochelle and Evans submit that in certain circumstances a debtor may be 'too poor to be sequestrated' as his estate may not have sufficient assets to yield a dividend or advantage to creditors, and thus will be denied access to the insolvency system.[520] Evans contends that the advantage to creditors policy results

[517] See sections 8, 9, and 12 of the Insolvency Act. A detailed analysis of these procedures is beyond the scope of this thesis. For a detailed consideration of insolvency law, see Steyn, LLD thesis, Brits, LLD thesis, Evans, LLD thesis, Otto, 'The history of consumer credit legislation in South Africa', *Unisa Fundamina*, 16 (1) 2010. 257, Calitz, 'Historical overview of state regulation of South African Insolvency law', *Fundimina*, 16 (2) (2010), 2, and Sharrock, *Hockly's Insolvency Law* (2016).

[518] See Evans, LLD thesis, 3, Evans, 'Does an insolvent debtor have a right to adequate housing', (2013) 25 *SA Merc LJ*, 119, Evans (2018) *De Jure*, 300-314 and Boraine and Roestoff, (2014) *THRHR*, 356. See also *R v Meer and Others* 1957 (3) SA 614 (N), 619, *Hillhouse v Stott* 1990 (4) SA 580 (W), and *Ex Parte Pillay* 1955 (2) SA (N), 309. These cases confirmed that insolvency is not expected to benefit debtors.

[519] See *Craggs v Dedekind, Baartman v Baartman & Another, Van Aardt v Borret* [1996] 1 SA (C) 935.

[520] See Rochelle, 'Lowering the penalties for failure: Using the insolvency law as a tool for spurring economic growth; the American experience, and possible used for South Africa' (1996) *TSAR*, 315-330, and Evans, (2018) *De Jure*, 300-304. Evans and Rochelle submit that the application of the advantage to creditors doctrine leads to the possibility that many debtors are excluded from sequestration and excluded from the possibility of a enjoying a fresh start.

in ‘poorer’ debtors being locked out of insolvency and could fall to be constitutionally foul and infringe upon section 9 of the Constitution - the right to equality.[521] Section 9 guarantees the right to equal protection and benefit under the law. The fact that a ‘poorer’ debtor is unable to access the remedial provisions of insolvency legislation results in there being no equal protection and benefit for such debtors.[522] Evans accordingly submits that the advantage to creditors’ requirement is misconceived and should be dropped altogether from South African insolvency law.

On the other hand, Boraine and Roestoff are of the view that the ‘advantage to creditors’ requirement should remain in the law.[523] However, they argue that proper alternative debt relief measures, affording debtors a discharge, need to be provided in South Africa. The authors submit that when a court considers a sequestration application, the court must balance the interests of the debtor and creditor before making a decision. They suggest that the time has come for the legislature, in addition to the ‘advantage to creditors’ requirement, to implement an ‘advantage to debtors’ requirement.[524]

Despite the challenges mentioned above, it is submitted that the ‘advantage to creditors’ requirement plays a significant role in the insolvency process. The ‘advantage to creditors’ requirement ensures that the insolvency process is not abused by unscrupulous debtors – examples of abuse of process will be discussed in the subsection (5.3.2) below. Nevertheless, the ‘advantage to creditors’ requirement may be seen to be unfairly weighted in favour of creditors. Hence, it is evident that there is a need for this requirement to be reviewed to fairly balance the rights of debtors and creditors.

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[521] Evans, (2018) *De Jure*, 308-313.

[522] See *Sarrahwitz v Maritz* 2015 (4) SA (CC), in this case, the Constitutional Court considered that application of sections 21 and 22 of the Alienation of Land Act 68 of 1981 which distinguished between an instalment-sale purchaser and once-off purchaser in relation to the sale and transfer of immovable property falling under an insolvent estate. The court found that the differentiation between the two category of purchasers were unconstitutional as it had the effect of violating the once-off purchaser’s right of access to adequate housing and possibly rendering the purchaser homeless. See also Evans, (2018) *De Jure*, 314 and Heyns and Mmusinyane, *PELJ*,17-19. Evans contends that a similar argument can be used when judging the constitutionality of the advantages to creditors policy, as this policy differentiates between the various classes of debtors and effectively prohibits ‘poorer’ debtors from entering insolvency thereby violating the right to equality.

[523] Boraine and Roestoff, (2) 2014, *THRHR*, 542.

[524] Boraine and Roestoff, (2) 2014, *THRHR*, 542.

5.3.2 Abuse of process

In insolvency proceedings, an example of abuse of process is a 'friendly sequestration'. Friendly sequestrations are a form of compulsory sequestration and are not illegal or invalid *per se*. However, friendly sequestrations are often used *mala fide* and an abuse of process occurs where the sequestration application is made with the motive, not to liquidate the assets, but to prevent the debtor's liability for payment.[525] The subsections below will briefly consider the concept of 'friendly sequestrations'.

a. Friendly sequestrations

A 'friendly sequestration' can be described as an application by a friendly creditor to sequestrate a debtor in order to assist him in obtaining the relief provided by the insolvency system.[526] This usually occurs when the colluding parties agree that the debtor will write to his 'friendly creditor' stating that he is unable to satisfy his debt. The friendly creditor will then apply for the sequestration of the debtor in terms of Section 8 (g) of the Insolvency Act – an act of insolvency.[527]

Friendly sequestrations are thus seen as an attempt by the debtor and his 'friendly creditor' to avoid the formalities and higher degree of proof required in the voluntary surrender process,[528] and several judgments have found this practice to amount to an abuse of process.[529] As a result of the potential for abuse, courts have adopted strict rules when considering these applications and held that where it is clear that

[525] *Snyman v The Master and Others* 2003 SA (2) 239 (T) is an example of *mala fide* use of the sequestration process. See also Steyn, LLD thesis, 398 and *Beinash v Wixley.*1997 (3) SA 721 (SCA).
[526] Sharrock, *Business Transactions Law*, (2002) 586.
[527] See Steyn, LLD thesis, 398. Steyn has described friendly sequestrations as an attempt 'to pull the wool over the court's eyes'.
[528] See Evans 'Unfriendly consequences of friendly sequestration' (2003) *SA Merc LJ* 437 and Evans (2018), *De Jure*, 300.
[529] See *Epstein v Epstein* 1987 (4) SA 606 (C) (hereinafter referred to as '*Epstein'*) and *Mthimkhulu v Rampersad and Another* 2000 (3) All SA 512 (hereinafter referred to as '*Mthimkhulu v Rampersad')*. See also Evans 'Unfriendly consequences of friendly sequestration' (2003) *SA Merc LJ* 437, Evans (2018), *De Jure*, 300, and Boraine and Roestoff, 2014, *THRHR*, 362.

there is an indication of abuse of court process, courts have discretion not to grant an order.[530]

b. Cancellation of a sale in execution

Over the years, the sequestration procedure has been used by many debtors as a procedure to frustrate a creditor's claim. In terms of Section 5 (1) of the Insolvency Act, upon receipt of a notice of sequestration, a creditor is compelled to stay any and all execution proceedings against the debtor. Hence, if a property is set for a sale in execution and a debtor applies for voluntary surrender, the mortgagee is prohibited from proceeding with the sale of the hypothecated property. If the property is sold in execution by the Sheriff after receipt of a notice of sequestration, such sale is invalid and illegal.[531] This prohibition has been used strategically by debtors in preventing creditors from proceeding with sales in execution, and delaying the foreclosure process.[532] It is submitted that such an approach is unsatisfactory as it unfairly prejudices *bona fide* purchasers at sales in execution and further creates uncertainty and a lack of finality in the sale in execution process.

5.4 Lack of modernisation in the Insolvency system

Since as far back as the 1980s, the South African Law Reform Commission has undertaken extensive reviews of insolvency law in South Africa. Nearly forty years have passed since the initial reviews started, but very little effort has been made by government and the legislature to drive the development of insolvency law.[533] Since

[530] See *Craggs v Dedekind and Other matters* 1996 (1) SA 935 (C), *Van Eck v Kirkwood* 1997 (1) SA 289 (SECLD), *Mthimkhulu v Rampersad*, and *Ex Parte Shmukler-Tshiko* (2013) JOL 29999 (GSJ), *R v Meer* 1957 (3) SA 614 (N), and *Epstein*. See also Evans 'The abuse of process of the court in friendly sequestration proceedings in South Africa' (2002) *International Insolvency Review* 13, and Borainne and Roestoff, '*Body Corporate Palm Lane v Masinge* 2013 JDR 2332 (GNP), Discretion and powers of the court in applications for sequestration', (2015) *De Jure*, 206.

[531] See *Webb v Bergsma* (4) HCG 376.

[532] See *Fourie NO and Another v Edkins* 2013 (6) SA 576 (SCA) (hereinafter referred to as '*Edkins'*), Kgarabjang, 'Effect of a notice of surrender on an insolvent's estate subsequent to a sale in execution', *Obiter* (2015), 171 (hereinafter referred to as 'Kgarabjang, *Obiter'*), and Mars, *The law of Insolvency in South Africa* (2008).

[533] See the South African Law Reform Commission Report, Project 63 Discussion Paper 86 (2000) *Review of the Law of Insolvency*. In 2000, a report from the South African Law Reform Commission found that the Insolvency Act had been amended more than twenty times, but had never been reviewed as a whole.

the enactment of the Insolvency Act, the political and socio-economic landscape of South Africa has changed dramatically by the introduction of a modern Constitution and consumer legislation such as the NCA.[534] The values and principles upon which the Constitution is based radically differ from those of the Insolvency Act,[535] and the issue of the insolvent's home and right to have access to adequate housing is yet to be considered within the context of insolvency law. Chapters Three and Four[536] discussed several cases where the issue of whether foreclosure amounted to an infringement of Section 26 of the Constitution were discussed. The foreclosure against a home was not found to be unconstitutional for various reasons. Yet to be tested by the courts, however, is the question of whether insolvency which will result in the sale of the debtor's home, amounts to an infringement of Section 26 of the Constitution.

5.4.1 Keeping up with international standards

The international standards for insolvency laws and practices have been articulated by the World Bank[537] and other organisations such as UNCITRAL.[538] In January 2011, the World Bank published a report that identified a wide range of desired benefits of, and set out the core legal attributes for, an effective insolvency regime. It maintained that an effective insolvency system should encourage resolution and negotiation. This could be advanced by eliminating the stigma attached to insolvency, lowering the costs of sequestration, avoiding the strict court procedures around insolvency, and allowing for voluntary debt settlements between debtors and creditors. The report categorised three distinct benefits, namely, the benefit for creditors, the benefit for debtors and their families, and the benefit for society.[539] A comparison of the World Bank Report's recommendations with the current South

[534] See Evans (2018) *De Jure*, 315-317.
[535] See *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC), *Brink v Kitshoff NO* 1996 (4) SA 197 (CC), and *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC). See also Evans, LLD thesis, Chapter 11, and Evans (2018) *De Jure*, 298, wherein he discusses several cases where the constitutionality of the Insolvency Act was attacked.
[536] See Chapter Three (3.3) and Chapter Four (4.4).
[537] See Working Group on the treatment of insolvency of natural persons, Insolvency and Creditor/Debtor Regimes Task Force, (World Bank Report 2012).
[538] See also Calitz, *De Jure* (2011), 308, Boraine and Roestoff, *THRHR*.352, Calitz and Burdette, 'The application of insolvency proceedings in South Africa: time for change', *TSAR*, 2006-4, 721 and the UNCITRAL Guide on insolvency law (2015).
[539] See World Bank Report, paras 56-59.

African situation reveals that South Africa does not conform to international standards of insolvency.[540] Over the past two decades the insolvency system has remained creditor oriented, and this is largely due to the courts' strict approach regarding sequestration as a debt relief option. Several scholars submit that in a modern credit driven society, debt relief is of the utmost importance and it is apparent the South African insolvency regime is in urgent need of reform.[541]

5.4.2 The lack of judicial oversight

During the sequestration process, judicial oversight only takes place at the point at which a court considers whether or not to grant the sequestration order. In other words, court supervision only occurs during the application process. At this stage, the court is mainly concerned with compliance with the legislative requirements for a sequestration, and no consideration, or very little, is given to Section 26 of the Constitution (or to any other constitutional rights), or to the fact that the debtor may be rendered homeless by the sequestration.[542] Once a sequestration order is granted, there is no judicial oversight of the ensuing insolvency process. Of particular concern is that there is no judicial oversight during the realisation of the insolvent's home. This is concerning as courts should consider circumstances which may be relevant to the realisation of the home. As seen in the discussion on foreclosure of the home in Chapter Three, Rule 46A provides that the court must consider 'all relevant circumstances' when considering an order of executability of a home. On the other hand, the Insolvency Act obliges the trustee to have the home sold as a matter of course.[543] Accordingly, the notion that a home should be sold as a last resort, and only after consideration of all relevant circumstances, as seen in Chapter Three in the discussion of foreclosure proceedings, is not applied during insolvency. Ironically, in most cases, a sequestration application is brought for the very reason

[540] See Boraine and Roestoff, (2) 2014 *THRHR*, 541, Calitz, *De Jure*, 2011, 308, Evans, LLD thesis, and Steyn, *PELJ* 2012 (15 (4) 217.
[541] See Boraine and Roestoff, (2) 2014 *THRHR*, 541.
[542] See *Absa Bank Ltd v Murray and Another* (8946/02 [2003] ZAWCHC 48. This matter involved an application to evict the insolvents from the property. The court granted the order. However, the court delayed the execution of the order for six weeks to allow the insolvent time to find alternative accommodation. See also Steyn, LLD thesis, 367. Steyn submits that it would be preferable for the housing situation of the debtor and his family to be addressed at the earliest stage of the insolvency process.
[543] Steyn, LLD thesis, 342.

that the debtor owns a home which, when realised, will yield benefit to creditors. The lack of judicial oversight during the foreclosure process was declared unconstitutional in *Gundwana*. It is therefore alarming that there is still a lack of judicial oversight during insolvency proceedings. The Insolvency Act was enacted well before the introduction of the Constitution and the values of the Insolvency Act and Constitution differ radically from one another. It may thus only be a matter of time before the lack of judicial oversight in the insolvency process will be subject to a constitutional challenge.[544]

5.4.3 Continuing insolvency reform: Clause 118 of the Insolvency Bill

The South African Law Reform Commission began working on new insolvency legislation from 1987, and subsequently published several reports and working papers. These efforts culminated in a Draft Insolvency Bill in 2000. One of the main aims of the law reform was to move towards the concept of unified insolvency legislation. However, it has been nearly two decades since the drafting of this bill and its implementation does not seem to be likely in the near future.

The Draft Bill did not add any unique or revolutionary ideas regarding the insolvency system. Early versions of the Bill indicated that the 'advantage to creditors' requirement would remain entrenched in insolvency practice. However, the most significant inclusion in the Draft Insolvency Bill is the proposed 'pre-liquidation composition' in Clause 118.[545] The composition is supervised by the Magistrates' Court and provision is made for an investigation into the affairs of the debtor.[546] The proposed composition appeared to be a new debt restructuring device, and an important feature of the device was that a prescribed majority, by value two-thirds of the concurrent creditors, could bind the minority.[547] The rights of secured and preferent creditors would not be affected by the composition, unless they provide their consent in writing.[548]

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[544] See Evans, LLD thesis, and Steyn, LLD thesis, 343.
[545] The first draft of Insolvency Bill proposed the insertion of section 74X in the Magistrates' Courts Act to provide for a pre-liquidation composition procedure. This proposal was never enacted.
[546] Clause 118 (10)(*c*) of the Insolvency Bill.
[547] Boraine and Roestoff, *THRHR*, 527.
[548] Clause 118 (7) of the Insolvency Bill. See also Calitz, *De Jure* 2011, 306.

Steyn submits that the proposed pre-liquidation composition process, when appropriately remodelled and refined, may provide a way out for over-indebted persons.[549] Clause 118 would pose a realistic alternative to sequestration, as it affords the debtor an opportunity to fulfil his obligations through a restructured debt repayment plan. The claims of secured and preferent creditors remain unaffected, and only the debts of concurrent creditors are restructured and made payable by lower instalments over a longer period. The proposed Clause 118 protects the rights and interests of secured creditors, including mortgagees, as a mortgage agreement would not be part of the composition. This will be attractive to mortgagees, as they will maintain confidence that their claims will not be compromised without their express consent, and therefore they may be less inclined to pursue foreclosure against the home.[550]

5.4.4 Comments on the modernisation of insolvency law

From the analysis above, it is submitted that the Insolvency Act does not conform to internationally recognised principles in relation to the rehabilitation and liquidation of a debtor's estate. Internationally, modern states have moved away from a strict pro-creditor system to a more debtor-oriented approach as this has been advocated by several international guidelines. The INSOL Report provides that effective debt relief for consumers should not only be structured by way of discharge, but help should also be given by finding solutions for adverse financial situations and preventing the debtor from getting into debt again.[551] The INSOL Report further provides that a debtor should be free to choose between liquidation and a rehabilitation procedure.[552] These provisions are not applied in South Africa.[553]

The consensus in academia is that the reviews that have been undertaken of South African insolvency law have been inappropriate.[554] Scholars contend that a review of the entire insolvency policy needs to be undertaken. Several believe that South

[549] Steyn, LLD thesis, 355.
[550] Steyn, LLD thesis, 356.
[551] INSOL Report, 10-11.
[552] INSOL Report, 16. See also UNCITRAL Guide on Insolvency Law (2015), 13.
[553] See *Ex Parte Ford.*
[554] See Van Heerden, Boraine and Steyn, Perspectives on protecting the family home in South African Insolvency law, Chapter 9, *International Insolvency Law*, Reforms and Challenges, 250, and Boraine and Roestoff, *THRHR*, 351.

African insolvency law, which hails from the 1936 Insolvency Act, has moved very little with the times, and is still steeped in a pro-creditor approach.[555] They contend that such an approach is incompatible with modern day consumerism and contrary to the Constitution and the concepts of *ubuntu*. In addition, Steyn and Evans note that there have been no reform initiatives in insolvency law in relation to the home of the insolvent.[556] The South African Law Reform Commission's Report did not contain any proposal for the protection of the home, nor did it make any reference to the home. Steyn and Evans each submit that in every application for sequestration, the right to have access to adequate housing and the interests of children must be addressed by the courts. This will prevent people from being rendered homeless as a consequence of sequestration. Steyn comments that even where a debtor is factually insolvent, realisation of his home should only occur as a last resort, where there are no other alternatives.[557] Evans proposes that measures should be put in place for the housing position of the debtor and his family to be considered prior to an application for sequestration and, in particular, consideration should be given to sections 26 and 28 of the Constitution.

Further, Evans notes that none of the reform initiatives in South Africa considered the possibility of extending the exemption laws. He submits that there have never been comprehensive and substantial drives in South African law to consider the notion of excluded or exempt property on a policy-oriented basis. In practice, the current exemptions are probably insufficient for a debtor to support himself and attain a fresh start.[558] It might become necessary for South Africa to consider broadening its exemption policies and possibly including the home as an asset that is exempt from execution and insolvency. The following section will consider this topic in greater detail.

5.5 Failure to include a home exemption

As a general rule, all property that is owned by the debtor at the date of sequestration forms part of the insolvent estate and can be realised for the benefit of

[555] Boraine and Roestoff, *THRHR*, 352, Steyn, LLD thesis, 407, and Evans LLD thesis, 434.
[556] Steyn, LLD thesis, 407, and Evans LLD thesis, 434.
[557] Steyn, LLD thesis, 408.
[558] Evans, LLD thesis, 432.

creditors. This principle is fundamental to the general policy of South African insolvency law that maximum assets must be recovered and included in the insolvent estate to the advantage of creditors.[559] Although South African insolvency law is based on this policy to the advantage of creditors, a further policy, namely, an exemption policy, of allowing debtors to keep certain assets in their estate has been entrenched through the common law.[560] This policy ensures that the insolvent and his family are not deprived of their dignity and basic necessities, and allows for certain property to be exempt from execution. Exemptions provide debtors with property necessary for their survival, and enable the debtor to rehabilitate himself and protect his family from the adverse consequences of impoverishment.[561]

In South Africa, exemptions are regulated by the Insolvency Act. There have, however, been many problems with the concept of exempt and excluded property, and most result from the difficulty of building a sound policy around these concepts in the context of a strict application of the 'advantage to creditors' doctrine.[562] The 'home' is not included as an asset that is exempt or excluded from execution or from the insolvent estate. Several academics have criticised the failure of the Insolvency Act to provide for any protection to the insolvent's home and submit that this is a major *lacuna* in South African law.[563] Academia contends that the failure to provide a home exemption is inappropriate as it does not provide the debtor with any assets to rebuild his estate.

In *Jaftha*, the debtor argued that Section 67 of the Magistrates' Courts Act was unconstitutional as it failed to exempt the home from creditor execution. Jaftha argued that Section 67 should be amended to exclude execution sales of homes below a stipulated minimum value.[564] The court rejected this argument and found that a blanket exemption would result in a poverty trap, incapacitate the generation of capital and ignore the interests of creditors. Evans has questioned the reasoning of the court's decision in *Jaftha* and argues that exemption of the home is not a novel

[559] Evans, LLD thesis, 250.
[560] Evans, LLD thesis, 251.
[561] See Van Heerden, Boraine and Steyn, *International Insolvency Law*, 251, and Resnick, *Rutgers Law Review* (1978), 653.
[562] See Evans, LLD thesis, Chapter 9. See sections 23, 79 and 82 of the Insolvency Act.
[563] Evans, (2013), *SAMLJ*, 122, and Millman, *Personal Insolvency Law* (2005), 2.
[564] See *Jaftha*, para 50.

idea as the United States and United Kingdom have made provision for the exemption of the home in their policies.[565] He submits that a policy must be established in South Africa to exclude a debtor's home from attachment by creditors and from the insolvent estate.[566] Evans argues that as a starting point, the legislature and/or judiciary should start by postponing the sale of the debtor's home for a particular period if circumstances justify a postponement.[567] Evans contends that, at the very least, it should become an entrenched policy to completely exclude houses of a certain minimum value from the reach of creditors. The availability of these houses as security for capital should be prohibited.

On the other hand, it is submitted that a full home exemption will be undesirable in South Africa. The implementation of a home exemption will have a huge impact on foreign investment and creditor confidence, as, if homes are placed beyond the scope of execution, no creditor will be willing to provide capital for home funding. This could possibly escalate South Africa's housing crisis, and homelessness, as few people will have access to capital to purchase homes without creditor assistance. Further, the adoption of a home exemption could create room for abuse, as *mala fide* debtors and fraudulent schemes could develop which could use the home as a sanctuary for corrupt activity. Hence, it is submitted that a more favourable approach will be the postponement of the sale of the debtor's home. The *moratorium* on the sale of the home will protect the debtor and his home, while still maintaining the interests of creditors. This will allow the debtor sufficient time to recover from his financial misfortune and make suitable arrangements for accommodation for himself and his family. The postponement of the sale of the home will not deny a creditor his rights as the creditor will still enjoy security over the home. However, his right to realise the home will be postponed. In developing such a policy, it will be necessary to consider how foreign jurisdictions have implemented their policies. Accordingly, the next chapter will consider a brief analysis of foreclosure and debt relief laws in foreign jurisdictions.

[565] Evans, (2013) *SAMLJ*, 135. See also Chapter Six of this thesis.
[566] Chapter Six will consider a foreign perspective of the home exemption policy.
[567] Evans, (2013) *SAMLJ*, 142. See also Chapter Four (4.4.3), and *Mdletye* and *Zwane*.

5.6 Conclusion

The main purpose of this chapter was to consider whether the current insolvency law and process provides any protection to the debtor and his home. From the brief analysis above, it is concluded that the South African insolvency system is in urgent need of reform. Current insolvency laws are outdated and provide minimal protection to the debtor and his family, and no protection to the home. The failure to provide a home/foreclosure *moratorium* or home exemption leaves the debtor and his family prone to homelessness, as a result of insolvency. This is unfavourable and it is questionable whether such a policy is constitutional. An urgent need has therefore arisen for law makers to formulate a new insolvency policy. It is submitted that when developing this policy, cognisance must be taken of the principles of the Constitution, *ubuntu* and foreign law standards – and in addition lawmakers should endeavour to create a balance between the rights of debtors, creditors and society. The next chapter will consider the application of foreclosure and insolvency laws in foreign jurisdictions.

CHAPTER SIX

A CONSIDERATION OF FOREIGN LAW

> One of the primary purposes of the Bankruptcy Act [of the United States] is to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from obligations and responsibilities consequent upon business misfortune. [This] gives the honest but unfortunate debtor, who surrenders for distribution the property he owns at the time of bankruptcy, a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt.... This recognises bankruptcy law as a social device that is of utmost importance not only for the fundamental private necessary, but also for the greater public concern.[568]

6.1 Introduction

As indicated in the preceding chapters, mortgage finance is an important element of the housing market in many countries, as mortgage finance plays a significant role in spreading domestic home-ownership and attracting international investment. It naturally follows that mortgage debt enforcement is equally important in a country, as effective debt enforcement encourages strong credit provision, foreign investment and domestic growth.[569] Thus, a complex conflict arises in achieving and protecting homeowner rights, while also protecting and enforcing mortgagee rights. As indicated earlier, finding a utopian balance between mortgagor and mortgagee rights has proven difficult in South Africa and in many other jurisdictions. Historically, although homeowner interests have always been present in legal discourse, creditor interests have always automatically prevailed.[570]

This chapter seeks to consider the different foreclosure and debt relief approaches used by different countries, in particular, the United States of America and England. These countries have been chosen due to their strong connection with South African law and their strong influence on international consumer laws. Although the English and American regulatory frameworks may not suit South African economic conditions in a strict sense, there are similarities between these jurisdictions'

[568] See *Local Loan Co v Hunt* 292 U.S 234 (1934), 246.
[569] See Brits, 'Protection for homes during mortgage enforcement: Human right approaches in South African and English law', (2015) 132, *SALJ*, 566 (hereinafter referred to as 'Brits, (2015) *SALJ*').
[570] See Fox, *Conceptualising Home*, 79-81.

historical, legal and cultural elements.[571] This chapter will also briefly analyse Irish, Spanish and Scottish debt relief laws. These jurisdictions have been chosen as these countries have recently modified their debt enforcement and debt relief laws, and have implemented innovative policies to govern the interaction between mortgagors and mortgagees during the foreclosure process. It is submitted that it will be valuable for South African law makers to consider the approaches adopted in these foreign jurisdictions and to gain ideas from them as to how to develop our current foreclosure process and policies.[572]

6.2 United States of American Law

6.2.1 Background regarding American policies

Early American insolvency and debt recovery procedures were founded on the early English practices and policies of debt slavery and imprisonment. The first forms of American insolvency legislation, namely the American Bankruptcy Acts 1800, 1841 and 1867, were initially directed towards protecting and benefiting creditors. These Acts provided minimal protection to *bona fide* debtors in the form of either discharge or exemptions. Concessions and leniency towards debtors only developed during the 18th century when exemptions and humanitarian issues began to be given consideration in order to protect the debtor.[573]

Today, American consumer debt relief law is regarded as the most unique consumer and debt relief system in the world. The uniqueness of the system is that the citizens of the United States do not regard insolvency as a last resort, and in fact many debtors treat it as a means to another, healthier end, not as the end itself. Unlike South Africa, which is predominately creditor oriented, American policies and principles are liberal and debtor friendly. As opposed to the 'advantage to creditors' requirement which is central in South African law, the American system places

[571] See Calitz, 'Developments in the United States' consumer bankruptcy law: A South African perspective', *Obiter* (2007), 397 (hereinafter referred to as 'Calitz, *Obiter* (2007)'), and Calitz, 'System of regulation of South African Insolvency law: Lessons from the United Kingdom', *Obiter* (2008), 352 (hereinafter referred to as 'Calitz, *Obiter* (2008)').

[572] This chapter does not intend to include an exhaustive exposition of the foreign mortgage and debt relief laws, and will merely outline the most pertinent and relevant laws applicable for the current topic.

[573] See Skeel, *Debts Dominion: A history of bankruptcy law in America*, (2001), 1.

emphasis on the 'fresh start' for the 'unfortunate debtor'.[574] This 'fresh start' policy assists debtors to build up a new estate by allowing them to keep a number of their essential assets.[575] Evans describes American insolvency law as a remedial mechanism with the ultimate aim to manage economic strain and preserve the debtor's estate.[576] He submits that the 'fresh start' policy is important as it prevents a debtor from becoming a debt slave who depends on social handouts.[577]

6.2.2 The governing laws and debt relief mechanisms available

The Bankruptcy Reform Act of 1978 – otherwise known as the Bankruptcy Code

The American insolvency system is currently regulated by the Bankruptcy Reform Act of 1978. This Act is commonly referred to as the 'Bankruptcy Code'. Several amendments to the Bankruptcy Code preceded the current version.[578] The Code essentially expanded the availability of bankruptcy as a remedy to debtors, and expanded the exemptions available to debtors thereby improving the debtor's chance of a fresh start.[579] For the purposes of this thesis, Chapters 7 and 13 of the Bankruptcy Code will be considered, as these chapters relate to the Code's insolvency or debt relief applications.

Chapter 7 provides for what is referred to as 'straight bankruptcy', and contemplates an orderly court-supervised procedure. Essentially, this process involves the trustee collecting the debtor's assets, selling the assets and distributing the proceeds pro-rata to creditors. The advantage of this procedure is that the debtor can keep certain exempt assets and receive a discharge immediately. As soon as the insolvency

[574] Ferriel and Janger *Understanding Bankruptcy* (2007) 1.
[575] Evans, 'A brief explanation of consumer bankruptcy and aspects of the bankruptcy estate in the United States of America', XLIII *CILSA* (2010), 337 (hereinafter referred to as 'Evans, *CILSA* (2010)'). The American system is based on the principles of debtor forgiveness and sympathy as it includes generous exclusions or exemptions, which places certain property out of reach of the creditors.
[576] Evans, LLD thesis, 136-147. See Chapter Six (6.2.3).
[577] See Chapter Five (5.4), and The World Bank Report.
[578] See Evans, LLD thesis, 137, and Pasvogel, 'The Bankruptcy Reform Act 1978 – A review and comments', 3-1, *University of Arkansas At Little Rock Review* (1980). The most radical changes in respect of exempt property where embodied in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 which placed domiciliary and dollar (monetary) limits on some categories of exempt property – this will be discussed in the following subsection.
[579] Rochelle, 'Lowering the penalties for failure: using the insolvency law as a tool for spurring economic growth; the American experience, and possible uses for South Africa', *TSAR* 1996-2, 315, 316 (hereinafter referred to as 'Rochelle, *TSAR* (1996)').

order is granted, a separate insolvent estate is created, and simultaneously, the debtor starts accumulating a new estate.

Chapter 13 of the Code provides for the adjustment of the debtor's debts and income and is known as the 'wage earners plan'. The arrangement is designed for an individual with regular income to enter into a repayment plan with creditors. Under this process, a rehabilitation repayment plan is proposed for a period of three to five years. The advantage of this plan is that the debtor retains control and possession of his assets and they need not be sold to liquidate creditors' claims. Unlike Chapter 7, Chapter 13 debtors do not receive an immediate discharge and are compelled to complete the payments under the plan before the discharge is received. Chapter 13 is often preferable to Chapter 7 as it enables the debtor to retain valuable assets such as the family home. Chapter 13 is similar to debt review in South African law.

One of the successes of the American bankruptcy system is the fact that it is supported by an institutionalised framework consisting of specialised bankruptcy courts, judges and trustees.[580] One of the recommendations of the 1973 Reform Report[581] was that the administration of bankruptcy should be turned over to a new government agency. As a result of these recommendations Congress passed the Bankruptcy Judges, US Trustees & Family Farmer Bankruptcy Act of 1986. This Act provides that trustees must be appointed in every jurisdiction in the United States to supervise all bankruptcy cases filed within a particular district. The primary role of the trustee is to serve as a watchdog over the bankruptcy process and supervise the administration of estates. The specialised court system enables bankruptcy judges to hear any matter arising out of bankruptcy cases. In comparison, South Africa does not have specialised judicial structures for insolvency matters. Further, in contrast to the specialised trustee system in America, the office of the Master in South Africa is not specialised and it has other administrative and regulatory duties, in addition to its insolvency responsibilities and functions. The question thereafter arises as to whether there is a need for specialised insolvency structures in South Africa.

[580] Calitz, *Obiter* (2007), 402.
[581] See the *Report of the Commission on the Bankruptcy laws of the United States* (1973).

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ('BAPCPA')

Due to heavy lobbying by creditor groups criticising the pro-debtor provisions of the Bankruptcy Code, certain amendments were implemented to provide stricter requirements for debtors to obtain debt relief.[582] In addition to these amendments, the BAPCPA was developed to steer bankruptcy policy in the United States away from the debtor friendly approach towards a creditor-oriented or neutral policy. This came about due to the perception that the integrity of bankruptcy process was being tarnished by shrewd and unscrupulous debtors who were exploiting the system.[583] Several debtors were seen to be exploiting the system by manipulating the homestead exemption policies and bypassing certain requirements of the Bankruptcy Code. The BAPCPA was enacted to end these abuses. The BAPCPA retained both the Chapter 7 and Chapter 13 procedures, but abolished the debtor's right to choose which remedy to adopt. The BAPCPA introduced a 'means test' to determine a debtor's qualification for relief in terms of Chapter 7. If the debtor's income was above a certain threshold, the debtor was not eligible for relief under Chapter 7. The new legislation also changed the debtor's obligation to repay in Chapter 13. Instead of proposing their own repayment plans, the new means test was based on the debtor's disposable income and required that all of it be used to repay creditors over five years. Generally, the mortgage obligation was not included in the repayment plan. Hence, the regular and full mortgage repayments had to be maintained. The fact that the mortgagee's security rights remained intact left the mortgagee satisfied while the debtor and his family were able to remain in their home.[584] The BAPCPA brought about fundamental changes to insolvency law and its main intention was to force debtors to make substantial lifestyle changes before they could receive any relief or benefit from insolvency.

Another significant amendment by the BAPCPA was the introduction of mandatory credit counselling and post-petition financial management education. As a pre-

[582] These amendments included section 707, substantial abuse, section 1325, disposable incomes, and section 1329, modification of the Chapter 13 plans. These amendments had the effect of slightly shifting the balance of rights to creditors, while maintaining the fresh start principle. See also Boraine and Roestoff 'Developments in American Consumer Bankruptcy Law' (part 1 and 2) *Obiter* (2000), 28 (hereinafter referred to as 'Boraine and Roestoff, *Obiter* (2000)').

[583] See Boraine and Roestoff, *Obiter*, (2000) 36-39, and *Report of the Commission on the Bankruptcy laws of the United States* (1973).

[584] See Steyn, *De Jure* (2012), 641-642, and Calitz, *Obiter* (2007), 405-407.

requisite to enter into bankruptcy a debtor had to receive credit counselling and perform budget analysis testing. The new credit counselling requirement represented an alternative to formal bankruptcy in the form of out of court repayment plan negotiations. In addition to undergoing credit counselling, the debtor was required to complete a personal finance management course as a precondition to receiving discharge. Further, the introduction of the mandatory pre-action conferences required the creditor to make reasonable efforts to accommodate the debtor by negotiating alternative payment arrangements with him, in order to ensure that the sale of the home occurred only as a last resort. In comparison, South African law does not require a debtor to undergo any financial counselling before or after seeking debt relief. This is problematic as it does not provide the debtor with any resources to assist him to learn from his mistakes.

6.2.3 The Homestead Exemption

The home exemption clause has been applied in the United States for more than a century.[585] The American home exemption is said to have started in Texas in 1838, and this exemption was only allowed for property that was used as a primary residence.[586] The exemption, however, could not be used where the home was fully mortgaged. According to the home exemption, it is the equity in the home, and not the home itself, that is exempt from execution. Therefore, the home exemption is generally not effective against the claim of a mortgagee.[587]

The Bankruptcy Code provides for various State exemptions of property. Section 522 of the Bankruptcy Code provides for the exemption of the debtor's assets. The Code provides for a list of federal exemptions, but provides that States may opt out of these federal exemptions and apply their own State exemptions instead. Most States have elected to opt out of the federal exemptions.[588] Generally, the homestead exemption allows for a fixed maximum value of the debtor's residence, and as a result of States opting out of the federal exemptions, the exemption amount differs from State to State. For example, in Alaska, Alaska Statutes allow for an exemption

[585] See section 522 of the Bankruptcy Reform Act of 1978.
[586] Van Heerden, Boraine and Steyn, *International Insolvency Law*, 259.
[587] Steyn, *De Jure*, (2012), 640
[588] Van Heerden, Boraine and Steyn, *International Insolvency Law*, 260.

of $ 54 000. Whereas, in Florida, Florida Statutes provide its residents with an unlimited home exemption provided the residence does not exceed 160 acres. Similarly, in Texas, the Texas Revised Civil Statutes provide an unlimited exemption for its residents for homes not exceeding 200 acres. Some academics have criticised the application of the exemption laws in the United States as, due to the opting out provisions, some debtors will stand to benefit handsomely from the legislation, while others may benefit a little depending on the legislation of the particular State.[589] Some of the States that provide exemptions require debtors to file a 'declaration of homestead' in order to qualify for an exemption. Evans contends that the homestead legislation is of little value when the home is mortgaged, as secured creditors have preference over homestead equity to the exclusion of debtors and other creditors. Therefore, in South Africa, where the majority of homes are mortgaged, the home exemption will prove to be of little value, unless a provision is developed to exclude the home from the insolvent estate for a particular period during which time the debtor can come to a payment arrangement with his/her creditor.[590]

6.2.4 Comments on American law and comparison with South African law

As explained above, in comparison with American law, which is predominately debtor friendly, South African credit law and policies are creditor oriented, and founded on the principle of ensuring the ultimate advantage to creditors. The debt relief mechanisms available in South Africa are also founded on the principles of full creditor satisfaction,[591] and the primary feature in South African insolvency law is the 'advantage to creditors' requirement. American law has no such parallel requirement. In contrast, American law is founded on the principle of providing the debtor with a fresh start and affording the debtor an opportunity to recover from his financial misfortunate.

American policies relating to insolvency are structured under a unified Act. In comparison, South African insolvency law is scattered across a variety of statutes, namely, the Insolvency Act, the Magistrates' Courts Act, and the Companies Act.

[589] Evans, LLD thesis, 187-195.
[590] Evans, LLD thesis, 195.
[591] Rochelle, *TSAR* (1996), 318.

This inevitably creates uncertainty and lack of uniformity. It is submitted that South Africa should follow the American example and establish uniform or unified legislation dealing with all aspects of insolvency. Further, unlike American law which has an institutionalised insolvency framework, South African law does not have specialised insolvency courts and judges, and it is submitted that this failure has resulted in inconsistency in insolvency practice. Accordingly, Chapter Seven will consider the adoption of specialised court structures in South Africa to ensure consistency in practice.

In South Africa, a statutory discharge is only afforded to a debtor by means of a rehabilitation order after a certain period of time. This is clearly in contrast to the United States where the fresh start and discharge principles are the core of the system. While many may urge the adoption of the fresh start and discharge policies in South Africa, it is contended that this would be unwise. It is submitted that one of the purposes of insolvency and rehabilitation is to ensure that the debtor learns from his financial mistakes, and that creditors receive fair distribution. If the fresh start principle were adopted in South Africa, concern would arise about potential abuse, as this system would allow dishonest debtors to continue their reckless cycle of spending with very little consequence. This would be severely prejudicial to creditors. It is therefore argued that the only way a debtor should obtain a discharge and fresh start is if he undergoes the sequestration process. Such a drastic procedure should ensure that his/her financial errors will not be repeated, thereby supporting economic stability and consumer and creditor equality.

6.3 England and Wales

Early English law also imposed harsh penalties upon defaulting debtors. Debtors were subject to imprisonment or slavery, and under early insolvency law all the assets of the debtor were subject to execution.[592] It was only during the 18th century that English law developed and adopted a more debtor-friendly approach.

[592] *Manby v Scott* (1659) 86 ER 781, 786.

Before 1986, where an insolvent was the sole owner of a family home (this was usually the husband) the family was continually exposed to the risk of his potential insolvency. In certain circumstances, courts would exercise discretion and allow the wife and children's right of occupancy to prevail over the trustee's right to sell the property. A practice thereafter developed where bankruptcy courts would refuse orders for possession and sale of the family home where it was likely to cause serious domestic hardship.[593] As part of the English insolvency law reform in the 1980s, the Cork Committee recommended a system that would delay the sale of the family home by the creditor.[594] As a result, sections 336, 337 and 338 of the English Insolvency Act 1986 were enacted. These sections provide for the protection of the debtor's home.[595] Further, sections 14 and 335A of the Trusts of Land and Appointment of Trustees Act (1996) allow for the postponement of the sale of the family home for up to a year from the date on which it vested with the trustee. After that period a further postponement is allowed in exceptional circumstances. Accordingly, English law developed to provide protection to the family home and acknowledged that the forced sale of the home not only affected the life of the insolvent, but also the insolvent's spouse, children and other occupants.

6.3.1 English foreclosure (repossession) practices

English foreclosure law, or repossession, allows the mortgagee to take immediate possession of the hypothecated immovable property, and to exercise his power of sale and foreclosure over the property to satisfy his claim.[596] The assertion of this possessionary right is one of the main remedies for the mortgagee, and is implemented as a precursor to the realisation of the mortgagee's real right of security by means of a sale with vacant occupation.[597] This principle is one of the fundamental differences between South African and English law.[598] Despite this difference, the policy considerations in South Africa and England are similar. Both jurisdictions allow for the balancing of mortgagors' and mortgagees' rights and

[593] See Van Heerden, Boraine and Steyn, *International Insolvency Law*, 254.
[594] See Cork Report, para 1114.
[595] Sections 336, 337 and 338 of the English Insolvency Act provide rights of occupation for the bankrupt and the bankrupt's spouse.
[596] See Gray and Gray, *Elements of the land* (2009) 763.
[597] Brits, *SALJ* (2015), 569.
[598] Fox, *Conceptualising Home*, 17. See also section 101 of the Law of Property Act 1925. In South African law the mortgagee does not take possession of the property.

acknowledge the need to protect the home and its occupants while equally protecting the creditor's real right of security. The subsections below will consider some of the rules implemented in England to regulate the repossession process.

a. The Mortgage Conduct of Business Rules and Pre-action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in respect of Residential Property

The Mortgage Conduct of Business Rules (hereinafter referred to as the 'MCOB') was issued by the Financial Services Authority (hereinafter referred to as the 'FSA') in 2003. The MCOB governs the way mortgages are concluded and administered in the United Kingdom. Section 13.5 of the MCOB outlines the way in which creditors should deal with debtors who are in default, and provides guidelines as to when litigation can be instituted. The MCOB provides a guideline that the arrear amount on the mortgage must be equivalent to two months before court proceedings can be initiated. The MCOB requires the creditor to deal fairly with debtors who are in default and requires creditors to put in place internal written policies to comply with this duty. The MCOB also requires the creditor to make reasonable efforts to enter into payment arrangements with debtors in respect of the arrear amounts or payment shortfalls after the sale of the property.[599] While the MCOB has been praised for creating new rules of practice for managing mortgage defaults, the main criticism of the MCOB is that the rules are not legally binding and therefore mortgagees are not obliged to comply with the MCOB's terms.[600] The MCOB has thus not been effective in compelling creditors to adhere to certain standards of fairness during mortgage default.

As a result of these criticisms, in 2008, the Civil Justice Council circulated a consultation on a mortgage arrears Protocol which proposed reforms to the repossession process.[601] This resulted in the implementation of 'the Pre-action

[599] See sections 13.3 and 13.6 of the MCOB which provides that in circumstances were a payment arrangement cannot be made, the creditor must allow the debtor to remain in possession of the property, and take steps to market the property privately to obtain the best price for the property.
[600] See Steyn, LLD thesis, 483.
[601] Whitehouse, 'The Mortgage Arrears Pre-action Protocol: An opportunity lost', (2009) 72 (5), *The Modern Law Review*, 793 (hereinafter referred to as 'Whitehouse, *The Modern Law Review*').

Protocol for possession claims based on mortgage of home purchase plan arrears in respect of residential property' (hereinafter referred to as the 'Pre-action Protocol'). The Pre-action Protocol tries to encourage creditors to assist debtors and only proceed to repossession as a last resort. The Pre-action Protocol demands a higher degree of equitable dealing by creditors and encourages telephonic and written correspondence with the debtor prior to the initiation of litigation.[602] The Pre-action Protocol further sets out a number of actions the court would expect creditors to have taken before litigating against the debtor. The Protocol also imposes upon creditors a number of requirements which*, inter alia*, make it compulsory for the creditor to communicate with the debtor, discuss the cause of the default, discuss the debtor's financial circumstances, and consider reasonable methods to repay the arrear amounts.[603]

Many major creditors, in consultation with government during the implementation of the Pre-action Protocol agreed that they would only start mortgage repossession proceedings against a debtor once the arrear amount on the mortgage had accrued for three months.[604] Section 103 of the Law of Property Act 1925 also provides that a mortgagee may not exercise any repossessionary rights until the mortgagor has been in default of payment for at least three months after having received notice to pay. It was hoped that this three month period would give all parties sufficient time to comply with the Pre-action Protocol, and that it would allow debtors an opportunity to seek any financial assistance or any desired relief.[605]

The Pre-action Protocol further provides that the creditor should consider postponing any repossession proceedings if the debtor has taken steps to privately market and sell the property. However, the creditor is not compelled to stay enforcement

[602] Whitehouse, *The Modern Law Review*, 797. Paragraph 2 of the Protocol provides that the main aims of the Protocol is to encourage fair and reasonable conduct between debtors and creditors during the discussion of disputes, and more pre-action contact between the parties to resolve disputes. Para 2.2 and para 5 provide that the parties must communicate and provide information to each other, and take reasonable steps to do so in a way that is clear, fair and not misleading. The Pre-action Protocol requires the creditor to provide the debtor with a regulatory information sheet or the National Homelessness Advice Service booklet on mortgage arrears.

[603] See para 5.2, 5.3 and 7.1 of the Pre-action Protocol.

[604] See Practice Notes on Mortgage Possession Claims (2011), accessed from www.lawsociety.org.uk.

[605] South African law does not have any of these guidelines, in particular, no guidelines are provided to creditors on when to proceed to litigation.

proceedings and the Pre-action Protocol offers no guidance on the factors to be taken into consideration during the marketing of the property. Whitehouse claims that the Pre-action Protocol is an opportunity lost as it has failed to alter the rights and obligations of the parties. Whitehouse submits that the Pre-action Protocol does not significantly impact the behaviour of creditors and has assisted debtors minimally. She argues that most of the recommendations in the Pre-action Protocol were taken verbatim from the MCOB, which have not proven to be effective in curbing mortgage repossessions. Many creditors were unwilling to follow the recommendations of the MCOB in providing to debtors payment holidays or capitalisation of the arrear amounts. Whitehouse submits that the Pre-action Protocol should have made it compulsory for creditors to assist debtors and afford some protection to homeowners and their families.[606]

Despite the failure of the Pre-action Protocol to provide compulsory terms, it does provide some sanctions to creditors who fail to comply with its rules. Paragraph 4.6 provides that the court may take into account the parties' compliance with the Pre-action Protocol when making a decision in a mortgage dispute and when making an order for costs. The court may also impose a sanction on a party who has failed to comply with the Pre-action Protocol, particularly in circumstances where court proceedings have unnecessarily commenced and led to wasted legal costs.[607]

In summary, the Pre-action Protocol specifically requires court enforcement proceedings to be brought as a last resort after all efforts to resolve the default have failed. The Pre-action Protocol requires the creditor to complete a formal checklist and to provide this checklist form to the court setting out his negotiations with the debtor.[608] Steyn submits that a Pre-action checklist similar to the one provided for in the Pre-action Protocol should be compiled and applied in South Africa.[609] Steyn submits that in order to truly uphold Section 26 of the Constitution, a more explicit

[606] Whitehouse, *The Modern Law Review*, 793-797.
[607] Para 4.6 provides that if the debtor has not complied with the Pre-action Protocol, the court may award the creditor with a higher rate of interest. Similarly, if the creditor has not complied with the Pre-action Protocol, the court may reduce the rate of interest due.
[608] Para 9.1 of the Pre-action Protocol requires both creditors and debtors to explain the actions taken to comply with the Pre-action Protocol (the Pre-action Protocol thus demands compliance by both the debtor and creditor).
[609] See Steyn, LLD thesis, 497.

process should be mapped out for creditors and courts to follow as achieved in England by the Pre-action Protocol. It is submitted that elements of the English Pre-action Protocol should be implemented in South Africa. Guidelines or rules for foreclosure process are currently absent in South African law, and this has led to much inconsistency and abuse. However, one of the main criticisms of the MCOB and the Pre-action Protocol are their failure to provide mandatory rules or to impose any meaningful sanctions on creditors who do not comply with their requirements. The Pre-action Protocol makes compliance with its terms optional and non-obligatory. Although the Pre-action Protocol does subject creditors who do not comply with its terms, to adverse cost orders, more meaningful sanctions are required. In this respect, it is submitted that stricter rules of compliance are required and this supports the view that legislation in the form of a Foreclosure Act should be implemented in South Africa. It is suggested that legislation must be created to provide mandatory rules and processes for both debtors and creditors before and during the foreclosure process. A Foreclosure Act will create clear rules and it will set out strict sanctions and penalties for non-compliance for both debtors and creditors.[610]

b. The Administration of Justice Act 1970 and The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950

In Chapter Four, the right to reinstatement in section 129 (3) of the NCA was discussed. English law also provides its debtors with the right to reinstatement in section 36 of the Administration of Justice Act 1970 (hereinafter referred to as 'AJA'). Section 36 of the AJA, entitled 'additional powers of court in action by mortgagee for possession of dwelling house', provides relief to debtors as it provides the court with discretion to stay any possessionary claim and grant a stay on proceedings against debtors facing temporary financial difficulties. Section 36 provides the court with the authority to adjourn proceedings for a reasonable period of time to allow the debtor to pay any sums due or to remedy the default. This provision therefore provides valuable support to a debtor facing temporary financial difficulties.[611] As indicated,

[610] See Chapter Seven for a discussion of the proposed Foreclosure Act.
[611] See Gray and Gray, (2009), 775, and Brits, LLD thesis, 263-267.

section 36 of the AJA appears to be similar to section 129 (3) of the NCA as it is premised on the debtor's ability to pay the arrear amount.

English law is subject to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, and all English courts have an obligation to apply and interpret the common law in line with the Convention. Article 8 of the European Convention governs the exercise of the court's discretion in section 36. Article 8 acknowledges that the content of the 'right to a home' may not be interfered with and provides that although people may not have a positive right to be provided with housing, they are protected against unlawful interference with their existing housing rights. It is submitted that Article 8 is similar, in many respects, to Section 26 of the Constitution. Both Article 8 and Section 26 protect one's home from unjustified interference, but neither explicitly entitles one to the right to housing. In other words, neither Article 8 nor section 26 provides an absolute right. Both provisions provide for qualified rights that can be infringed, or limited, under justifiable circumstances based on the proportionality test.[612] Article 8 sets out the circumstances where interference with housing rights will be justifiable. Essentially, the interference must be prescribed by law, it must be directed at one of the aims of Article 8 (2), and it must be necessary in a democratic society. The conditions of maintaining the economic well-being of the country and protecting the rights and freedoms of others, will cater for the rights of creditors in terms of a mortgage agreement.[613] In other words, the creditor's right to foreclosure or to repossess a property will be justifiable in terms of Article 8.

As with Section 26 of the Constitution, Article 8 also requires that there be a proportionate and legitimate aim to any interference of the right. This requires the court to examine whether the granting of foreclosure or repossesionary orders will be necessary taking into consideration the impact on the debtor and the occupiers.[614] Article 8 requires the court to enquire whether there is a legitimate need for the interference, and whether the interference is proportionate to the goal. Courts are

[612] See Brits, LLD thesis, 274.
[613] See *London Borough of Harrow v Qazi* (2003) UKHL 43, and *Wood v United Kingdom* (1997) 24 EHR CD 69. These cases found that the enforcement of a judgment debt was a legitimate aim which could be justified under Article 8. See also Brits, LLD thesis, 276.
[614] See Brits, *SALJ*, (2015), 570, and Fox, *Conceptualising Home*, 455.

also required to enquire whether there are less invasive ways to achieve the same goal. However, the issue of proportionality between the right to respect the home, and the measures imposed to protect the rights of creditors, has not been explicitly worked out in judgments and thus remains unclear and is still heavily weighted in favour of creditors.[615] As discussed in Chapter Two, in South Africa the proportionality test is provided for in Section 36 of the Constitution. During execution against the home Section 36 requires that the importance of the debtor's right (housing right) must be balanced against the purpose of the violation and the impact of the violation (the enforcement of mortgage rights). As discussed in Chapters Two and Three, the enforcement of mortgage rights against residential property serves a legitimate public purpose and accordingly qualifies as a justifiable limitation of Section 26 of the Constitution. Section 36, however, provides that limitation would not be allowed if there were less invasive ways to achieve the same purpose, and if limitation amounts to an abuse of process. This is the central element of the proportionality test. Clear guidelines for the application of the proportionality test are however currently absent in both South Africa and England. This gap emphasises the need for a clear proportionality test to be implemented for foreclosure scenarios, and it is accordingly submitted that this can be done through adopting a Foreclosure Act. It is submitted that a Foreclosure Act will provide for a proportionality test and set out exact factors for a court to consider in a foreclosure application.[616]

6.3.2 Debt relief measures available

Currently, debtors in England and Wales have two main options in dealing with their debt problems – namely, formal options under the Insolvency Act 1986 (Bankruptcies and Individual Voluntary Arrangements) and informal options (Debt Management Plans).[617] For the purpose of this thesis, the formal options will be considered.

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[615] See Fox, *Conceptualising home*, 480, and Brits, *SALJ* (2015), 572. Brits claims that the postponement of creditor rights may provide a more proportionate response than immediate repossession. He claims that the door is opening for courts to apply a proportionality test in foreclosure cases and it is questionable whether the court's decisions will change the foundation of the mortgage doctrine entitling creditors to an unqualified right to immediate execution.

[616] See Chapter Seven for a proposed proportionality test.

[617] Walters, *INSOL International Insolvency Review,* 22. In terms of informal procedures, parties can enter into a Debt Management Plan (DMP), which involves rescheduling agreements between the debtor and creditors that extends the period for repayment. These plans usually provide for

a. Formal options under the Insolvency Act

(i) Bankruptcy

Early English bankruptcy laws categorised bankrupt debtors as anti-social, immoral individuals who took advantage of creditors.[618] Bankruptcy laws in England therefore imposed harsh penalties, including imprisonment, and even capital punishment, on defaulting debtors. Over the centuries however, there has been a benign progression from the stigmatisation of debtors, towards the recognition that creditor interests would be best served by affording the debtor a fresh start. The main source of bankruptcy in English law is the Insolvency Act of 1986, which was founded on the recommendations from the Cork Report. The Act has been amended several times, and the Enterprise Act has probably had the largest impact to the Insolvency Act.[619] The Enterprise Act brought about reforms that attempted to eliminate the stigma of bankruptcy and establish a more enterprise-oriented culture.[620]

The overall responsibility for insolvency law in England rests with the Department of Business, Enterprise and Regulatory Reform. This responsibility is discharged by members of the Insolvency Service. The Insolvency Service is responsible for establishing insolvency policies and legislation, and also for advising the Ministry on domestic and international insolvency matters.[621] In contrast, in the United States and South Africa, the American Trustee and South African Master of the High Court plays no active role in the establishment of insolvency policy.

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repayment in full over an extended time, or until when the debtor has sufficient income to meet the repayments. It is advantageous, especially for home-owners, in the sense that the debtor does not have to surrender any assets. The downside of this arrangement, when compared to bankruptcy and IVAs, is that it does not stay debt collection efforts, they are not legally binding and there is no guaranteed interest freeze. DMPs usually last for about ten years. The advantage of an informal procedure is that the debtor can avoid the publicity and inconvenience associated with bankruptcy.

[618] Omar, *International Insolvency law: Themes and perspectives* (2008), 18.

[619] See Walters, Personal Insolvency law after the Enterprise Act, (2005) *Journal of Corporate Studies*, 65.

[620] The Enterprise Act is perceived as having made bankruptcy more 'debtor-friendly'. Some concerns were raised that the reduction in the duration of the bankruptcy period to a year would encourage reckless borrowing and cause or contribute to accelerating numbers of personal insolvencies. The Enterprise Act made several changes to insolvency law in England and Wales to liberalise the bankruptcy regime. See sections 265-268 of the Enterprise Act. See also Walters, *INSOL International Insolvency Review,* 9-17.

[621] Calitz, *Obiter* (2008), 361.

A bankruptcy order stays all debt enforcement proceedings by creditors against the debtor.[622] The bankruptcy is terminated by discharge and annulment. Under English law a debtor, the bankrupt individual, may obtain an automatic discharge, one year from the date of the bankruptcy order, provided that the bankrupt's conduct does not give rise to public concern. Thus, the debtor must 'earn' this discharge and fresh start, and there is a considerable *quid pro quo* for a bankruptcy fresh start. It is possible for a bankrupt person to get an automatic discharge within a year only if he/she became bankrupt due to misfortune and if their conduct was not culpable. The discharge releases the bankrupt from all bankruptcy debts, and frees him from the disabilities and disqualifications to which he was personally subject while bankrupt. However, the discharge does not affect the right of any creditor to prove in the bankruptcy any debt from which the bankrupt is released. Also, if a bankrupt's behaviour is socially unacceptable, post-discharge restrictions can be imposed. This may be done through a Bankruptcy Restriction Order ('BRO') or a Bankruptcy Restriction Undertaking ('BRU').[623]

(ii) Individual Voluntary Arrangements ('IVAs')

IVAs are binding consensual agreements between debtors and creditors, and are regarded as a formal debt relief mechanism in English law. IVAs are usually used to restructure unsecured debts and are facilitated by an IP within the parameters of a statutory framework.[624] IVAs are flexible in that they allow debtors to make affordable contributions from assets, ongoing income or third party funds. The duration of the

[622] See sections 287-296 of the English Insolvency Act.
[623] The BRO is imposed by an order of court and the bankrupt may face restrictions for up to fifteen years after discharge. Some of the kinds of behaviour that the court takes into consideration when making a BRO are: failing to produce records to the trustee or OR, and gambling or fraud. The BRU is an undertaking offered by the bankrupt to the Secretary of State, where the bankrupt agrees to be subject to similar restrictions under a BRO. The BRU may be an attractive option in that the bankrupt would avoid the publicity and contested costs of a court hearing, and less severe terms may be imposed as compared to a court order. Post discharge restrictions do not affect the entitlement to automatic discharge, but restricts the debtor's ability to access credit and occupy certain offices.
[624] Walters, *International Insolvency Review*, 5-17. IVAs were also intended to provide a bankruptcy alternative for self-employed traders and professionals. As legal restrictions on un-discharged bankrupts have traditionally impacted through statutory or professional rules on the debtor's freedom to practice various professions, IVAs offer a method whereby professionals could seek formal debt relief without necessarily having to forfeit their professional status.

IVA is not limited in terms of statute. However, in practice, it generally lasts for a period of five years.[625]

Debtors who wish to achieve a resettlement of their debts through an IVA must start by making a proposal to their creditors. An IVA only becomes legally binding if it is approved by more than 75% of the creditors by value.[626] Once an IVA is approved it binds all creditors. The court plays no part in the IVA approval process.[627] There are very few limits on what can be agreed. The only statutory controls are terms that adversely affect the rights of secured or preferent creditors. In other words, an IVA may not contain any terms which affect the rights of secured or preferent creditors to enforce their security.[628] Terms of this nature cannot be approved without the concurrence of the secured creditors who are affected. Therefore, debtors who are homeowners must keep up their full mortgage repayments to avoid repossession.

IVAs have a range of potential advantages for debtors when compared to bankruptcy. Debtors may prefer an IVA to other options, including bankruptcy, for the following reasons:

- IVAs provide a stay on individual debt collection efforts and freeze interest on outstanding debts. They allow for a measure of a discharge upon completion of the plan.
- Debtors can agree to repay what they can afford over a defined time period.
- Debtors can avoid the publicity and stigma attached to bankruptcy.

[625] See Walters, *International Insolvency Review*, and section 388 of the English Insolvency Act for the IVA process.
[626] See sections 257-258 of the English Insolvency Act. See also *The straightforward consumer IVA Protocol* (2016), and Walters, *International Insolvency Review* and *Evaluation* on *the straightforward consumer IVA Protocol* (2016). One of the criticisms of the IVAs is that the plan could only take effect if it was approved by 75% of the creditors. As a result of these challenges, the Insolvency Service took steps to promote co-operation in the system by producing an 'IVA Protocol'. This is a voluntary industry code and it provided that if the debtor's proposal is put forward in accordance with Protocol processes and on agreed standard terms, creditors are expected to approve it. Given that the IVA Protocol is not binding, creditors are not bound to approve a Protocol compliant IVA, however, they were obliged to disclose their reasons for voting against such IVAs. There is thus an expectation that creditors will generally approve Protocol compliant IVAs without modification. An interesting feature of the IVA Protocol is that debtors are required to disclose previous attempts to deal with their financial problems and explain why these were unsuccessful. The implication is that debtors should pursue informal solutions to their problems by communicating directly with their creditors first instead of jumping straight into an IVA. This approach strives to promote the process of informal resolution through bank - customer dialogue in the Banking Code, the MCOB and Pre-Action Protocol.
[627] Walters, *INSOL International Insolvency Review*, 19.
[628] See also Steyn, LLD thesis, 478.

- IVAs, unlike bankruptcies, allow debtors in certain occupational and professional groups, to continue with that occupation or profession.
- Salaried home-owners can keep up their mortgage repayments, and avoid exposing their home to risk. This departs from bankruptcies where the home is at risk.[629]

6.3.3 Comments on English law and comparison with South African law

As discussed above, in comparison with South African insolvency and debt relief laws, which are predominantly creditor oriented, English laws are debtor orientated and built on the premise that the debtor should be assisted during difficult financial times. There are two main debt relief options in England, namely, bankruptcy and the IVA. While, the English bankruptcy process is similar to South African insolvency law, English insolvency law does not have an 'advantage to creditors' requirement. The English insolvency process is straightforward and more lenient than South African law as it provides the debtor with a discharge a year after the bankruptcy order. However, post-discharge restrictions were introduced in England to prevent any abuse of the system by unscrupulous debtors seeking to take advantage of the discharge. The IVA functions as a form of debt repayment plan in England. IVAs give debtors an opportunity for rehabilitation through a fresh start, but they make the debtor 'earn' a fresh start. IVAs allow debtors to pay according to how much they can afford, and this gives salaried consumers a chance to keep their homes, provided they can maintain their mortgage repayments.[630]

England has also adopted several codes and protocols which provide guidelines for both debtors and creditors during repossession proceedings. The MCOB and the Pre-action Protocol provide detailed rules for both parties, in particular creditors, concerning their duties prior to initiating debt enforcement proceedings. However, one of the flaws of the MCOB and the Pre-action Protocol are that these provisions are not law, and therefore it is not compulsory for creditors to follow them. In

[629] See Walters, *International Insolvency Review*. 20-21. Creditors can also benefit from IVAs. They can receive greater returns than in bankruptcy since creditors can request payment for longer than the five year limit in bankruptcies. Creditors would also receive a better reputation if they support IVAs instead of immediately resorting to bankruptcy.

[630] It is submitted that IVAs are similar to South Africa's debt review system, however, under the IVA the mortgage agreement is not included in the debt rearrangement payment plan.

comparison, South African law does not have any guidelines or rules for foreclosure practice. It is accordingly submitted that South Africa can learn from the English practice of adopting rules of practice to regulate foreclosure or repossession proceedings. It is suggested that South Africa should adopt legislative rules for foreclosure practice in the form of a Foreclosure Act, with which both debtors and creditors must comply before, during and after the foreclosure process.

6.4 A consideration of other jurisdictions

The fall in the housing prices during the recession led to a high volume of mortgage defaults internationally.[631] Many jurisdictions adapted their laws to cater for the increase in foreclosures. Several countries, including Scotland, Ireland and Spain implemented new mortgage resolution processes to provide temporary relief to struggling homeowners.[632] Many jurisdictions introduced a foreclosure *moratorium* or temporary freeze on debt payments and interest to assist debtors during the recession. Several states also implemented different debt relief mechanisms to reduce or extend the period of payment on loans.[633] The subsections below will briefly consider how some jurisdictions reacted to the foreclosure crisis, and discuss the mechanisms implemented to assist debtors to keep their homes.

6.4.1 Scotland

The most recent reform in Scottish foreclosure process was the Home Owner and Debtor Protection Act 2010 (hereinafter referred to as the 'HODPA'). This Act was implemented in response to the increased repossessions and consequent homelessness resulting from the 2008 recession. The HODPA, in conjunction with

[631] See Ellen and Dastrup, 'Housing and the Great Recession', (2012), *The Stanford Centre on poverty and Inequality*, Baker, 'The housing bubble and the financial crisis', *Real World Economics Review* (2009) Issue 46, 73, Holt, 'A summary of the primary causes of the housing bubble and the resulting credit crisis', *The Journal of Business Inquiry* (2009) 8.1, 120, and Shiller, 'Irrational Exuberance' (2006), *Princeton Press* (2 ed).

[632] See Andritzky, *IMF Working Paper*, Resolving residential mortgage distress: Time to Modify 14/226 (2014) (hereinafter referred to as 'Andritzky, IMF Working Paper').

[633] Andritzky, *IMF Working Paper*, 9-20. Many foreign banks modified their loan agreements to assist debtors either by refinancing or restructuring the loan. In America, the HOPE Alliance and the HAMP provided incentive payments to creditors to modify loan repayments and assist debtors. In America, approximately ten percent of all mortgage loans were modified under HAMP during the 2009 period. See also Steyn, LLD thesis, 498.

the Conveyancing and Feudal Reform Act 1970 (hereinafter referred to as the 'CFRA'), introduced restrictions upon creditors wishing to enforce their real right of security over immovable property used for residential purposes. The HODPA provides that a court may not grant a repossession application in favour of a creditor unless it is satisfied that certain pre-action requirements have been complied with, and that it is reasonable in the circumstances to do so.[634] The HODPA further provides for the exclusion of a debtor's main residence from repossession up to a certain financial limit.

The CFRA introduced a pre-action checklist which required the creditor to, *inter alia,* provide the debtor with information relating to the arrear amount due and to refer the debtor to debt assistance management; to make reasonable efforts to assist the debtor in developing a payment plan for fulfilment of his obligations and to refrain from any court proceedings while the debtor is taking steps to resolve the default.[635] These requirements are very similar to that of the English Pre-action Protocol. The main difference between the English Pre-action Protocol and CFRA is that the Scottish Pre-action requirements are encapsulated in national legalisation. Thus, the CFRA makes it compulsory for creditors to adhere to its rules, whereas in England the pre-action requirements set out in Protocols and Codes are not binding.

The HODPA also sought to include mandatory debt advice and education to debtors prior to accessing any debt relief procedure, and also linked the debtor's discharge in sequestration to his co-operation during this process. The HODPA further introduced payment holidays in all debt relief procedures and required the freezing of interest and other charges following entry into any debt relief program. Moreover, various statutory provisions allowed the court to delay the sale of the home in certain circumstances.[636] These provisions allowed the court, after consideration of the debtor's affairs, to postpone the realisation of the home for up to three years.

[634] See also sections 23 and 24 of the CFRA. Section 24A of the CFRA provides that the court must take into account, *inter alia,* the nature and reason for the default; the ability of the debtor to settle the default within a reasonable time; the actions taken by the creditor to assist the debtor; and alternative accommodation available to the debtor.
[635] See Steyn, *SLR*, (2015), 146. The HODPA requires the creditor to engage in pre-action contact with debtors on settlement of the arrear amount, prior to initiating foreclosure proceedings, and provide the court with details of these communications.
[636] See section 24 of the HODPA (Scotland) and section 40 of the Bankruptcy Act 1985.

Insolvency in Scotland also recently underwent major reform. The reforms were aimed at updating the credit law and ensuring that it was fit for the modern economy. The reforms sought to reduce the stigma attached to insolvency by encouraging entrepreneurship and reasonable business risk. The resultant changes included changes to the provisions for automatic discharge and the introduction of an element of debt relief into the debt arrangement scheme.

Scottish law also provides for informal debt relief mechanisms via a trust deed for creditors and debt arrangement schemes. A trust deed operates as an informal sequestration as it conveys the debtor's assets and income to a trustee to be administrated for the benefit of creditors.[637] The Debt Arrangement and Attachment Act 2002 provide debtors with a *moratorium* from creditor debt enforcement through a debt arrangement scheme. Debt arrangement schemes allow debtors with multiple debts to enter into voluntary debt payment programmes with their creditors for repayment of their debts over a certain period of time. This programme protects the debtor from enforcement action by creditors, and also allows for interest and penalty charges to be frozen.[638] Debt arrangements schemes are, however, not open for secured claims and thus do not affect mortgage debts.

6.4.2 Ireland

Ireland was one of the countries hit hardest by the recent recession. The Irish government reacted to this crisis by introducing several measures to reduce the forced sales of homes.[639] The reform of Irish insolvency law resulted in three new debt resolution processes, namely the Code of Conduct of Mortgage Arrears (hereinafter referred to as the 'CCMA'), the Mortgage Arrears Resolution Process (hereinafter referred to as 'MARP'), and, Personal Insolvency Arrangements (hereinafter referred to as 'PIA').

[637] McKenzie Skene, *Once more unto the breach: Further bankruptcy reform in Scotland*, Conference paper at the INSOL conference at the Hague, March 2013. Skene submits that the reforms in Scotland sought to achieve greater consistency amongst the debt relief procedures and sought to achieve a fair and just process for the payment of mortgage debt.
[638] See Scotland Debt Arrangement and Attachment Act 2002.
[639] Steyn, LLD thesis, 509.

In 2009,[640] the original version of the CCMA was implemented by the Central Bank. The CCMA applied specifically to mortgaged property that was the primary residence of the debtor and regulated lending activities of mortgagees. The CCMA required mortgagees to deal sympathetically with debtors who were in payment default. It required every mortgage lender to have in place a MARP. One of the main objectives of the CCMA was to increase debtor education and counselling. Similar to the English Pre-action Protocol and Scottish HOPDA, the CCMA prescribes certain rules for creditors to follow should a debtor fall into default. However, unlike the English Pre-action Protocol, the CCMA is a mandatory process. The CCMA provides that the creditor is required to convey a warning to the debtor about the possibility and consequences of repossession, and undertake an assessment of the debtor's finances to consider alternative payment arrangements.[641] The CCMA prohibits creditors from commencing repossession proceedings against a debtor's primary residence until every reasonable effort could be made to agree on an alternative arrangement.[642] The CCMA further provides that at least twelve months must lapse, from the date on which the debtor entered MARP, before the creditor can apply to court to commence legal action.[643] The CCMA thus serves as a foreclosure guideline for creditors and introduces a *moratorium* on foreclosure process.

In 2011, MARP was formally introduced. As indicated above, MARP served as a regulatory guideline for the interaction between the debtor and creditor during the foreclosure process.[644] MARP is set out in the CCMA and is aimed at facilitating repayment arrangements between the parties with the objective of pending foreclosure.[645] A debtor would enter the creditor's MARP once the mortgage was

[640] A revised version of the CCMA was introduced in July 2011 following a report by the Expert Group on Mortgage Arrears and Personal Debt. This version was revised again in 2013. The full Code is available on the Central Bank website www.centralbank.ie.
[641] See Provisions 32-34 of the CCMA. The CCMA required the creditor to consider options of extending the term of the mortgage period, capitalising the arrear amount, and deferring interest and/or instalment payments.
[642] See Provision 46 of the CCMA.
[643] Provision 47 of the CCMA.
[644] MARP has four stages: communication, financial information, assessment and resolution. The process starts by the creditor requesting the debtor to complete a Standard Financial Statement form outlining the debtor's financial position. The creditor will assess the form and determine whether a payment arrangement is possible. Once an arrangement is concluded debt enforcement proceedings are placed on hold.
[645] MARP caters for three instances, namely, when a debtor is pre-arrears (not in arrears, but anticipates falling into default), already in default, or when an existing payment arrangement breaks down.

thirty one days in arrears.[646] MARP made it mandatory for all banks to develop mortgage resolution strategies aimed to assist debtors. These programs, however, had some challenges as many banks experienced difficulties in engaging with debtors, particularly where arrear amounts built up loans for years without any legal consequences due to the *moratorium*. In other words, while a debtor is engaged in MARP the creditor is prohibited from enforcing any repossession proceedings against the debtor.[647] Many debtors used the process as a stalling tactic and frustrated the claims of creditors. As a result, several rules were developed to exclude MARP's application from debtors who are deemed to be un-cooperative.[648] In this respect, MARP equally requires *bona fide* co-operation by both the debtor and creditor, and provides strong provisions on what happens should a debtor be declared un-cooperative.[649] Once MARP no longer applies, the creditor can commence legal proceedings. The creditor is required to inform the debtor in writing of the commencement of legal action and inform the debtor about the options of voluntary surrender and voluntary sale. The repossession proceedings can commence either three months from the date the debtor entered MARP, or eight months from the date when the default initially arose, whichever is later.[650]

The Personal Insolvency Act 2012 also provides for debt relief in the form of a PIA. PIAs were developed to cater for the settlement of unsecured and secured debts,

[646] The CCMA provides that once the arrears are outstanding for thirty one days, the creditor must provide the debtor with a letter advising the debtor of the arrear amount due, the payments missed and explain the MARP process to the debtor. The letter must also alert the debtor to the consequences of non co-operation, and the effect of the default on the debtor's credit rating (this is somewhat similar to the section 129 notice in the NCA).

[647] Andritsky, *IMF Working Paper*, 17. The foreclosure *moratoria* limited creditors' options of pursing delinquent borrowers, and these legal barriers weakened the leverage of many banks in engaging with consumers. The more generous provisions in Ireland relaxed the debtor's willingness to negotiate with creditors. Further, during the *moratorium* period, the condition and value of the home deteriorated and this negatively affected the creditor's security. Banks were required to build new strategies and cultures for loan collections. This involved the introduction of new loan modification options.

[648] A debtor is deemed to be unco-operative if he fails to make full and honest disclosure of information, or deliberately delays in real engagement with the creditor.

[649] See *Review of the Code of Conduct on Mortgage Arrears*, Response to Consultation Paper CP63 by the MABS National Development Limited, January 2013.

[650] See also section 2 of the Family Home Bill 2011. The Bill precludes a creditor from commencing repossession proceedings against a family home unless it certifies, in writing, to the court that it has complied with the CCMA. Section 2 further requires the court to consider the conduct of the creditor in assisting the debtor with restructuring the loan and recapitalising the arrear amount. The Bill allows the court to refuse an order for repossession and instead order that the debtor remain in the family home as a court approved tenant, requiring the debtor to pay rental to the creditor on terms fixed by the court. The Bill is yet to be implemented.

including mortgages up to three million euros. PIAs usually last a term of six years.[651] The Insolvency Service of Ireland has published detailed information and guidelines about PIAs.[652] A debtor applying for PIA must have co-operated with MARP for at least six months and have been unable to agree on an alternative payment arrangement. Majority creditor approval is required to conclude a PIA and after approval the arrangement is administered by the Insolvency Service and approved by the courts. A key feature of the PIA is that, in the majority of cases, the debtor will be able to remain in his home.[653] The PIA appears to have been specifically tailored to facilitate mortgage debts alongside other debts.

The PIA process begins with the debtor and a Personal Insolvency Practitioner (hereinafter referred to as 'PIPs') developing a proposal. The Insolvency Service of Ireland provides guidance and regulates PIPs.[654] The PIP will apply to court for a protective certificate which confirms that the creditor cannot proceed with debt enforcement against the debtor while the PIA is in place. Under the PIA, the debtor repays a percentage of his debts in one monthly payments over a period of time to his PIP for distribution to the creditors. The overall aim of the PIA is to resolve unsecured debt within seven years and restructure the secured debt thereafter. If there is any outstanding unsecured debt after seven years, creditors will write off these debts.[655] Thus, at the end of the process, the debtors unsecured debts will be discharged or settled, and the remaining secured debts will need to be maintained and settled in full. In this way PIA's are similar to South Africa's debt review. However, unlike debt review, which does not place a limitation on the numbers of times a debtor can apply for debt review, PIA's may only be engaged in once during

[651] See sections 120-122 of the Personal Insolvency Act 2012 and Guide to a Personal Insolvency Arrangement, by the Insolvency Service of Ireland, September 2015.
[652] See *'A solution for people with unmanageable debts including mortgages'*, guidelines for PIAs by the Insolvency Service of Ireland.
[653] See '*A solution for people with unmanageable debts including mortgages, by the Insolvency Service of Ireland'*, and Andritsky, *IMF Working Paper*, 18. In bankruptcy, all unsecured debt is discharged after three years, however, mortgage lenders can chose to stay outside bankruptcy. The discharge under insolvency law was reduced to three years to bring it in line with international standards (in comparison, South African insolvency discharge is after ten years).
[654] Personal Insolvency Practitioners are qualified professionals regulated by the Insolvency Service of Ireland.
[655] See '*A solution for people with unmanageable debts including mortgages, by the Insolvency Service of Ireland'.*

the debtor's lifetime. If the debtor defaults on the arrangement, the creditor is entitled to proceed with foreclosure.[656]

6.4.3 Spain

Spanish foreclosure law has been described as the strictest debt enforcement system in Europe.[657] During 2012, Spanish courts authorised over 50 000 foreclosures and court records reveal that from 2006 to 2013 over 500 000 families lost their homes to foreclosure. These statistics reveal that Spain's mortgage laws give particular leverage to mortgagees and other creditors. This is shown by the fact that even after debtors cede their homes to banks, under Spanish law homeowners continue to carry mortgage debt left over after the auction of the home.[658] In this respect, Spanish law is similar to South African law, as both jurisdictions hold the debtor liable for any monetary shortfall after the forced sale of the property. Spanish law is, however, stricter than South African law as in Spain the mortgage debt is excluded from bankruptcy. Further, no fresh start is afforded to Spanish debtors and they cannot even own a car after foreclosure.

During 2012, Spanish citizens undertook several protests after the suicide of nine homeowners who were facing foreclosure of their homes.[659] This public outcry resulted in the reform of Spanish foreclosure law. The Spanish government introduced foreclosure guidelines in the form of a 'Code of Good Practice' for banks to deal with debtors. The Code allowed for a temporary halt or *moratorium* on foreclosure proceedings in the form of a two year freeze on foreclosure. The two year freeze was afforded to single parent families, unemployed debtors, households with children under three years of age, persons with serious disabilities or illness, and families with a household income of less than 1 600 euros. The Code also provided more leeway for debtors to renegotiate mortgage repayments and stay in

[656] The National Mortgage Arrears Resolution Service allows for free legal representation to certain debtors seeking a court review on the PIA, if a creditor rejects the PIA proposal.
[657] Miller, Spain's foreclosure evictions causes string of suicides, 18 May 2013, www.tmillersupport.com (hereinafter referred to as 'Miller, Spain's foreclosure evictions causes string of suicides'). Miller has described the Spanish foreclosure system as draconian and inhumane.
[658] See, Brat and Njork, Spain aims to ease foreclosure laws, *The Wall Street Journal,* 11 November 2012 (hereinafter referred to as ' Brat and Njork, *The Wall Street Journal*').
[659] See, Brat and Njork, *The Wall Street Journal*, and Miller, Spain's foreclosure evictions causes string of suicides.

their homes. These initiatives extended the period of the mortgage and helped the debtor to decrease mortgage payments. Further, Spanish laws have recently been amended to place limits on the amount of interest and costs on defaulting loans, and they allow the debtor up to ten years to repay arrear amounts.[660]

One of the other options exercised in Spain is the 'mortgage to rent' conversation. This allows a defaulting debtor to sell his home to the bank, and remain in occupation as a tenant and pay rental to the bank. The debtor also has an opportunity to repurchase the property once his financial position becomes stable again.[661]

6.4.4 New Zealand

New Zealand has also recently reformed its debt relief laws. The Insolvency Act 55 of 2006 of New Zealand provides for several alternative measures to bankruptcy in the form of proposals, summary instalment orders[662] and the 'no asset' procedure.[663] New Zealand was one of the first jurisdictions that made provision for the 'NINA' - no income, no asset, debtor.

Sections 361 to 377 of the New Zealand Insolvency Act makes provision for NINA debtors. The NINA process usually lasts for a twelve month period, as opposed to the three year period under insolvency. Once the NINA procedure becomes effective, a *moratorium* is placed on debt enforcement proceedings and the debtor is not allowed to obtain any further credit (this is similar to South Africa's debt review). The New Zealand government set up strict entry requirements for the NINA procedure to prevent any cases of abuse.[664] After a period of twelve months, the

[660] Andritzky, *IMF Working Paper*, 12. Many European States have responded to consumer pressure to limit banks' ability to seize homes. Greece has had in place a *moratorium* for several years that prevented banks from foreclosing against homes.
[661] See Andritzky, *IMF Working Paper*, 14.
[662] Summary instalment orders are essentially payment plans between the creditor and debtor agreeing for the debtor to pay a reduced instalment for a period of three to five years.
[663] See Part 5 of the New Zealand Insolvency Act, and Brown, The financial health benefits of a quick NAP-New Zealand's solution to consumer insolvency, INSOL Conference, Vancouver, June 2009, 8.
[664] See section 363 of the New Zealand Insolvency Act. A debtor is required to apply to an assignee and submit a statement of affairs as to his financial position, assets and liabilities. The NINA procedure can be terminated by the assignee if the debtor was dishonest in his application and

NINA debtor will be automatically discharged from the procedure. One of the major driving forces behind the introduction of the NINA procedure was the need to channel asset-less debtors to a more appropriate debt relief measure.[665]

As in South African law, in New Zealand sequestration can be applied for by either the debtor or creditor. The sequestration application also occurs by court application and no *moratorium* is provided to the debtor prior to the court approval of the sequestration. New Zealand, however, does not provide for an 'advantage to creditors' requirement. Hence, in South Africa, a NINA debtor will not be successful with a sequestration application. South Africa does not provide any assistance to the NINA debtor. The NINA debtor, in South Africa, is punished as, if a debtor has no assets to satisfy the 'advantage to creditor' requirement, he is left without any debt relief remedy. Roestoff and Coetzee submit that South Africa can seek guidance from New Zealand in realising that it is not sensible to put a NINA debtor through a costly sequestration procedure. They claim that the current debt review procedure and the proposed pre-liquidation composition will not assist NINA debtors. The no asset procedure in New Zealand offers an uncomplicated mechanism whose simplicity is attractive to a developing country'.[666]

6.4.5 Other States and overall comments

In 2009, the European Commission recognised the severe consequences of foreclosure and compiled a Working Paper[667] to examine the measures in place by member states to react to the increase in foreclosures. The European Commission proposed measures to promote responsible lending with the aim of reducing the rate of residential foreclosures. The Working Paper revealed that in many member states, creditors voluntarily adopted internal policies to assist debtors and avoid

concealed assets. In such cases, the debtor will be liable for penalties and any interest that may have accrued while the procedure was in place.

[665] Coetzee and Roestoff, Consumer debt relief in South Africa – Should the insolvency system provide for NINA debtors? Lessons from New Zealand, *International Insolvency Review* (2013), 34 (hereinafter referred to as 'Coetzee and Roestoff, Consumer debt relief in South Africa').

[666] See Coetzee and Roestoff, Consumer debt relief in South Africa, 37.

[667] See *European Commission Working Paper* – National measures and practices to avoid foreclosure procedures for residential mortgage loans, (2011).

foreclosure.[668] In France, many creditors relied on specialised mediation and arbitration mechanisms to negotiate arrangements with debtors.[669] In France, there is also an official body that acts as an arbiter between the bank and the debtor to work out repayment of the loan. Only if this process fails will the bank take the matter to court.

Certain states, in reaction to the increased foreclosure rates, introduced *moratoria* or loan modification terms to assist debtors. In France, provisions were set in place to allow courts to suspend the debtor's payment obligations for up to two years. In Belgium, the Netherlands and Finland, debtors could seek assistance from the courts by requesting reduced instalment payments, delayed payments, reduced interest rates or recapitalisation of the arrear amounts.[670] In Germany, a debtor can apply for the suspension of any summons served by a creditor if there is a reasonable prospect of repaying the arrear amount within six months. A similar approach is adopted in Scotland, Hungary and Belgium, as courts and creditors usually allow time extensions to debtors to allow them to get their affairs in order and settle the arrear amount within a reasonable time period. This practice also forces creditors to enter into payment arrangements with debtors and to reschedule debts. The European Commission Working Paper found that several states required a minimum period to lapse before the creditor could initiate foreclosure proceedings. This minimum period was vital as it allowed the parties to negotiate with each other to reach a suitable arrangement.[671] This is beneficial to both parties as it allows the debtor time to settle any outstanding payments, and saves the creditor from unnecessary legal costs.

[668] In 2015, the Croatian government announced a fresh start scheme which was aimed at providing a discharge to poor individuals. The Scheme requires municipalities and banks to write off debts of certain debtors. Policymakers that give debtors a fresh start under these circumstances without a debt burden would have long term economic benefits that would outweigh the short term costs. However, the requirement of compelling banks and other private institutions to write off debts could result in higher interest rates and fees. See also *The Feasibility of Debt Forgiveness Programme in South Africa,* April 2015, by the NCR, 8.

[669] See *European Commission Working Paper*, para 3.

[670] See *European Commission Working Paper*, paras 3-4.

[671] See *European Commission Working Paper*, para 5. The Netherlands Code of Conduct on Mortgage Credit provides that foreclosure proceedings are precluded unless there has been consultation between the debtor and creditor and two months have lapsed since the debtor's default.

South African law fails to provide any guidelines to creditors on appropriate timelines on when to, or when not to, initiate litigation. Accordingly, in South Africa different organisations use different rules when considering whether to start debt collection proceedings, and this has created inconsistency in practice. As noted above, this is in contrast to England, Scotland and Ireland, where codes or legislation provide exact guidelines to debtors and creditors as to when foreclosure can be initiated, and the duties of each party during this process.

From the analysis above, it is noted that different countries have adopted different methods to deal with their debt challenges. Overall, all the countries provide some form of forbearance with their debtors. Many states adopt a foreclosure *moratorium,* or debt rearrangement and loan modification policies, to restructure loan repayments. These countries have realised that loan modifications or a *moratorium* could offer a mutually beneficial way to resolve mortgage defaults.[672] Foreclosures impact heavily on the economy of the country, and harsh foreclosure processes may destroy many societal values and structures and result in losses for all the parties concerned. Thus, alternative solutions such as loan modifications, debt repayment plans and *moratoria* can provide substantial economic and social benefits. Internationally, these forbearance procedures have assisted several debtors to keep their homes. These procedures can however attract free-riders, looking to take advantage of the system and to reduce or escape their payments. In this respect, it is submitted that entry requirements be established to prevent any abuse of the system. Chapter Seven will consider the idea of including a foreclosure *moratorium* in South Africa.

6.5 Conclusion and recommendations

When comparing South African law with foreign jurisdictions, it is submitted that, despite the international trend to assist over-indebted consumers, South African laws have remained pro-creditor. Thus, most foreign countries, like England and the United States, have provided greater protection to homeowner interests than are available in South Africa. Although the South African system provides debtors with

[672] Andritzky, *IMF Working Paper*, 23.

some debt relief procedures, in the form of debt review and sequestration, many debtors are excluded from these remedies for various reasons (see Chapters Four and Five). Accordingly, the debt relief options in South Africa have been largely unsuccessful in assisting a debtor facing foreclosure.

The comparative analysis above reveals that internationally there are three main approaches to assisting debtors during foreclosure. One option is the home exemption. This approach is adopted in the United States (as mentioned it is submitted that this option would not be suitable for South Africa). The common feature of the home exemption is that it does not apply to mortgages, and thus does not serve as an effective mechanism for mortgagors seeking to save their homes. The second option involves implementing debt relief measures which restructure unsecured debts, with a partial discharge, while ensuring that the full mortgage instalments are maintained. This is seen with the IVA's in England. Further, it is noted that the debt relief options available in other countries specifically exclude mortgage repayments from the debt restructuring process. Accordingly, while the debtor is under the debt relief program, he is still required to maintain his full mortgage instalments. In comparison with South Africa's debt review under the NCA, mortgage repayments are included in the rearrangement plan, and this can be done without the consent of the mortgagee. It is submitted that the inclusion of the mortgage debt in the debt review process is one of the principal flaws of the South African debt review process.

The third option instituted by many foreign countries is a combination of legislative provisions and rules that protect mortgagors and delay the forced sale of the home. This approach is adopted in England, Scotland, Ireland and Spain, and it is submitted that it may be the best option to implement in South Africa (this option will be discussed further in the following chapter). The introduction of a foreclosure *moratorium* has also been used by many countries to protect homeowners. However, it is submitted that there is a fine line involved in striking a balance between the rights of debtors and creditors, as a prolonged *moratorium* may undermine the debt collection process and lead to lower credit supply and higher mortgage interest rates. The right to foreclosure should not be undermined as the strength of foreclosure rights play a significant role in investor confidence and

mortgage finance rates. However, large scale foreclosures can also have a negative effect on the economy by lowering housing prices and increasing social costs as foreclosure usually results in families relocating or seeking social assistance. Hence, while, a foreclosure *moratorium* may reduce the negative externalities attached to a foreclosure, the *moratorium* creates room for debtors to default on their loans. It is therefore suggested that a debtor should not enjoy an automatic right to a *moratorium*. A debtor seeking a *moratorium* must apply for such an indulgence before a court. It is submitted that although a *moratorium* serves a deep social benefit by shielding families from homelessness, it also has the effect of delaying foreclosure and this may create an incentive for the dishonest to default and create higher default rates. A blanket *moratorium* will create room for abuse, and it is therefore submitted that a debtor seeking a *moratorium* must be required to earn such a privilege.

Further, as noted in section 6.4, several jurisdictions have introduced protocols, codes, or legislation making it compulsory for the creditor to act in good faith during a foreclosure process. These protocols and codes set out rules for both debtors and creditors before, and during, the foreclosure process. For example, America, England and Scotland have introduced pre-action conferences which require the creditor to negotiate with the debtor prior to proceeding to foreclosure. These rules have created guidelines of good practice and also create consistency in application. Ireland is an example of a country that has gone further and set legislative guidelines and rules governing the foreclosure process and interaction via the CCMA and MARP.

Another practice that has developed in some jurisdictions is the ‘mortgage to rent’ conversion. In the United States, investors assist homeowners who are undergoing foreclosure by identifying homes, and offering to buy, not the houses themselves, but the mortgage. Under these ‘mortgage to rent’ programs the debtor sells the home to the bank and the parties agree that the debtor can remain in occupation on the property as a tenant, with the option to buy back the property. Similarly, in England and Wales, the Mortgage Rescue Scheme was introduced in January 2009 and aimed to assist homeowners in financial difficulty who were at risk of repossession and homelessness. The scheme enables social landlords to acquire homes and rent

them back to the debtors. The scheme runs for two years. The FSA implemented protective frameworks to regulate these sales and rent-back schemes, and thereby prevent any exploitation of vulnerable debtors facing foreclosure.

In summary, if South Africa is to become an economic power with international standing, our legal system needs to be developed to bring it in line with international standards. South African policies are steeped in a creditor-oriented approach. In contrast, United States and English policies equally balance the interests of creditors and debtors and take into account the objectives of providing the debtor with a fresh start and with preserving the asset value of the estate. These American and English policies essentially protect the interests of all parties affected by the debtor's financial difficulties. It is therefore contended that South Africa should undertake a reform of its credit laws to bring it in line with these more up-to-date economic and social practices. In particular, reform of the insolvency and debt relief laws is required along with a re-evaluation of the treatment of the home during these processes. In the next chapter, several recommendations will be made as to how to improve South African law and how to balance the rights of debtors and creditors fairly during the foreclosure process.

CHAPTER SEVEN

SUMMARY AND CONCLUSION

> [There is a] need for the enunciation of appropriate policies and principles to be applied when a mortgagee seeks the sale in execution of a defaulting mortgagor's home. Besides obviously serving the interests of lending institutions that require certainty in the administration of their business, it would be in the interests of the broader community for the courts, or even the legislature, to provide a more clearly defined framework within which the required balance is to be struck between, on the one hand, mortgagee's security interest, and on the other hand, homeowner's rights to security of tenure.[673]

7.1 Introduction

This chapter serves as a conclusion to the thesis and is divided into three parts. The first will summarise the preceding chapters, and highlight the flaws and gaps within the current South African foreclosure process. The second will provide detailed and novel recommendations as to how the flaws in the foreclosure process might be resolved. These recommendations will be supported by a proposed Foreclosure Act, which is attached as an annexure to this chapter. The final part of the chapter will provide concluding remarks on the topic of foreclosure in South Africa.

7.2 Summary and Conclusion

As set out in Chapter One, the primary purpose of this thesis was to critically analyse the current foreclosure and debt relief systems in South Africa; to expose the flaws and inefficiencies in these systems; and to provide recommendations as to how these issues can be addressed satisfactorily. The subsequent chapters discussed the different aspects of foreclosure law in detail, and revealed the flaws within each area of foreclosure. The section below briefly summarises the findings of each of these chapters.

The underlying rights of mortgagees and mortgagors were considered in detail in Chapter Two. It was noted that while mortgagors enjoyed strong and clear protection of their real right of security, mortgagees did not enjoy the same clarity and protection with regard to their right to a home or their constitutional right to have

[673] See Steyn, 'Safe as houses', 102.

access to adequate housing. From the analysis of the mortgagor's rights, it was noted that the biggest problem in quantifying the right to a home, or the right to have access to adequate housing, was the absence of a legal definition of 'the home'. The failure of law-makers to provide this definition has presented a hurdle in developing mortgagor rights and enhancing the protection of the home. The emotional elements that attach to a home, which are difficult to quantify, have made the task of developing such a legal definition challenging.[674] On the other hand, the analysis of the mortgagee's rights found that mortgagees enjoy strong protection under the law. The mortgagee's real right of security against the hypothecated immovable property (the home) entitles the mortgagee to seek direct execution against the home in circumstances where the mortgage payments are in default.

Chapter Two further established that current South African legislation and case law does not provided any guidance with regards to the balancing of mortgagor and mortgagee rights, and this has resulted in much uncertainty. The foreclosure against a home results in a conflict between mortgagor and mortgagee rights. Accordingly, it is important that a clear balance be struck between a mortgagor's right to a home, and a mortgagee's right to execution against the home, during foreclosure. It was concluded that the uncertainties expressed in Chapter Two could only be resolved by legislative intervention, and it was recommended that a Foreclosure Act be enacted providing a clear legal definition of the home. The introduction of a Foreclosure Act would also serve the purpose of assisting the courts during the foreclosure process by establishing exact rules to balance mortgagor and mortgagee rights, and thereby recognising the true value of the home, while giving equal importance to the enforcement of legitimate mortgagee rights.

The current rules and practices governing the foreclosure process were considered in Chapter Three. Here the lack of consistency and the uncertainty in the foreclosure process were brought to light along with the need to establish clarity. Several cases were considered, *inter alia, Jaftha, Saunderson, Ntsane, Gundwana* and *Mokebe*.[675] All of these cases maintained differing applications of foreclosure procedure, particularly in relation to the mortgagee's right to direct execution against the

[674] See Chapter Two.
[675] See Chapter Three (3.3).

hypothecated property. In *Saunderson*, the Supreme Court of Appeal held that the registrar possessed the authority to grant monetary judgment and an order for executability against immovable property. However, in *Gundwana*, the Constitutional Court overruled *Saunderson*, and found that only a court is permitted to grant an order of executability against immovable property. In *Mokebe*, the full bench of the South Gauteng High Court held that an application for monetary judgment and an order for executability must be brought simultaneously, and not on a piecemeal basis. The case analysis of foreclosure law in Chapter Three revealed the inconsistency, lack of regulation and lack of any clear guidelines available during the foreclosure process. It was concluded that these anomalies could only be satisfactorily resolved by legislative intervention in the form of the introduction of a Foreclosure Act, which would establish clear rules for the foreclosure process.

Chapter Four considered the application of debt review under the NCA. Several sections of the NCA were considered, in particular Sections 129 and 86. Several inconsistencies and ambiguities within the NCA were revealed which have made the interpretation and application of the Act difficult, consequently prejudicing both debtors and creditors. It was noted that the correct interpretation of some sections of the NCA are still being assessed, in particular Section 129 (3), and that the amendments by the NCAA have not truly resolved its interpretational problems.[676] The chapter therefore concluded that the NCA had failed to provide any effective relief for a debtor seeking to save his home from foreclosure. Thus, it was argued that there is an urgent need for a debt relief mechanism to be established specifically to assist with mortgage debt, and that this relief could best be provided in the form of a foreclosure *moratorium*.[677]

Chapter Five briefly discussed the application of insolvency law in South Africa. This chapter considered the interaction between the Insolvency Act and the NCA, and the need for clarity with regard to the relationship between these two Acts.[678] The chapter further revealed the lack of an up-to date South African insolvency system

[676] See Chapter Four.
[677] As indicated in Chapter Four (4.4.3), it appears that a foreclosure *moratorium* is slowly being considered by the courts. Some courts are postponing applications for monetary judgment and orders of executability against immovable property and providing time for the debtor to reinstate the agreement . See also *Mdletye* and *Zwane*.
[678] See Chapter Five.

and the failure of South African insolvency law to adhere to international rules and trends.[679] The backwardness of our current insolvency system has resulted in it being ineffective in assisting South African consumers who require debt relief.

Chapter Six considered the different debt relief mechanisms available in the United States of America and in England.[680] These jurisdictions provide assistance to their debtors in the form of either a homestead exemption or a foreclosure *moratorium*. Further, it was noted that the debt rearrangement plans offered to debtors in these jurisdictions specifically exclude secured debts. In other words, a mortgage debt could not form part of any debt repayment plan. This was adopted to protect the interests of secured creditors and to ensure that the debtor kept his home during any debt repayment process. This is in contrast to South Africa's debt review process, where the mortgage debt is not excluded from debt restructuring, and this inclusion of the mortgage debt under debt review has been the subject of much criticism.

Several foreign jurisdictions have also adopted codes, protocols or specific legislation to provide rules or guidelines of good practice for both mortgagors and mortgagees during foreclosure process. These rules regulated the conduct of both parties during the foreclosure process and created clarity as to their rights and responsibilities.[681] In comparison, South African law fails to provide any rules or guidelines for their foreclosure process and this absence of foreclosure rules has created much uncertainty and confusion. Thus, it is recommended that South Africa learn from foreign jurisdictions and implement a coherent set of rules to govern foreclosure law. Once again, it is submitted that this can only be done by the introduction of a Foreclosure Act.

Overall, it is argued that the current structures that regulate foreclosure against a home in South Africa are inadequate. The current law fails to provide adequate relief or protection to debtors, and also fails to provide a clear and straightforward process for creditors to enforce their rights. As indicated, the NCA, which governs debt enforcement, has several interpretational gaps and the debt review procedure has

[679] See Chapter Five.
[680] See Chapter Six (6.2 and 6.3)
[681] See Chapter Six (6.4).

not provided effective relief to a mortgagor seeking to prevent the foreclosure of his home. In addition, South Africa's insolvency laws are outdated, and their strict creditor-oriented approach severely prejudices *bona fide* debtors wishing to seek debt relief. Therefore it was evident that both insolvency and debt review processes have failed to serve as effective debt relief mediums for mortgagors, and the lack of regulation in the foreclosure process has resulted in much inconsistency and abuse.

The most appropriate way to resolve these problems would appear to be the introduction of a South African Foreclosure Act which would govern the whole foreclosure process. The main purposes of such an Act would be to balance the rights of mortgagors and of mortgagees fairly during the foreclosure process, and to provide clear rules as to the rights and responsibilities of both parties. Recommendations for the implementation of such a Foreclosure Act are considered below.

7.3 Recommendations

The primary recommendation throughout this thesis has been that a Foreclosure Act should be enacted to address the flaws in the current South African foreclosure process. A Foreclosure Act would create a streamlined process with precise rules, rights and responsibilities delineated for both debtors and creditors. These rules will make it easier for the courts, the debtors and the creditors to establish what circumstances render foreclosure justifiable, or not justifiable. A Foreclosure Act would also provide specific precedents in the form of legal documents for each foreclosure stage, namely, a specialised letter of demand, summons and judgment application. This will create certainty and uniformity in process. (Examples of these precedents are attached as annexures to this chapter). In addition, a Foreclosure Act would introduce novel structures to assist both debtors and creditors to reach suitable alternatives to execution against the home. These recommendations are discussed below.

7.3.1 The introduction of a mandatory pre-litigation resolution process

In Chapter Six,[682] it was noted that several foreign jurisdictions require the mortgagor and mortgagee to engage in pre-litigation/mediation processes prior to initiating foreclosure proceedings. These pre-litigation processes compel mortgagees to communicate with, and to assist, their mortgagors prior to initiating litigation. This process ensures that litigation is initiated only as a last resort. In England,[683] the MCOB and Pre-action Protocol set out guidelines for both debtors and creditors to follow during the repossession process. These provide for pre-litigation contact between the parties, and provide rules as to how negotiations should proceed. The MCOB and Pre-action Protocol are however not binding, and do not compel parties to follow their rules. Scotland and Ireland, on the other hand, are examples of countries that set mandatory rules for pre-litigation contact and mediation.[684] These rules set down exact processes for a creditor to follow prior to proceeding with litigation.

It is submitted that South Africa should follow the example of these jurisdictions and, within a proposed Foreclosure Act, implement mandatory pre-litigation rules for the foreclosure process. In *Ntsane*, Bertelsmann J held that parties should engage in mediation prior to proceeding with foreclosure and further suggested that banks should have their own internal mediation bodies to assist debtors in this respect. Therefore, it is suggested that a Foreclosure Act will require every mortgage lending institution to have an internal pre-litigation negotiation department. The Foreclosure Act would require every mortgagee's pre-litigation negotiation department to require the mortgagee and mortgagor to work amicably together in order to reach a favourable solution to the mortgage arrears by, *inter alia*, rescheduling the arrears; reducing instalment payments for a defined period; lowering interest rates; marketing the selling of the property; extending the term of the loan; or implementing 'mortgage to rent' conversions. It is submitted that only in circumstances where an arrangement is not possible, or where the debtor is uncooperative in the pre-litigation process, should the creditor be allowed to proceed to litigation. Prior to proceeding to

[682] See Chapter Six (6.4).
[683] See Chapter Six (6.3).
[684] See Chapter Six (6.4).

litigation, the mortgagee must complete a pre-litigation checklist and detail the efforts engaged in with the mortgagor to resolve the matter. The mortgagee must provide the Foreclosure Court with a copy of this checklist, and must attach a copy of the pre-litigation checklist to the summons served on the mortgagor. This checklist will assist the courts in determining whether or not all options have been exercised by the debtor and creditor, thereby ensuring that foreclosure is initiated only as a last resort.

7.3.2 The establishment of specialised 'Foreclosure Courts'

The involvement of the courts is paramount in the foreclosure process. This was emphasised by the Constitutional Court in *Gundwana* where the court confirmed that judicial oversight is 'a must' during execution against residential property. Hence, it is important for expert or specialised judges to hear foreclosure applications and apply foreclosure process consistently. One of the reasons for the lack of clarity in the current foreclosure process is the inconsistent approaches applied by various courts in different provincial jurisdictions. The lack of consistency in judicial process and decision-making was set out in Chapter Three.[685] It is argued that a unified court system with specialised judges could resolve the issue of inconsistency and lack of uniformity. It is therefore recommended that every regional and district high court establish a 'Foreclosure Court' (court rooms) specifically for foreclosure matters. This will create a specialised court structure for foreclosure applications and would provide the necessary priority, uniformity and expertise for dealing with these matters.

It is also suggested that legal assistance be provided to home-owners who are unable to afford attorneys, in the form of Legal Aid. Therefore it is recommended that a Foreclosure Legal Aid Clinic (or a foreclosure department within the Legal Aid Clinic) be established at every Foreclosure Court to represent disadvantaged home-owners. This will ensure that debtors are on an equal legal footing with creditors. Foreclosure Courts should also allow debtors to represent themselves should they

[685] See Chapter Three (3.3).

wish. These proposals will reduce the legal costs attached to current foreclosure applications and eradicate the time delays currently experienced at the high court.

7.3.3 The implementation of standardised or precedent foreclosure legal documents

In Chapter Three, the different stages of the foreclosure process were considered. It was noted that each stage contained various flaws.[686] For example, in *Saunderson*, the court found that there was a flaw in the foreclosure summons as it failed to alert debtors to their constitutional rights. In *Mortinson*, the court found that the foreclosure judgment affidavits failed to provide the court with sufficient information as to the status of the mortgage and the property. In *Folscher* and *Fraser*, the court found that the legislature had failed to include a definition for the term 'all relevant circumstances' in Rule 46 (1), and that this resulted in much uncertainty. In an effort to resolve these issues, it is recommended that uniform/precedent legal documents be used for each stage of the foreclosure process. In other words, at each different stage (involving the letter of demand, summons, judgment, writ and sale in execution stages) the creditor would be required to comply with a precedent legal document. The use of precedent foreclosure documents will ensure consistency and clarity in practice. The subsections below will consider each stage of the foreclosure process and provide recommendations as to how certainty can be created with the use of these documents. The letter of demand will be considered first.

a. The 'Foreclosure Letter of Demand'

It is recommended that a letter of demand be formulated specifically for foreclosure matters, namely, a 'foreclosure letter of demand'. (A draft example of this letter is attached as an annexure to this chapter). This letter will replace the current section 129 notice, and will include additional information for the debtor on the following important factors:

- the current balance and arrears on the mortgage;
- the date payment must be made to avoid litigation being initiated;

[686] See Chapter Three (3.3) and (3.4).

- the debtor's constitutional, legislative, and common law rights and remedies;
- the debtor's right to apply for mediation, debt review, pre-litigation negotiation, his right to market and sell the property privately, or to avail himself of any other available relief, for instance a foreclosure *moratorium (*which will be discussed in the following subsections);
- the consequences of foreclosure (*inter alia*, an adverse credit record and judgment listing, and the possibility of his home being sold); and
- his right to reinstatement by settling the arrears due, together with reasonable enforcement costs.[687]

It is submitted that this foreclosure letter of demand would fully advise the debtor of all his rights and remedies, and would make him aware of the seriousness of losing his home if the matter were not resolved. It is suggested that delivery of this document could be affected by various means, *inter alia,* post, fax or email, and that proof of delivery will fulfill the creditor's duty under the Foreclosure Act. This will be an improvement upon the current Section 129 notice. (As explained in Chapter Four, several errors have been experienced in the past with regards to the contents and delivery requirements of default notices.[688]) It is believed that this special foreclosure letter of demand will address each of the current inconsistencies. It is recommended that the foreclosure letter of demand must be sent to the debtor once the mortgage account is thirty (30) calendar days in arrears.

b. The 'Foreclosure Summons'

In *Snyders* and *Saunderson*, the courts established several requirements to supplement a foreclosure summons, including the requirement that the debtor must be advised of his Section 26 constitutional rights. Further, various practice directives and rules were issued in different jurisdictions setting out other requirements for

[687] As discussed in Chapters Three and Four, the right to reinstatement in subsections 129 (3) and (4) are important rights for a debtor. These rights, however, have been the subject of controversy since the *Nkata* judgment and the NCAA. It is submitted that the nature of the right needs to be clearly defined and should be included in the foreclosure letter of demand and the foreclosure summons to make the debtor aware of this right. It is submitted that a debtor should be entitled to reinstate an agreement by settling the arrears due and any reasonable enforcement costs, at any time prior to two days before a sale in execution date, or prior to a sale date being set by the Foreclosure Court. The setting of an exact time-line on when the right to reinstatement will lapse will create clarity in process.
[688] See Chapter Four (4.2).

summonses. For example, in Gauteng the requirement of personal service of summons was recently implemented.[689] It is submitted that a coherent approach is urgently required in all the provincial jurisdictions. Hence, it is recommended that the Foreclosure Act will contain a precedent for the 'Foreclosure Summons' that must be used for all foreclosure matters in South Africa. The Foreclosure Act should provide that a summons can only be served once the mortgage account is three (3) months in arrears, and after the debtor and creditor have engaged in pre-litigation negotiation. The creditor will be required to annex a pre-litigation negotiation checklist to the summons which will detail the efforts made by the debtor and creditor to reach an arrangement.

c. Foreclosure Judgment applications

As discussed in Chapter Three, there are currently no rules or guidelines available to assist courts in determining under what circumstances judgment can or cannot be granted. This omission has resulted in much inconsistency and lack of clarity. The *Ntsane* judgment is an example which illustrates how abuse of process and unfairness can arise due to a lack of guidelines establishing when judgment is justifiable and when it is not. The *Mdletye* and *Zwane* judgments are examples where the courts used their own discretion to postpone the orders of executability against an immovable property.[690] Therefore it is submitted that parameters be set whereby, if the arrear amount is not more than six percent (6 %) of the outstanding balance, judgment and writ should not be granted.[691] An example of a foreclosure judgment application is attached to this chapter as an annexure.

d. Warrant of attachment and Rule 46

The *Gundwana* judgment and Rule 46 confirmed that judicial oversight is required for all matters where execution is sought against a primary residence. In Chapter Three, it was noted that there is a lack of clarity as to the interpretation of 'all relevant

[689] See Chapter Three (3.3).
[690] See Chapter Four (4.4).
[691] The percentage of six is proposed as six percent arrears of a R 1 000 000 mortgage will amount to R 60 000, which should amount to six months of arrears. It is submitted that a creditor should be entitled to judgment when an account is six months in arrears.

circumstances' in Rule 46 and Rule 46A, and the failure of the legislature to provide an exact list of factors for the court to consider during a Rule 46A application, creates room for doubt.[692] This lack of clarity was further exposed in the *Mokebe* judgment. It is thus recommended that the Foreclosure Act will provide a clear set of factors for the court to consider during the application of Rule 46A and any other foreclosure related application.

e. The inclusion of a proportionality test or specific factors for the court to consider during a foreclosure application

In *Jaftha* and *Mortinson*, the court set out several factors for a court to consider during execution against a home.[693] The Foreclosure Act would seek to expand on these factors and would endeavour to draw up an exact list of factors that the court must consider when hearing a foreclosure application. The primary factor for the court to consider is the *bona fides* of each party. However, the following secondary factors can also be considered, *inter alia*:

- whether the rules of court and the Foreclosure Act have been complied with;
- the current mortgage debt and the amount of the arrears;
- whether there are alternative means in which judgment can be satisfied;
- whether there is any disproportionality between the form of execution and other possible means to exact payment. (A proportionality test would consider the current mortgage debt and arrears owed, compared to the value of the property);
- the attempts made by the debtor and creditor to rehabilitate the loan (involving consideration of the pre-litigation checklist);
- the number of times the debtor has been in default;
- the market valuation of the property;
- the financial position of both parties;
- the purpose for which the property is used;

[692] See Chapter Three (3.3).
[693] See Chapter Three (3.3).

- the conduct of both parties and, in particular, their conduct during pre-litigation negotiations;
- the municipal arrears and/or body corporate levies owing, if any;
- the likelihood of the debtor becoming homeless as a result of the order; and
- any other compelling circumstances.

7.3.4 A consideration of 'Mortgage to Rent' conversions

It is submitted that the option of mortgage to rental buy-back conversions should also be seriously considered in South Africa. As indicated in Chapter Six, this option is exercised in Scotland, Ireland and Hungary.[694] The 'mortgage to rent' option will allow the defaulting debtor to sell his home to the creditor at a fair value (or for the balance due on the mortgage) and remain in occupation on the property while paying a fair monthly rental. Such an arrangement will allow the debtor the opportunity to buy back his home if his financial position improves. The 'mortgage to rent' option protects both the debtor and creditor, as the debtor still has a roof over his head, and the creditor has ownership rights over the property and also receives rental from the debtor. It is, however, suggested that strict rules should be set to govern mortgage to rent conversions as any loopholes could create room for abuse by unscrupulous creditors.[695]

7.3.5 The introduction of a foreclosure *moratorium*

From the analysis of foreign law in Chapter Six, it was noted that there were two main forms of debt relief provided to debtors, namely: a homestead exemption, or a foreclosure *moratorium*. As discussed above, it is submitted that South Africa should adopt a foreclosure *moratorium* on the forced sale of the debtor's home. A stay on foreclosure proceedings for a specific period will provide the debtor with adequate opportunity to reach a payment arrangement on the mortgage arrears, or to proceed

[694] See Chapter Six (6.4).
[695] See *Report on the Public Hearing on Housing, Evictions and Repossessions*, 35. One initiative recently undertaken by Absa is a sale product which enables Absa to purchase the property and sell it back to the debtor and restore their ownership. This has, however, received some criticism from communities as they allege that banks are illegally taking over the properties and victimising poor people.

with the marketing and private sale of the property. However, the debtor should not be entitled to an automatic *moratorium* as this may create room for abuse by *mala fide* debtors. It is recommended that a *moratorium* must be applied for by the debtor to the Foreclosure Court. The services of an attorney will not be necessary for this application. It is suggested that a *moratorium* should be provided for nine (9) months and could possibly be extended by a further three (3) months (a maximum period of twelve months). It is believed that this period will provide the debtor with sufficient time to either remedy his default or consider alternatives to foreclosure. A debtor seeking a *moratorium* must complete a precedent motivation checklist, which will be attached to every foreclosure letter of demand and summons. (A copy of this application is attached as an annexure to this chapter). The debtor's *moratorium* application must contain the following information, *inter alia*:

- who is residing on the property, and the ages and occupation/employment of the occupants;
- the length of time all parties have been in occupation of the property;
- the reason for the mortgage falling into default;
- the reason a *moratorium* is sought, and the debtor's intentions during and after the *moratorium* period;
- the debtor's action plan to remedy the arrears;
- a detailed account of the debtor's income and expenditure;
- the total household income;
- an inventory of the debtor's movable property;
- whether the debtor owns any other immovable property or has any alternative accommodation available;
- the current valuation of the property;
- the current balance owing of the mortgage agreement;
- the remaining term of the loan agreement; and
- the amount of any outstanding municipal rates and levies.

The application for a foreclosure *moratorium* must be delivered to the creditor. A creditor can oppose the granting of the *moratorium* on the grounds that:

- the debtor has acted *mala fide* (the debtor has been dishonest, un-cooperative in negotiations, has committed fraud or intends to vandalise the property); and
- the debtor and his family do not reside on the property (the property is not their primary residence).

It is submitted that the courts should have discretion to grant the *moratorium* after consideration of all the relevant facts. It must be acknowledged that a *moratorium* creates delays in creditor enforcement, and opportunities for delinquent debtors to abuse the system. Hence, the granting of a *moratorium* should only be provided as an indulgence to a *bona fide* debtor seeking assistance in saving his home and recovering from his financial difficulties. Once a judgment has been granted the debtor will lose his right to seek a *moratorium*. A debtor can only obtain a *moratorium* once during the lifetime of the mortgage.

7.3.6 The introduction of mandatory consumer education

The Banking Association of South Africa has acknowledged that there is a lack of financial awareness and understanding about issues of borrowing and lending on the part of many consumers. As discussed in Chapters Two and Three, many debtors are unaware of the legal terms in a mortgage agreement and also unaware of their rights and remedies should they fall into default. Financial education has been a huge challenge in South Africa, and the lack of it is detrimental both to the debtor and to the economy as a whole. It is thus submitted that an in-depth educational program needs to be established for consumers in South Africa.

It is also submitted that the American experience of adopting mandatory debt counselling education is commendable. As discussed in Chapter Six,[696] American policies require debtors who have undergone a debt rearrangement plan, to undertake a financial training course to assist them manage their debt. These courses assist debtors in understanding consumer laws, and in managing their debts and preventing them from defaulting on their loans in the future. It is recommended

[696] See Chapter Six (6.2).

that these programs be adopted in South Africa, as many debtors are unable to understand consumer laws and policies, and many fail to structure personal debt management plans. Accordingly, it is recommended that every debtor who applies for debt review or a foreclosure *moratorium* must undertake a debt management course. This course should educate the debtor on financial planning skills and expand his/her knowledge of consumer laws. However, it is submitted that educating debtors who are already in financial trouble will not fully resolve the challenge of poor consumer education in South Africa. Thus, it is recommended that consumer education courses be also introduced at a high school level. This would equip the next generation of consumers to manage their finances more effectively. It is therefore suggested that all high schools provide their pupils with a financial planning course of one year duration. This recommendation could be a joint venture with the Department of Education and the Department of Trade and Industry. This venture would expand the knowledge of consumer law and equip the youth to manage their finances when they are out of school. Overspending and mismanagement of income is a major problem in South Africa and gaining financial knowledge at an early age will help to prevent the current problem of over-indebtedness from developing further.

7.3.7 Monitoring of the Sale in Execution process

In Chapter Three, the sale in execution process was discussed and it was noted that the current process has some loopholes which create room for abuse.[697] It is accordingly suggested that the 'sale in execution' process needs to be more strictly regulated and that this could be achieved by introducing judicial oversight into the process. It is therefore recommended that all sales in execution must be facilitated by the Foreclosure Courts and, in particular, by the registrar of the court in partnership with the Sheriff. A creditor wishing to proceed with a sale in execution must make an application to the Foreclosure Court for a sale date. The Foreclosure Court, in conjunction with the Sheriff, will provide the creditor with a date. The Sheriff will thereafter attend to the service of the sale notices to the debtor. It is recommended that further advertising of the auctioned property is necessary to

[697] See Chapter Three (3.4).

increase the number of bidders present at the auction. Hence, a week before the sale, the sale in execution will appear on the court roll and court notice boards to make interested parties aware of the sale. On the day of the sale, the Sheriff, in partnership with the registrar, will conduct the auction in court (a court room). It is submitted that since the auction proceedings occur in court with two separate independent parties, there is limited possibility of any collusion, corruption or abuse.

With regard to the amendments by Rule 46A for the court to set a reserve price, the writer is not in favour of this amendment. It is submitted that the structure of the auction process should not be changed, and the property at a sale in execution should be sold to the highest bidder on the day of the auction. The calculation of a reserve price creates accounting and statistical applications in the law, and this should be avoided. Nevertheless, it is suggested that sales in execution should not be allowed if the outstanding debt is less than twenty percent (20%) of the market value of the property, or if the arrears due are less than for a twelve (12) month period. It is submitted that in such a scenario, the creditor is not at any severe risk and it would be easier to recover his debt from the execution of movable assets.

7.3.8 Introduction of a Foreclosure Regulatory Body (FRB)

It is submitted that one of the main reasons why South Africa has a much higher foreclosure rate than other countries is that our laws fail to regulate the behaviour of mortgagees. Accordingly, it is suggested that a Foreclosure Regulatory Body (FRB) be established to monitor both mortgagors' and mortgagees' compliance with the Foreclosure Act. It is envisaged that the FRB will serve a similar function to the NCR with the NCA. The FRB will fulfil the role of governing consumer foreclosure disputes, complaints and queries, and will have the authority to issue penalties to both debtors and creditors who fail to comply with the standards in the Foreclosure Act. It is also envisaged that the FRB will play a role in enhancing consumer education by engaging in national workshops and programs in rural areas and public schools, and alert consumers to their rights and remedies.

7.4 Concluding remarks

The purpose of this thesis was to discuss the flaws in the foreclosure process and to provide recommendations as to how these flaws could be resolved. The thesis considered an array of examples from the literature and from court decisions that discussed foreclosure and debt relief processes in South Africa. The literature and case law revealed the inconsistencies in the foreclosure process and brought to light the need for a more coherent approach to be established. It was evident that the only way the flaws in the foreclosure process could be resolved was by the implementation of a Foreclosure Act.

A Foreclosure Act would create consistency in the law by establishing a uniform framework for the foreclosure process. Most importantly, the implementation of a Foreclosure Act would give effect to Sections 25 and 26 of the Constitution by protecting and providing clarity as to the rights and responsibilities of mortgagors and mortgagees alike. In conclusion, a Foreclosure Act would create certainty in the law and provide clear protection for mortgagors, mortgagees and society as a whole. Moreover, such an Act would be beneficial to the country's economy and could increase investor confidence. It is therefore evident that there is an urgent need for such an Act. Indeed failure to create such a Foreclosure Act could possibly result in a social and economic crisis.

A draft proposal of a Foreclosure Act is attached as an annexure to this chapter.

ANNEXURE

THE FORECLOSURE ACT PROPOSAL

The draft sections below serve as mere indicators of how the Foreclosure Act should be structured and what it should include.

Full title

The Foreclosure Act No 1 of 2019: The Foreclosure Act

Section 1: Purpose of the Act

The purpose of the Foreclosure Act is to create clarity and uniformity on the foreclosure process in South Africa. There has been a lack of consistency in the application of foreclosure law and process in the different provincial divisions and this is mainly due to the lack of national legislative governance during foreclosure of a home. The Foreclosure Act seeks to establish uniform rules to be applied during the foreclosure process, and to address the current inconsistencies in the execution against hypothecated immovable property. The ultimate goal of the Foreclosure Act is to ensure a fair and just foreclosure process, where execution against the home is resorted to only after all reasonable alternatives have been exercised.

The current legal process provides a minimum standard. However, the spirit of the Constitution and the concept of *Ubuntu* are absent, and must be adopted and embraced by all the role players in the foreclosure process.

Section 2: Definitions

‘The home’ – the home is any immovable property which is utilised as a primary residence for its occupants.

‘Foreclosure’ - the legal procedure governed by the Foreclosure Act used to execute against hypothecated immovable property in terms of a mortgage agreement.

‘Foreclosure *moratorium’* - a specific period of grace provided to the debtor wherein the creditor is prohibited from proceeding with debt enforcement (foreclosure) against the debtor and his home.

‘The Foreclosure Court’ – a specialised court structure within the District and Regional High Court exclusively adjudicating foreclosure disputes.

‘The Foreclosure Regulatory Body’ – a body established in terms of the Foreclosure Act to regulate the conduct of both debtors and creditors during the foreclosure process.

Section 3: The foreclosure letter of demand

When a mortgage is thirty (30) calendar days in default, the creditor must send a foreclosure letter of demand to the debtor. A precedent foreclosure letter of demand is annexed in the Schedule of this Act. This foreclosure letter of demand can be sent by either: registered post, telefax or email. Proof of delivery that the notice has been sent to the correct address chosen by the debtor will serve as fulfilment of this section.

Section 4: Pre-litigation resolution process

The Foreclosure Act requires every mortgage lender to establish an in-house pre-litigation negotiation centre to mediate all consumer arrear queries.

After the creditor has sent a foreclosure letter of demand in terms of section 3, the creditor’s pre-litigation negotiation centre must contact the debtor and *bona fide* seek alternatives to foreclosure.

The creditor and debtor must collectively, and in good faith, consider the options of, *inter alia*, reducing the monthly instalments, reducing the interest payable, recapitalising the arrears, extending the term of the mortgage, converting the mortgage into a rental option, or selling the property privately.

It is mandatory for pre-litigation negotiation to take place prior to debt enforcement (foreclosure) at the Foreclosure Court. Failure upon the part of the creditor to *bona fide* engage in pre-litigation negotiation will result in a penalty being issued against the creditor by the Foreclosure Regulatory Body. Failure upon the part of the debtor to *bona fide* engage in pre-litigation negotiation will entitle the creditor to immediately proceed with litigation, and will result in the debtor losing his right to claim a foreclosure *moratorium*, provided for in section 6 of this Act.

Should the pre-litigation negotiations be unsuccessful, or should the debtor be un-cooperative in engagement, the creditor can proceed with issuance of a foreclosure summons and must provide the Foreclosure Court with a pre-action checklist detailing his pre-litigation negotiation efforts.

A creditor can only proceed to issue a foreclosure summons once the payment default on the mortgage is evaluated to be three (3) months in arrears. However, if

the debtor is un-cooperative in the pre-litigation negotiations, the creditor may proceed with foreclosure prior to the account arrears reaching three (3) months.

A debtor will be considered to be un-cooperative in pre-litigation negotiations if he, *inter alia,* fails to provide the creditor with any requested information within a period of seven (7) working days, provides the creditor with incorrect or fraudulent information, fails to engage with the creditor in a *bona fide* manner, or refuses to communicate with the creditor.

Section 5: The Foreclosure process

The foreclosure letter of demand. Once a mortgage account is thirty (30) calendar days in arrears, the creditor must send the debtor a foreclosure letter of demand. This letter can be delivered by: registered mail, fax, or email. The foreclosure letter of demand must alert the debtor to his rights and remedies and his duty to engage in pre-litigation negotiation with the creditor.

The foreclosure summons. Should pre-litigation negotiation prove unsuccessful and the account fall three (3) months into arrears, the creditor can proceed with litigation and serve a foreclosure summons upon the debtor. The creditor must complete and annex a pre-litigation checklist to the foreclosure summons and indicate the efforts made to engage with the debtor and avoid foreclosure. Service of the summons is to be effected by the Sheriff of the High Court to the nominated *domicilium* address (personal service of the summons is not required).

The foreclosure judgment and writ application. An application for judgment can be made by the creditor once the arrears on the mortgage is equal to six percent (6 %) of the current balance, or the account arrears be equivalent to six (6) months in arrears. Once court judgment has been granted, a debtor will not be allowed to apply for a foreclosure *moratorium*.

During the judgment and attachment application the court is required to consider the following factors before granting an order, *inter alia:* compliance with the Foreclosure Act and relevant legislation; the outstanding balance and arrears due; alternative means in which judgment can be satisfied; the conduct of both parties during pre-litigation negotiation; the valuation of the property; the purpose for which the property is used; the outstanding rates and levies; the likelihood of the debtor being homeless; and any other compelling circumstances. The conduct of the parties will be the primary factor that must be considered by the court.

The sale in execution – the creditor is required to apply to the Foreclosure Court for a sale in execution date. An application for a sale date can only be made once the arrear amount due is over twenty percent (20 %) of the outstanding balance and/or

twenty percent (20 %) of the market value of the property, and/or equivalent to twelve (12) months in arrears.

The creditor's application for a sale date will be assessed by the Foreclosure Court and a sale date will be set. The sale must be advertised in the Government Gazette and local newspaper in the jurisdiction of the property thirty (30) calendar days prior to the sale date. A week before the sale date, the sale will appear on the Foreclosure Court roll and notice boards.

The sale will be conducted by the Registrar of the Foreclosure Court in partnership with the Sheriff of the High Court.

Once a sale in execution date is set, the debtor will be prohibited from reinstating the agreement in terms of section 129 (3) of the National Credit Act.

On the day of the sale in execution, the property will be sold to the highest bidder. The opening bid for all auctions will be set at R 50 000.

Section 6 – The foreclosure *moratorium*

A debtor can apply to the Foreclosure Court for a foreclosure *moratorium* for a period of nine (9) months.

An application for a foreclosure *moratorium* can be made by the debtor at any time before judgment is granted by the Foreclosure Court.

The Foreclosure Court may consider the following circumstances during the application for a foreclosure *moratorium*: *inter alia,* the occupants on the property and the period of their occupation; the reason for the arrears; the reason why a *moratorium* is sought; the debtor's action plan to remedy the arrears; the debtor's income and expenditure; the current valuation of the property; the outstanding balance on the mortgage; and the remaining term of the mortgage.

A creditor can oppose the granting of a foreclosure *moratorium* on the grounds that, *inter alia*, the debtor's application is *mala fide* or the property is not used as a primary residence.

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG ACTING IN ITS CAPACITY AS A FORECLOSURE COURT IN TERMS OF THE FORECLOSURE ACT)

Case No. #

In the matter between:

ABC BANK Plaintiff

and

DEBTOR
Defendant

INDEX – PRECEDENT FORECLOSURE DOCUMENTS IN TERMS OF THE FORECLOSURE ACT

Item

APPLICATION FOR A FORECLOSURE MORATORIUM

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG ACTING IN ITS CAPACITY AS A FORECLOSURE COURT IN TERMS OF THE FORECLOSURE ACT)

Case No. #

In the matter between:

ABC BANK Plaintiff

and

DEBTOR
Defendant

APPLICATION FOR A FORECLOSURE MORATORIUM IN TERMS OF SECTION 6 OF THE FORECLOSURE ACT

I, the undersigned,

DEBTOR'S NAME and IDENTITY NUMBER

do hereby make oath and say that:

1. (The debtor to indicate his/her status, *inter alia*, employment, marital status, age etc.)

2. **History of the mortgage:**

2.1 (Debtor to indicate how the mortgage originated, and period of the mortgage. and the payments made. Further, provide information as to

the period of time the property has been used as a primary residence and the number of occupants on the property, their occupation and ages).

2.2 (Property address to the provided – street address and erf number).

3. **Reason for the arrears**

3.1 The debtor must provide a detailed explanation for the reason the mortgage fell into arrears and the reason for his current financial predicament e.g. unemployment, divorce, etc (income and expenditure and supporting documents to be **attached**)

4. **Action plan during the foreclosure moratorium period**

4.1 The debtor must provide detailed information as to how he intends to rectify his default during the *moratorium* period, *inter alia,* whether the property will be marketed and sold privately; his efforts to actively seek employment; whether he is expecting to receive funds which will settle the arrear amount and/or full mortgage.

5. **Efforts to engage with the creditor**

5.1 The debtor must outline the efforts he has made to communicate with his creditor and engage in a payment or mortgage rearrangement plan. A copy of the pre-action checklist must be attached.

6. **Any other compelling reasons or circumstances**

6.1

_____

DEBTOR'S NAME

I HEREBY CERTIFY that the Deponent has declared that s/he knows and understands the contents of this Affidavit and that to the best of his/her knowledge and belief it is the truth, which Affidavit has been signed and sworn to before me at on this the day of 2018 and that the provisions of the Regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, have been complied with.

_____

COMMISSIONER OF OATHS

NAME:

ADDRESS:

FORECLOSURE LETTER OF DEMAND IN TERMS OF SECTION 3 OF THE FORECLOSURE ACT

Date:

Debtor's Name xx
Address xxx per email

Dear Mr and Mrs xxx

'Without Prejudice'

LEGAL NOTICE IN TERMS OF SECTION 3 OF THE FORECLOSURE ACT
ACCOUNT CURRENT BALANCE – R X
ACCOUNT CURRENT ARREARS – R X

We refer to previous correspondence in respect of the arrears on your account and confirm that your account has now fallen more than thirty days (30) in arrears. We confirm that your account is R XXX in arrears and your currently monthly instalment is R xxxx.

Please take note that your account has now been escalated to the pre-litigation negotiation department who will be contacting you to engage in pre-action negotiation in terms of section 4 for the Foreclosure Act.

In order to rectify your default, you are now required to:

- pay the default arrears within ten (10) business days of delivery of this letter, and reinstate the mortgage agreement in terms of section 129 (3) of the National Credit Act; or
- contact our offices directly to discuss the possibility of making a payment arrangement in terms of section 4 of the Foreclosure Act.

Should you fail to settle the outstanding arrears, and fail to engage in pre-action negotiation with us, we confirm that we will instruct our attorneys to proceed with foreclosure in terms of section 5 of the Foreclosure Act. Kindly note that attorney legal fees will be incurred herein, and the resultant legal action may result in the forced sale of your home.

Should the arrears not be settled, or a payment arrangement not be finalised, the Sheriff of the High Court will be attending your property to serve a "Foreclosure Court Summons" upon you. Should an arrangement still not be formalised and the

account remain in arrears, we will proceed to enforce our rights in terms of the mortgage agreement and obtain “Court Judgment” against you for the full outstanding balance on your account (kindly note that in terms of section 11 of the Prescription Act 68 of 1969, this judgment will remain against you for a period of thirty (30) years and will negatively affect for credit ratings and scores). Thereafter, we will proceed to obtain a “Writ and Attachment” and instruct the Sheriff of the High Court and Foreclosure Court to proceed with a Sale in Execution / Auction Sale against the hypothecated immoveable property.

We sincerely hope that all of the above processes will not be necessary. We accordingly request you urgently to settle the full arrears on your account, or to contact us to formalise a payment arrangement to avoid any further legal action being taken against you.

Regards,

FORECLOSURE SUMMONS AND PARTICULARS OF CLAIM IN TERMS OF SECTION 5 OF THE FORECLOSURE ACT

PARTICULARS OF CLAIM

1 **PARTIES**

1.1 The Plaintiff is **CREDITOR'S FULL DETAILS** (full trading name and CIPC and NCR registration number) with principal place of business at x (relevant certificates must be attached).

1.2 The Defendant **DEBTOR'S FULL NAMES AND ID NUMBERS** a major male/female of full contractual capacity, with *domicillium citandi et executandi* chosen by him/her at: XXX

2 **LOAN AGREEMENT**

2.1 On or about the **(date and place), the DEBTOR and CREDITOR**, entered into a written loan agreement of which a copy is attached hereto as annexure **"X"**.

In terms of which it was agreed that:

2.1.1 The full amount outstanding, from time to time, would bear interest (creditor to explain the **interest calculations** charged e.g. Jibar, Repo or Prime rates)

2.1.2 As security for the obligations of the DEBTOR, the DEBTOR authorised the registration of a mortgage bond over:

a. A PROPERTY CONSISTING OF –

(a) **FULL DETAILS OF THE HYPOTHECATED PROPERTY, ERF NOS, PROPERTY ADDRESS, SIZE OF THE PROPERTY, ETC.**

HELD UNDER TITLE DEED NUMBER X, which property is situated within the jurisdiction of the Foreclosure Court, in favour of the CREDITOR.

The bond referred to above was duly registered under *Bond No*. in the Deeds Office on (*date*). In terms of the bond the DEBTOR bound specifically as a mortgage the property, in favour of the CREDITOR, as security for R X (*amount of the agreement*)

2.1.3 The amount of indebtedness of the DEBTOR (including interest) and the rate of interest and the manner in which same is calculated and/or charged is currently and shall be determined and *prima facie* proved by a certificate signed by any duly authorised representative representing the CREDITOR (**creditor's certificate of balance and account statement to be attached**).

3. **PERFORMANCE / DEFAULT BY THE DEBTOR**

3.1 All of the conditions to which the Loan Agreement was subject were timeously fulfilled by the CREDITOR.

3.2 The DEBTOR has failed to timeously and punctually perform its obligations under the loan by falling into arrears with the monthly instalments, (which arrears were *R X* as at *date*) and which arrears the DEBTOR, despite demand, fails and/or neglects to pay (**Confirmation that the mortgage is three months in arrears – account statements to be attached).**

4. **THE FORECLOSURE ACT**

4.1 As a result of the breach of the loan agreement by the DEBTOR, the CREDITOR called on the DEBTOR to make payment of **R X** in terms of section 3 of the Foreclosure Act. A copy of the **Foreclosure Letter of Demand** is attached hereto. Notwithstanding such demand the DEBTOR has failed and/or neglected to make payment of the aforementioned sum or any

part thereof. Proof of dispatch of the Foreclosure Letter of Demand (by pre–paid registered post or electronic delivery) is attached hereto.

4.2 Furthermore, the CREDITOR confirms that it has engaged in pre-litigation negotiation with the DEBTOR, in terms of section 4 of the Foreclosure Act, in an attempt to resolve the arrears and prevent litigation. However, the DEBTOR has breached all arrangements concluded or has been un-cooperative during the negotiation process. (**Pre-litigation checklist** to be attached confirming the creditor's efforts to assist the debtor).

4.3 The DEBTOR is alerted to section 6 of the Foreclosure Act and his right to apply for a foreclosure *moratorium*. Should this application be successful, the CREDITOR will be prohibited from proceeding with foreclosure for a period of nine (9) months.

5. THE CONSTITUTION

5.1 The DEBTOR'S attention is drawn to the provisions of Section 26 (1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing and such right *may* be implicated by the order sought herein. Should the DEBTOR'S claim that the order for execution will infringe that right it is incumbent on the DEBTOR to place information supporting that claim before the Foreclosure Court. Failure to do so may result in such an order being made.

6. EXECUTABILITY AND SALE OF THE HOME

6.1 The DEBTOR'S attention is drawn to the provisions of Rule 46 (1) of the Uniform Rules of Court and section 5 of the Foreclosure Act, in terms of which the DEBTOR is advised that should judgment be granted, the Foreclosure Court may in future, declare the property executable and authorise the Sheriff of the Court to issue a Writ of Execution against the relevant immovable property. Thereafter a sale in execution shall take place wherein the immovable property will be sold at public auction. The aforesaid may lead to

the eviction of the DEBTOR and/or any other persons occupying the relevant immovable property.

6.2 Should the relevant immovable property be the primary residence of the DEBTOR, the DEBTOR is entitled to place any circumstances before this Foreclosure Court, in the prescribed manner, as to why the Foreclosure Court should not order the execution of the relevant immovable property.

7. **RELEVANT FACTORS**

7.1 The DEBTOR'S monthly instalment amount is **R X**. The arrears as at **DATE** amount to **R X and three (3) calendar months in arrears**. The arrears accumulated partially as a result of sporadic and/or non-payment of the instalment made by the Defendants from **DATE** to **DATE**. The balance due and owing by the Defendants is **R X**.

7.2 A copy of the DEBTOR'S account statement, reflecting that payments have not been received in accordance with the Loan Agreement, is attached hereto as Annexure **"X"**.

7.3 The approximate market value of the immovable property which is subject to the mortgage bond is **R X**. This is confirmed by an internal valuation report dated X attached hereto as Annexure **"X"**.

7.4 Despite demand and various endeavours to enter into an arrangement with the DEBTOR, the DEBTOR could not advance alternative means and/or arrangements to satisfy the arrears and/or indebtedness.

WHEREFORE the CREDITOR claims:

1. Payment in the amount of **R X**;

2. Interest on the sum of **R X** at the rate of **X %** per annum;

3. An order declaring the abovementioned property to be specially executable;

4. That the above Foreclosure Court authorise issue judgment and a warrant of attachment in respect of the immovable property.

PRE-LITIGATION CHECKLIST REQUIRED TO BE ATTACHED TO THE FORECLOSURE SUMMONS

MORTGAGE PRE-NEGOTIATION CHECKLIST IN TERMS OF THE FORECLOSURE ACT

1. DETAILS OF THE MORTGAGE

(Full mortgage statement and recent valuation of the property to be attached)

INITIAL MORTGAGE AMOUNT	
CURRENT BALANCE	
ARREARS AMOUNT	
MONTHS IN ARREARS	
VALUATION OF THE PROPERTY	
PROPERTY ADDRESS AND DESCRIPTION	

2. DETAILS OF THE DEBTOR

(Debtor's income and expenditure to be attached)

EMPLOYMENT STATUS	
DEBTOR'S AGE	
MORTGAGE MONTHLY INSTALMENT	
NUMBER OF DEPENDENTS RESIDING ON THE PROPERTY	
DEBTOR'S MONTHLY INCOME	
HOUSEHOLD MONTHLY INCOME	
REASON THE DEBTOR FELL INTO ARREARS	

3. PRE-LITIGATION EFFORTS

(The creditor is to provide a detailed account of the efforts undertaken to assist the debtor and the debtor's co-operation during these processes)

REDUCED PAYMENT ARRANGEMENTS AND OR INTEREST	Date engaged / offers considered
RECAPITALISING THE ARREARS	
MARKETING AND SELLING OF THE PROPERTY	Date engaged / offers received
MORTGAGE TO RENT CONVERSION	
CONDUCT OF THE DEBTOR DURING NEGOTIATIONS	Summary of meetings, telephone conversations, emails, etc.
OUTCOME OF THE ABOVE PROCESSES	
CONSIDERATION OF A FORECLOSURE MORATORIUM	

DEFAULT JUDGMENT APPLICATION AND AFFIDAVIT IN TERMS OF SECTION 5 OF THE FORECLOSURE ACT

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG ACTING IN ITS CAPACITY AS A FORECLOSURE COURT IN TERMS OF THE FORECLOSURE ACT)

Case No. #

In the matter between:

ABC BANK Plaintiff

and

DEBTOR
Defendant

AFFIDAVIT FOR DEFAULT JUDGMENT IN TERMS OF SECTION 5 OF THE FORECLOSURE ACT

I, the undersigned,

CREDITOR'S NAME OR PERSON HAVING AUTHORITY TO ACT ON BEHALF OF THE CREDITOR

do hereby make oath and say that:

1. I am employed by ABC BANK (registration number ###) as a Manager in the foreclosure department. I have, save where the context clearly indicates otherwise, personal knowledge of the facts herein contained which are, to the best of my belief both true and correct and I can and do swear positively thereto. To the extent that submissions are made on legal issues, such submissions are based on advice which has been provided by legal advisors and I accept such advice to be correct. .

2.

ABC BANK

2.1. Herein the creditor explains its capacity provides evidence of its legitimacy - NCR documents, CIPC documents, company resolutions, compliance with all regulations, NCA, Companies Act etc. These documents must be attached as ANNEXURE A

3.

In my capacity as a Manager of the foreclosure department, I have access to, and have under my control, all documents, records and information to enable me to monitor and determine:

3.1. the status of the loans administered by ABC BANK (which includes the # loan # / loans referred to in this action) and the compliance by borrowers with their obligations to the Lender in terms of the loans.

4.

In preparation for deposing to this affidavit, I have had regard to the records relating specifically to the Loan under account number # and I have determined and confirm the following:

PURPOSE OF THIS APPLICATION

5.

The purpose of this application is to seek an order for Default Judgment in the following terms:

5.1. Payment of the sum of R #########.

5.2. Payment of interest on the sum of R #### at the rate of #### % per annum compounded monthly in arrear from #### to date of payment. Account statement to be attached as ANNEXURE B.

5.3. An Order declaring the property known as:
Full details of the property, street number and address erf numbers, to be specially executable. Updated valuation of the property to be attached as ANNEXURE C.

5.4. Costs of this application on an attorney and client scale to be taxed.

COMPLIANCE

6.

6.1. In terms of *Standard Bank v Saunderson*, the Defendant's attention has been drawn to Section 26 of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing and the Defendant has been informed that should he/she claim that the order sought will infringe upon that right, that it is incumbent on the Defendant to place information supporting such claim before the Foreclosure Court;

6.2. The Defendant has been advised that in terms of Rule 46(1)(c)(ii) of the Rules of Court and section 5 of the Foreclosure Act, no writ of execution shall be issued against his/her primary residence, unless a Foreclosure Court, having considered all the circumstances, orders execution against such property;

PAYMENT HISTORY

7.

7.1. The arrears amount as at the date on which the summons was issued was approximately R########, with the monthly instalment being R########. Confirmation that the account was three months in arrears.

7.2. The current arrears as at (######) amounts to R#####, with the current monthly instalment being R######. This arrear amount is over six (6) percent of the current balance owing, as required by section 5 of the Foreclosure Act.

7.3. The Defendant's account is currently ####### months in arrears.

7.4. The last payment made by the Defendant was on #######, in the amount of R###### and the total amount outstanding under the bond in terms which execution is sought is R#####.

RELEVANT FACTORS

8.

8.1. The immovable property which the Plaintiff seeks to have declared executable was not acquired by means of, or with the assistance of, a state subsidy (in terms of *Absa Bank v Ntsane*).

8.2. It is unknown whether the immovable property sought to be declared executable is the primary residence of the Defendant and is currently being occupied by the Defendant, or is utilised for residential purposes

8.3. The debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable.

8.4. The amount claimed in the summons is R########## and there is no possibility that the Defendant's liabilities to the Plaintiff may be liquidated within a reasonable time period without having to execute against the Defendant's primary residence. The creditor has engaged in pre-litigation negotiation with the debtor and this has proven fruitless (**attach** a copy of the pre-action checklist and ANNEXURE D).

8.5. At the time that the loan agreement was concluded, the Defendant had the necessary income source to service the loan repayments as it became due (SUPPLY EVIDENCE OF ASSESSMENTS DONE)

8.6. Given the Defendant's inability to maintain the monthly instalments, it is clear that the Defendant is not in a position to service the obligations under the credit agreements, or satisfy the judgment debt.

8.7. The extent of the arrears and outstanding balance is sufficient, the Plaintiff believes, to justify execution against the immovable property as it is not likely that the Defendant will possess sufficient movable goods to satisfy the amount due to the Plaintiff.

COMPLIANCE WITH FORECLOSURE LETTER OF DEMAND IN TERMS OF SECTION 3 OF THE FORECLOSURE ACT

9.

9.1. The provisions of Section 3 of the Foreclosure Act have been complied with in that the compulsory notice in terms of the Act was sent to the Defendant's chosen address by prepaid registered post, fax or email. The notice together with proof of dispatch by prepaid registered post is annexed to the summons as ANNEXURE D respectively.

9.2. In terms of *Standard Bank v Sebola*, and section 5 of the Foreclosure Act, the post-dispatch "track and trace" printout from the website of the South African Post Office indicating delivery at the relevant post office, or electronic delivery message confirmation, is annexed to the summons;

9.3. A period of at least fifteen (15) business days elapsed between the date that the lender delivered the foreclosure letter of demand in terms of Section 3 of the Foreclosure, and the Defendant's response/ failure to respond to the aforesaid notice. No pre-litigation agreement as envisaged in Section 4 of the Foreclosure Act has therefore been concluded.

9.4. I respectfully submit that:

9.4.1. none of the provisions contained in the NCA or the Foreclosure Act precludes the institution of this action;

9.4.2. the jurisdictional requirements contemplated in the NCA and Foreclosure Act have been complied with and that there is nothing contemplated in the aforementioned Acts which preclude the above Foreclosure Court from determining this matter.

10. In the premise I submit it is just and equitable that the immovable property be declared executable, and pray for an order in terms of the application for default judgment to which this affidavit is attached.

_____

#

I HEREBY CERTIFY that the Deponent has declared that he/she knows and understands the contents of this Affidavit and that to the best of his/her knowledge and belief it is the truth, which Affidavit has been signed and sworn to before me at on this the day of 201x and that the provisions of the Regulations contained in Government Notice No. R1258 of 21 July 1972, as amended, have been complied with.

_____

COMMISSIONER OF OATHS
NAME:
ADDRESS:

WARRANT OF ATTACHMENT OF THE HYPOTHECATED IMMOVABLE PROPERTY IN TERMS OF SECTION 5 OF THE FORECLOSURE ACT

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG ACTING IN ITS CAPACITY AS A FORECLOSURE COURT IN TERMS OF THE FORECLOSURE ACT)

Case No. #

In the matter between:

ABC BANK Plaintiff

and

DEBTOR
Defendant

WRIT OF ATTACHMENT IN TERMS OF SECTION 5 OF THE FORECLOSURE ACT

TO: THE SHERIFF FOR THE DISTRICT OF #

WHEREAS you are directed to cause to be realised the sum of **R x** together with interest thereon at the rate of **%** per annum as from date to date of payment, in satisfaction of a judgment debt and costs obtained by **APPLICANT/PLAINTIFF** against the Respondent/Defendant**.**

AND WHEREAS the undermentioned property was declared specially executable for the said sums on **x in terms of the judgment (attached) granted** by the Foreclosure Court;

NOW THEREFORE you are directed to attach and take into execution the immovable property of the said Respondent/Defendant, being:

Full details of the property

And cause to be realised there from the aforesaid sum of **x** together with interest thereon at the rate of **x %** per annum as from x to date of payment, costs still to be taxed, together with the costs hereof and your charges in and about the same, and to dispose of the proceeds thereof in accordance with Rule of Court No. 46.

Any party dissatisfied with the Judgment granted or direction given by the Registrar may in terms of Rule 31(5)d and within 20 (TWENTY) days after he/she/they have acquired knowledge of such Judgment or direction, set the matter down for reconsideration by the Court.

FOR WHICH THIS SHALL BE YOUR WARRANT.

DATED AT _____ ON THIS ____ DAY OF _____

_____

THE REGISTRAR OF THE FORECLOSURE COURT

APPLICATION FOR A SALE IN EXECUTION DATE TO BE SET BY THE FORECLOSURE COURT

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG ACTING IN ITS CAPACITY AS A FORECLOSURE COURT IN TERMS OF THE FORECLOSURE ACT)

Case No. #

In the matter between:

ABC BANK Plaintiff

and

DEBTOR
Defendant

NOTICE OF APPLICATION FOR SALE IN EXECUTION IN TERMS OF SECTION 5 OF THE FORECLOSURE ACT

TO: THE SHERIFF OF THE HIGH COURT;
THE REGISTRAR OF THE HIGH COURT; and
THE ABOVEMENTIONED DEBTOR

In pursuance of a judgment granted by this Honourable Court on **date**, and a Warrant of Execution issued on **date**, the **CREDITOR** now wishes to apply for a SALE IN EXECUTION DATE for the undermentioned immovable property. In complaince with section 5 of the Foreclosure Act, the CREDITOR confirms that the current arrears amount due on the mortgage is above 20% of the current mortgage balance, and/or over 20% of the Market Value of the undermentioned immovable property, and/or the mortgage is twelve (12) months in arrears (attached a copy of the accourt statement and recent valuation of the property).

Once a SALE IN EXECUTION DATE is set by the Foreclosure Act, the undermentioned property will be sold in execution by the Sheriff of the High Court in conjunction with the Registrar of the High Court at **THE FORECLOSURE COURT OF SOUTH AFRICA: JOHANNESBURG DIVISION**, to the highest bidder.

Full Conditions of Sale can be inspected at the offices of the **SHERIFF OF THE HIGH COURT**, **and the REGISTRAR OF THE HIGH COURT.** The Conditions of Sale will also be read out by the Sheriff prior to the sale in execution.

The Execution Creditor, Sheriff and/or Plaintiff's Attorneys do not give any warranties with regard to the description and/or improvements.

FULL DESCRIPTION OF THE PROPERTY

_____

CREDITOR'S ATTORNEYS DETAILS

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The Constitution of the Republic of South Africa Act 108 of 1996

The Credit Agreements Act 75 of 1980.

The Deeds Registries Act 47 of 1937

The Insolvency Act 24 of 1936

The Magistrates' Courts Act 32 of 1944

The National Credit Act 34 of 2005

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The Usury Act 73 of 1968.

Foreign legislation, charters and treaties

Bankruptcy Act 1985

Bankruptcy Reform Act of 1978 (United States)

English Insolvency Act 1986

The International Covenant on Economic, Social and Cultural Rights

The Universal Declaration of Human Rights

The Enterprise Act 2002 (England)

The European Social Charter

Debt Arrangement and Attachment Act 2002 (Scotland)

Home Owner and Debtor Protection Act (Scotland) 2010

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The African Charter on Human and People's Rights.

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