

'Safe as houses'? – Balancing a mortgagee's security interest with a homeowner's security of tenure

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1 INTRODUCTION

In the case of *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others*,¹ the Constitutional Court set aside the sale in execution, at the instance of their creditors, of the immovable property of each of the two appellants on the basis that, in the circumstances, it amounted to an unjustifiable infringement of their right to have access to adequate housing, protected by section 26 of the Constitution.² Following upon this, a number of reported cases have dealt with the issue whether the sale in execution of immovable property which has been mortgaged in favour of a creditor may constitute an infringement of the debtor's section 26 rights and, if so, whether such infringement is justifiable in terms of section 36 of the Constitution.

In the case of *Nedbank Ltd v Mortinson*,³ the Full Court, in the Witwatersrand Local Division, issued rules of practice for such matters. In the cases of *Standard Bank v Snyders & Others*⁴ and *Standard Bank of South Africa v Adams*,⁵ the Court, in the Cape Provincial Division, refused, in the circumstances, to grant orders authorising the sale in execution of the mortgaged immovable property. In an appeal against the decision in the case of *Standard Bank v Snyders & Others*, the Supreme Court of Appeal, in a decision reported as *Standard Bank of South Africa Ltd v Saunderson & Others*,⁶ granted the orders sought for the sale in execution of the mortgagors' immovable properties but, acknowledging the relevance in this context of the right to have access to adequate housing, issued a practice direction for allegations required in future summonses commencing action. More recently, however, in *ABSA Bank Ltd v Ntsane & Another*,⁷ in the Transvaal Provincial Division, the Court would not allow a mortgagee to enforce an acceleration clause in the parties' loan agreement, nor was it prepared to order the sale in execution

1 2005 (2) SA 140 (CC); hereafter referred to as 'the *Jaftha* case'

2 The Republic of South Africa Constitution Act 108 of 1996, referred to, in this article, as 'the Constitution'

3 2005 (6) SA 462 (W)

4 2005 (5) SA 610 (C)

5 2007 (1) SA 598 (C)

6 2006 (2) SA 264 (SCA); hereafter referred to as 'the *Standard Bank* case'

7 2007 (3) SA 554 (T); hereafter referred to as 'the *ABSA Bank* case'

of the defendants' home, although their contract provided for it. The Court held that to do so, in the circumstances of the case, would be an unjustifiable infringement of the defendants' right to have access to adequate housing and might also constitute an infringement of their right to dignity. In the reported judgment, Bertelsmann J suggested that processes other than execution ought to be established for the resolution of issues between mortgagees and mortgagors who are in default.

This article seeks to trace developments leading up to, and in relation to these decisions and to highlight the need for the enunciation of appropriate principles, policies and processes 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 also 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, a mortgagee's security interest, and on the other, a homeowner's security of tenure. If principles are not clearly spelt out in advance, cautious lenders will be reluctant to provide finance against the mortgage of a person's home, lest they find themselves in a situation where they are unable, upon the debtor's default, to realise their security. Another inevitable consequence will be increased costs for those who *are* able to obtain credit: if lending institutions sustain losses as a result of being unable to realise their security by selling mortgagors' homes in execution, they will most likely seek to amend their fee structures in order to cover such losses.⁸ If, on the other hand, they lend money only to persons who pose no credit risk, they will do less business than before, with fewer customers to sustain their business and cover their costs. In either case, this will inevitably lead to an increase in the cost of credit for the individual.

2 THE RIGHT TO ADEQUATE HOUSING AND THE FORCED SALE OF A DEBTOR'S HOME

2.1 THE JAFTHA CASE

The *Jaftha* case⁹ concerned sections 66(1)(a) and 67 of the Magistrates' Court Act 32 of 1944. The appellants, Maggie Jaftha and Christina van Rooyen, were two poor, uneducated women whose houses, acquired through the post-apartheid Reconstruction and Development Programme (the RDP), had been sold in execution for non-payment of debts of, initially, R250 (in respect of an unsecured loan) and R190 (being the price of vegetables purchased on credit) respectively. This occurred after default judgment was obtained against each of them in the Magistrate's Court and the sheriff submitted a return stating that there were insufficient movable assets to satisfy the judgment debts. A local accountant heard of their plight and contacted a law-

⁸ Although any such amendment will have to occur in accordance with the provisions, contained in Part C of the National Credit Act 34 of 2005, which regulate the fees which a credit provider may charge.

⁹ See (fn 1 above).

yer friend on their behalf. Ultimately, a legal team, including eminent senior counsel, acted on their behalf to challenge, in the Cape Provincial Division of the High Court,¹⁰ and, later, in the Constitutional Court, the constitutional validity of section 66(1)(a) and section 67 of the Magistrates' Court Act. Section 66(1)(a) provides, *inter alia*, for the sale in execution of immovable property, in the absence of sufficient movables, such as, *inter alia*, beds, bedding and wearing apparel and necessary furniture and tools of trade are protected from seizure and should not be attached or sold. It was contended, on behalf of the appellants, that a law which permits the sale in execution of people's homes because they have not paid their debts violates the right to have access to adequate housing, protected in section 26 of the Constitution.

Section 26 provides as follows:

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

Section 39(1)(b) of the Constitution requires courts to consider international law when interpreting the Bill of Rights. Mokgoro J, writing for the Constitutional Court, specifically considered Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, 1966, which reads as follows:

'The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including *adequate food, clothing and housing*, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.' (Emphasis added by Mokgoro J.)¹¹

The Court noted that, in General Comment 4, the United Nations Committee on Economic, Social and Cultural Rights Committee, giving content to Article 11(1) of the Covenant, emphasised that the right to housing should not be interpreted restrictively but should be viewed as 'the right to live somewhere in security, peace and dignity'.¹² Mokgoro J observed that the Committee recognised that 'the concept of adequacy is particularly significant in relation to the right to housing.'¹³ Further, while the Committee acknowledged that adequacy 'is determined in part by social, economic, cultural, climatic, ecological, and other factors', it identified 'certain aspects of the right that must be taken into account for this purpose in any particular context.'¹⁴ Particularly relevant, Mokgoro J stated, was the Committee's focus on security of tenure which, in its view, goes beyond ownership in that 'all persons should possess

10 See *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2003 (10) BCLR 1149 (C).

11 Quoted at para 24 of the judgment in the *Jaftha* case.

12 At para 7 of General Comment 4, available at [http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/CESCR+General+comment+4.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/CESCR+General+comment+4.En?OpenDocument)

13 At para 8 of General Comment 4

14 *Ibid.*

a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats'.¹⁵

Mokgoro J noted that the international law concept of adequate housing and its central theme of security of tenure reinforce the notion of adequate housing in section 26 of the Constitution, as understood in the historical context of forced removals and racist evictions in South Africa. In the *Jaftha* case, it was common cause that, if a recipient of a state housing subsidy were to lose ownership of the home in a sale in execution, he or she would be disqualified from obtaining other state-aided housing.¹⁶ It was also common cause that, if the appellants had been evicted because of sales in execution, they would have had no suitable alternative accommodation.¹⁷ Observing that the purpose of section 26 was to create a new dispensation in which the State should strive to provide access to adequate housing, the Court concluded that, at the very least, any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected under section 26(1).

However, such a measure may be justified under section 36 of the Constitution, which provides as follows:

- '36. (1) 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 human dignity, equality and freedom, taking into account all relevant factors, including –
- (a) the nature of the right;
 - (b) the importance of the purpose of the limitation;
 - (c) the nature and extent of the limitation;
 - (d) the relation between the limitation and its purpose; and
 - (e) less restrictive means to achieve the purpose.
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

Mokgoro J viewed the trifling nature of the debt in this case as diminishing the importance of the purpose of the limitation of the right (that is, the collection of debts), especially where other methods exist to enable recovery of the debt. However, the learned judge recognised that the interests of creditors should not be overlooked and that, in a sense, a consideration of the legitimacy of the sale in execution should be seen as a balancing process.¹⁸ On the one hand, for example, the debtor might have incurred the debt recklessly, knowing that he was unable to pay it, while, on the other hand, execution might be unjustifiable because the advantage for a creditor who seeks execution is outweighed by the immense prejudice and hardship which this would cause the debtor.¹⁹

Of significance is the statement by the Court that, in the absence of abuse

¹⁵ *Ibid.*

¹⁶ This is the position according to the National Housing Code, available at <http://www.housing.gov.za/Content/The%20Housing%20Code/Index.htm>, formulated and issued in terms of the Housing Act 107 of 1997.

¹⁷ At para 12

¹⁸ At para 41

¹⁹ At para 42

of court procedure, a sale in execution should ordinarily be permitted against a home mortgaged to secure the debt. This was because courts should be careful to acknowledge that the 'need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home'.²⁰ The Court dismissed the argument by counsel for the appellants that a blanket prohibition against sales in execution of a house below a certain value, which they argued should be read into section 67, was appropriate. The Court was of the view that this could lead to a poverty trap which would prevent many poor people from improving their station in life because of an incapacity to generate capital of any kind. Also, it would pay insufficient attention to the interests of the creditor as it would potentially foreclose the possibility of creditors recovering debts owed to them by owners of excluded properties.²¹

Mokgoro J was of the view that a judicial officer should always consider the practicability of ordering that the debt should be paid in instalments and that every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort. The learned judge summarised the factors which a court should consider when deciding whether to grant an order for the sale in execution of a debtor's home:

- the circumstances in which the debt was incurred, such as, for example, whether the debtor willingly put up the property as security for the debt;
- any attempts made by the debtor to pay the debt;
- the financial situation of the parties;
- the amount of the debt;
- whether the debtor is employed or has a source of income to pay the debt; and
- any other factor which is relevant in the circumstances.²²

The Court concluded that section 66(1)(a) was unconstitutional in that it was sufficiently broad to allow sales in execution to proceed in circumstances where it would not be justifiable for them to be permitted²³ and it held that judicial oversight was required in every case. In the result, the Constitutional Court directed that certain words be read into section 66(1)(a) to have the effect that, while the process for obtaining a judgment and execution against movables remains unchanged, once the sheriff has issued a *nulla bona* return indicating that insufficient movables exist to discharge the debt, the creditor will need to approach a court to seek an order permitting execution against the immovable property of the judgment debtor.

2.2 The Standard Bank case

The *Standard Bank* case²⁴ concerned applications by a mortgagee for hypothecated, immovable property to be declared executable. In eight cases,

20 At para 58

21 At paras 50–51

22 At para 60

23 At para 44

24 See (fn 6 above).

Standard Bank filed a written application with the Registrar for default judgment in terms of Rule 31(5)(a) of the Uniform Rules of Court. When the Registrar adopted the attitude that, in light of the decision in the *Jaftha* case, she did not have the power to grant an order declaring immovable property executable, Standard Bank enrolled the matters in the High Court as unopposed applications for default judgment. In a ninth matter, in which the defendant represented herself, Standard Bank brought an application for summary judgment against the defendant, and this was set down for hearing on the same day as the other eight cases.

The Cape Provincial Division²⁵ adopted the approach that, in order to comply with the ordinary principles of pleading, a plaintiff's summons should contain a suitable allegation to the effect that the facts alleged by it (which should be identified) are sufficient to justify an order in terms of section 26(3) of the Constitution.²⁶ As each summons lacked this essential allegation, while judgment was granted in favour of Standard Bank, the applications for orders permitting execution against the immovable properties of the defendants were dismissed.²⁷

In an appeal against the decision in the Cape Provincial Division of the High Court, the Supreme Court of Appeal, regarding this as a 'test case',²⁸ appointed *amici curiae* to represent the interests of the respondents in the matter.²⁹ Cameron and Nugent JJA, delivering the judgment of the Supreme Court of Appeal, stated at the outset that a mortgage bond is an indispensable tool for spreading home ownership³⁰ and that the value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms. The learned judges of appeal observed how this confidence had been shaken by the decision of the court *a quo*,³¹ and that what had, until then, been routine practice in the courts had become controversial because of uncertainty as to what must be alleged to justify an order for execution.³² It was also noted that in the case of *Nedbank Ltd v Mortinson*,³³ a case which was similar although a different outcome was reached, the Full Court in the Witwatersrand Local Division had also assumed that the rights conferred by section 26 would be compromised and would require justification whenever it was sought to execute against residential property. Both the Witwatersrand Local Division and the Natal High Court had issued different practice directions for guidance in future cases.³⁴

The Supreme Court of Appeal pointed out that in the *Jaftha* case the Constitutional Court did not decide that section 26(1) is compromised in every

25 See *Standard Bank v Snyders and others*, referred to in (fn 4 above).

26 At para 23 of *Standard Bank v Snyders & Others*

27 At para 25 of *Standard Bank v Snyders & Others*

28 At para 6 of the *Standard Bank* case

29 The application for summary judgment, in which the defendant had initially entered an appearance to defend the matter, had fallen away.

30 At para 1

31 At para 3

32 At para 14

33 See (fn 3 above)

34 At para 14

case where execution is levied against residential property, but decided only that a writ of execution that would deprive a person of 'adequate housing'³⁵ would compromise his or her section 26(1) rights and would therefore need to be justified as contemplated by section 36(1).³⁶ Cameron and Nugent JJA were of the view that it would be rare for section 26(1) rights to be compromised by the sale in execution of mortgaged residential property. The Court distinguished the *Jaftha* case from the case before it in that the former clearly entailed a deprivation of 'adequate housing' and the judgment creditor was not a mortgagee.³⁷ On the other hand, in the *Standard Bank* case the property owners had willingly bonded their property to the bank to obtain capital and, therefore, in the Court's analysis, 'their debt was not extraneous, but was fused into the title to the property'.³⁸ The judges of appeal pointed out that in the judgment in the *Jaftha* case the observations concerning mortgage bonds were made in the context of the kind of interests which might need to be considered only once it was shown that section 26(1) was in fact compromised. However, as none of the defendants had alleged or shown in the *Standard Bank* case that an order for execution would infringe their rights of access to adequate housing, and no reason existed to believe that it would, the Court held that Standard Bank was not called upon to justify the orders it sought and that they ought to have been granted.³⁹

Further, the Supreme Court of Appeal held that the Registrar of the High Court was authorised to grant the orders declaring the properties executable as none of the defendants had disputed their constitutional validity.⁴⁰ The appeal was upheld and the hypothecated properties were declared to be specially executable. Finally, bearing in mind that it was possible that section 26(1) might be infringed by execution, and that in most cases where an order for execution is sought the defendant has no defence to the claim for payment and would thus be unlikely to seek or obtain legal advice, the Court found that it would be desirable for the defaulting debtor to be informed, in the process of initiating action, that section 26(1) might affect the bond-holder's claim to execution. A practice direction, which the Court considered to be appropriate, was issued specifying essential allegations to be included in future summonses and requiring notice to be given to the defendants of their section 26(1) rights.

35 And this concept is relative: See para 16. This observation was made with reference to the decision in *Government of the Republic of South Africa and Others v Grootboom & Others* 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

36 At para 15

37 At para 16

38 At para 18

39 At para 21

40 At para 24

2.2.1 *The decision of the constitutional court*

In the *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank Ltd & Another*,⁴¹ the University of KwaZulu-Natal's Campus Law Clinic, citing the Standard Bank and the Minister for Justice and Constitutional Development as respondents, applied to the Constitutional Court for leave to appeal against the judgment and order handed down by the Supreme Court of Appeal in the *Standard Bank* case. In the alternative, it sought an order granting it direct access to the Constitutional Court and an order declaring either that section 27A of the Supreme Court Act 59 of 1959 and Rule 31(5)(a) of the Uniform Rules of Court do not permit a Registrar of the High Court to grant an order declaring immovable property specially executable, or that they are unconstitutional to the extent that they do permit a Registrar to do so. It also sought an order declaring that a court may only declare immovable property specially executable when the summons seeking such order includes a warning to the defendant setting out his or her rights.

The Campus Law Clinic reiterated various submissions which had been made by the *amici curiae*, in the *Standard Bank* case.⁴² Briefly, the submissions were as follows:

- In terms of section 28(2) of the Constitution, a 'child's best interests are of paramount importance in every matter concerning the child': these provisions entail an obligation, in the first instance, on parents to properly shelter their children, and on the state to ensure that the necessary legal and administrative infrastructure is in place so that children receive, and are not unconstitutionally deprived of, the protection (including housing) to which they are entitled in terms of section 28 of the Constitution. Courts – not Registrars – are the upper guardians of the best interests of children. Thus judicial supervision is required.
- The right to human dignity (section 10) may be affected in that an order may impact on a range of 'innocent victims of the debtor's financial failure' – dependants other than children, including spouses and elderly or infirm adult members of the household or family. Dignity occupies a central place in our constitutional value system and Bill of Rights.
- A decision to execute against the family home may thus involve complex questions of law and policy and the consideration of the effect of such an order on fundamental rights. In light of the complexity, it would be untenable to allow the Registrar to make the requisite decision. The factors are such that judicial oversight is a prerequisite.
- While the practice direction issued by the Supreme Court of Appeal in the *Standard Bank* case was an improvement, it is constitutionally inadequate.

In relation to the last point, the Campus Law Clinic provided what, in its view, would be a more appropriate practice direction.

⁴¹ 2006 (6) SA 103 (CC), hereafter referred to as 'the *Campus Law Clinic* case'.

⁴² I am indebted to Professor Max Du Plessis, one of the *amici curiae* in the *Standard Bank* case, and to Sarah Linscott, erstwhile project manager of the Social Justice Project run by the Campus Law Clinic, for making relevant court documents and other information available to me.

While the Constitutional Court acknowledged that the *Standard Bank* case raised an important constitutional issue, as reflected in the *Jaftha* case, it was of the view that it would be inappropriate to consider whether the order and practice direction made by the Supreme Court of Appeal was correct without a consideration of the broader issues.⁴³ In the circumstances, leave to appeal was refused and direct access to the Constitutional Court was not granted. It noted, however, that this constituted no bar to the Campus Law Clinic, or other interested body or person, pursuing this matter in other proceedings. The Constitutional Court was of the view that this was a matter which should properly commence in the High Court with the joinder of all interested parties, which could well include lending institutions other than Standard Bank, as well as bodies representing housing and homeowners' interests. It also considered it important that the Minister be given a proper opportunity to lodge appropriate affidavits and argument in that, when a statute is challenged on the basis that it limits a right, the government would ordinarily be expected to offer information and argument relevant to the possible justification of any such limitation.

2.3 The Absa Bank case

More recently, in the Transvaal Provincial Division, in the case of *ABSA Bank Ltd v Ntsane & Another*,⁴⁴ the Court refused to grant an order for the sale in execution of the mortgaged home of the defendants who were R18.46 in arrears in their repayments in respect of a remaining R62 042.43 loan debt. Judgment was, however, granted in the amount of R18.46, plus interest.

The defendants did not receive assistance from the state to purchase the immovable property,⁴⁵ and the Court assumed, in light of the known circumstances, that it was their first⁴⁶ and only⁴⁷ home. Counsel, appointed as *amicus curiae*, pointed out that in terms of the National Housing Code only a first-time homeowner is entitled to a state housing subsidy.⁴⁸ Relying upon section 26 of the Constitution, and the judgment in the *Jaftha* case, he argued that the loss of the defendants' home, coupled with their consequent disqualification from accessing a housing subsidy, would effectively deprive them of access to 'adequate' housing.⁴⁹ Therefore, he contended, an order declaring the immovable property executable would be unconstitutional. The Court, per Bertelsmann J, noted that, as stated by the Constitutional Court in the *Jaftha* case, any measure which limits the right to have access to adequate housing may however be justified under section 36 of the Constitution. Specific reference was made to the statements of the Constitutional Court, mentioned above,⁵⁰ that:

43 At paras 23 and 24

44 Referred to, in this article as 'the ABSA Bank case'; see (fn 7 above).

45 At para 60

46 At para 61

47 At para 84

48 At para 62. To access the text of the National Housing Code, see website at (fn 12 above).

49 At para 63

50 See 2.1, above.

- execution against the family home would be unjustifiable when it was for the recovery of a debt of trifling importance to the creditor while it would result in a disastrous dispossession of the family of the debtor of their only shelter;
- the interests of creditors should not be overlooked and, in a sense, a consideration of the legitimacy of a sale in execution of the house should be seen as a balancing process; and
- a factor of great importance would be the circumstances in which the debt arose; if the debtor had mortgaged the house to the creditor, 'a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure'.⁵¹

Bertelsmann J immediately noted that the case fell into the last-mentioned category, in that the defendants had mortgaged their home in favour of the creditor. Further, in the *Standard Bank* case, the Supreme Court of Appeal stated that 'such cases would be rare' and that it was 'particularly hard to conceive of instances where a mortgagee's right to reclaim the debt from the property [would] be denied altogether; ... it [was] more easily possible to contemplate a court delaying execution when there [was] a real prospect that the debt might yet be paid ...'.⁵² However, Bertelsmann J identified a specific issue which had not arisen before: whether a mortgagee's decision to enforce an acceleration clause (that is, to insist on repayment of the full amount outstanding, where the debtor had defaulted by not paying one or more of the agreed instalments) could be set aside or reviewed by the court in an application for default judgment and an order declaring the property specifically executable. The learned judge remarked, however, that although the Court in *Nedbank Ltd v Mortinson* merely assumed without deciding as a matter of law, that declaring residential property executable constituted a limitation of the rights protected in terms of section 26(1), it did state that a small arrear amount triggering the action against the debtor increased the possibility of an infringement of these rights and that, therefore, such claims required careful scrutiny.⁵³

In the circumstances, it was the plaintiff's right to commercial activity, and the right to enforce agreements lawfully entered into, which had to be weighed against the debtors' right to adequate housing. The proportionality of harm to the defendants, if judgment were to be granted against them, had to be weighed against the harm which the plaintiff might suffer if the agreement underlying the registration of the mortgage bond was rendered commercially ineffective. Referring to the *Standard Bank* case,⁵⁴ Bertelsmann J stated that not only would this deny the plaintiff the right to enforce a covenant properly and lawfully entered into, but it might also create uncertainty and distrust in commercial activities, and investment in the economy might be negatively affected 'if Courts were seen to be interfering willy-nilly with established prac-

51 At para 58 of the *Jaftha* case

52 At para 65, quoting Cameron and Nugent JJ, at paras 19 and 20 of the *Standard Bank* case

53 At para 68

54 See paras 2 and 3 of the *Standard Bank* case.

tices.⁵⁵ The following factors were identified as being relevant to the consideration of the parties' respective rights: the value of the bonded property; the past history of payments made by the debtor; the amount outstanding on the bond; any assets (other than the immovable property in question) which the debtor might possess, particularly movable assets capable of easy attachment and sale in execution; any other debts of which the bond holder is aware, such as arrear rates and municipal taxes; and whether the debtor is employed or not.⁵⁶

Bertelsmann J stated that a court 'should enquire from the bond holder why a small amount that is in arrears on a bond over a moderate property could not be collected by execution against movable assets.'⁵⁷ Referring to cases⁵⁸ in which our courts have held that claims in the High Court which would produce an unfair result, would create undue difficulty to conduct or to settle the claim, or which brought about undue exposure to High Court costs, constituted an abuse of the process, the learned judge adopted the approach that a court would be entitled to refuse to grant execution against an immovable property 'where the result is so seemingly iniquitous or unfair to the houseowner that the enforcement of the full rights to execution would amount to an abuse of the system.'⁵⁹ The Court stated that '[t]o allow such a result in a country where housing is at a premium and poverty and the legacy of a previous dispensation deny millions the fundamental right of a roof over their head infringes the fundamental right to adequate housing and may also ... be in conflict with the right to dignity.'⁶⁰ The Court also regarded it as being grossly unfair if a forced sale were to obtain a price less than the market value, while a controlled sale might obtain a much higher price and leave the defendants with some money after paying the plaintiff's claim.⁶¹ The Court stated the position thus:

'Whenever a bond holder calls up a bond, or seeks an order declaring the bonded property specially executable, while the amount in arrears at date of application for judgment is so small that it should readily be capable of settlement by execution against movable assets, taking all circumstances into account, the declaration of the immovable property as executable would constitute an infringement of the debtor's fundamental right to adequate housing.'⁶²

Clearly, the Court concluded, this was the case in the matter before it. It added that the onus would be on the plaintiff to prove that no other reasonable alternative method existed to enforce its right – if the plaintiff could not show this the application should be refused.⁶³

The Court added that even if an attempt to enforce repayment of the full

55 At para 71

56 At para 72

57 At paras 75–8

58 *Standard Bank of South Africa v Shiba; Standard Bank of South Africa v van den Berg* 1984 (1) SA 153 (W) at 158D-159B and *Whitfield v Van Aarde* 1993 (1) SA 332 (ECD).

59 At para 78

60 At para 82

61 At para 84

62 At para 85

63 At paras 87 and 88

amount outstanding did not constitute an infringement of the defendant's constitutional right to adequate housing, default judgment should nevertheless be refused on the ground that the claim constituted a *prima facie* abuse of the right to claim an outstanding amount that could easily be obtained by way of execution against movable assets. Further, the plaintiff had failed to deal with the issues raised by the Court when the matter was previously postponed and had, in particular, not argued that it had not profited, overall, from the transaction with the defendants. In the circumstances, the Court refused the application to declare the immovable property executable for default judgment for the full amount outstanding on the bond, but granted judgment against the defendant for the sum of R18.46, together with interest, and costs on the Magistrates' Court scale.⁶⁴

Finally, Bertelsmann J expressed the need for the banking and financial services sector to establish a compulsory arbitration process which a court could invoke by referring the question whether an order for the sale of immovable property should be granted where small amounts are in arrears. Such a tribunal should attempt to resolve any problems between the financing house and the debtor, to find ways to settle the arrears, or to make alternative arrangements, or even to sell the immovable property on the open market, or take any other practicable steps 'to ensure that poor homeowners are not deprived of the roof over their head if this can be avoided by creative co-operation between the debtor and the creditor.'⁶⁵

3. COMMENTS

3.1 Implications of the decision in the *ABSA Bank* case

The remark has been made that the *Standard Bank* case 'illustrates that the constitutionally entrenched right of adequate housing is starting to have implications in areas where the powers of banks and other mortgage holders were previously unassailable.'⁶⁶ This can be said, in particular, of the *ABSA Bank* case. If this decision of the Transvaal Provincial Division is to be followed, then instances where a defaulting mortgagor's section 26 rights are unjustifiably infringed, by an order declaring his or her home executable, may well turn out to occur more frequently than the Supreme Court of Appeal apparently anticipated. Its effect will be not only to broaden the parameters, already set by the Constitutional Court in the *Jaftha* case, for circumstances in which the sale in execution of a debtor's home will constitute a limitation of his or her section 26 rights, but also to refine the definition of factors which are relevant to a court's consideration, as required by section 36 of the Constitution, to determine whether such limitation is justifiable or not. Although it is not always clear from the reported judgment in the *ABSA Bank* case whether particular statements are made in relation to the limitation of section 26 rights or in relation to the justifiability of such limitation, as envisaged by

64 At paras 90–93

65 At para 97

66 Johan van der Merwe 'Case Review' in (2006) Vol. 7 No. 3 *ESR Review: Economic and Social Rights in South Africa* 26 28

section 36 of the Constitution,⁶⁷ the following implications of this decision may be posited.

In the *Jafta* case the limitation of section 26 rights was constituted by the order for the sale in execution of the state subsidised house of an indigent debtor who had no alternative accommodation and who, once she lost her home, would not be eligible again to receive a housing subsidy. In the *ABSA Bank* case the Court impliedly endorsed⁶⁸ the argument of the *amicus curiae* that the loss of the defendants' home, coupled with their consequent disqualification from accessing a housing subsidy, effectively would compromise their access to 'adequate' housing. To extrapolate from this, every sale in execution of the home⁶⁹ of a defendant who is 'a first-time homeowner', and who does not have another home, may be regarded as a limitation of his or her section 26 rights. It follows that in such a case a court (and not a Registrar, in the case of an application for default judgment) must apply the balancing process, as contemplated by section 36, to determine whether such limitation is justifiable. Consequently, my submission is that a mortgagee who seeks an order declaring the mortgagor's home specially executable ought also to incorporate in the summons commencing action an allegation setting out whether or not the defendant is a first-time homeowner.⁷⁰

Further, the effect of the decision in the *ABSA Bank* case is to extend and qualify the factors which were identified in the *Jafta* case as being relevant to whether the limitation of the debtor's section 26 rights is justifiable. Mokgoro J stated that, '[i]f the judgment debtor willingly put his or her house up ... as security for the debt, a sale in execution should ordinarily be permitted where there has not been an abuse of court procedure.'⁷¹ The *ABSA Bank* case illustrates circumstances in which such a limitation would not be justifiable, but which, in this context, would constitute an abuse of court procedure: where a trivial arrear amount, in respect of a mortgage loan which is secured by a property of moderate value, could be collected by execution against movable assets, the enforcement of an acceleration clause and the exercise of a right to execution against the property, which would bring about an iniquitous or grossly unfair result for the house owner, would amount to an abuse of the system.⁷² As Bertelsmann J stated, the plaintiff must produce evidence that there is no alternative but to sell the debtor's home in execution. This accords with the approach which the Supreme Court of Appeal adopted in the *Standard Bank* case, that once it is established that the mortgagor's rights will be compromised by the order, it will be for the mortgagee to justify the order which it seeks.⁷³

67 See, for example, paras 76–78, 80, 81 and 85.

68 Although the Court did not expressly accept this argument, it did do by implication, in that it went on to consider factors relevant to the balancing process which takes place only once a limitation of a right has been established.

69 Possibly the phrase 'of moderate value' should be inserted as a qualifier here.

70 For discussion of the implications of earlier reported decisions for the essential allegations to be made by a plaintiff, see CM van Heerden & A Boraine in 'Reading procedure and substance into the basic right to security of tenure' (2006) 39 (2) *De Jure* 319.

71 At para 58 of the *Jafta* case

72 At paras 78, 79, 83 and 84 of the *ABSA Bank* case

73 At paras 20 and 21 of the *Standard Bank* case

3.2 Issues which need to be addressed

In the *Jaftha* case, the Constitutional Court adopted the approach that it would be inappropriate to attempt to delineate all the circumstances in which a sale in execution would not be justifiable, as it would be impossible to anticipate all of the factual permutations which might arise.⁷⁴ The court considered that an appropriate remedy should be sufficiently flexible to accommodate various circumstances in a way that takes cognisance of the plight of a debtor who stands to lose his or her security of tenure, but which is also sensitive to the interests of the creditors whose circumstances are such that recovery of the debt owed is the countervailing consideration, in a context where there is a need for poor communities to take financial responsibility for owning a home. On the other hand, in the *ABSA Bank* case, in the Transvaal Provincial Division, the Court emphasised the need for the applicable principles to be narrowly defined and for the issues which courts are required to address to be clearly formulated,⁷⁵ and expressed concern about the negative consequences which might flow from the creation of uncertainty whether a court will give effect to the terms of a mortgage bond.⁷⁶ In the *Standard Bank* case, the Supreme Court of Appeal remarked how confidence in the value of a mortgage bond as an instrument of security had been shaken by the decision of the court *a quo*.⁷⁷

My submission is that potential creditors need to know in advance the circumstances, defined as precisely as possible, in which a sale in execution of mortgaged property will constitute a limitation on the mortgagor's section 26 rights, as well as those in which such limitation will or will not be justifiable. At this stage the position is far from clear and thorough treatment of the issues is urgently required in the manner envisaged by the Constitutional Court in the *Campus Law Clinic* case.⁷⁸ If necessary, the position should be regulated by specific, appropriately drafted legislation, especially in light of some of the recently enacted provisions of the National Credit Act 34 of 2005, discussed briefly below. The following are some of the issues which merit consideration.

3.2.1 Consideration of other fundamental rights

In the *ABSA Bank* case the *amicus curiae* argued, and the court stated, without pursuing the matter, that the sale in execution of the defendants' home, in the circumstances, might amount to an infringement of their dignity. The right to dignity, as well as children's rights, including a child's right to shelter, were relied upon in argument by the *amici curiae* before the Supreme Court of Appeal in the *Standard Bank* case, and thereafter, in submissions made to the Constitutional Court in the *Campus Law Clinic* case.⁷⁹ It may be noted that

74 At para 53 of the *Jaftha* case

75 At paras 76 and 85 of the *ABSA Bank* case

76 At para 71 of the *ABSA Bank* case

77 At para 3 of the *Standard Bank* case

78 At paras 23 and 24 of the *Campus Law Clinic* case

79 Similar submissions were made by CM van Heerden & A Boraine in 'Reading procedure and substance into the basic right to security of tenure' (2006) 39 (2) *De Jure* 319.

in England and Wales the welfare of any minor who lives, or who is reasonably expected to live on the property as a home, is a factor which a court is required to consider in such circumstances.⁸⁰ Further, upon the bankruptcy of the debtor, when the trustee applies for an order for the sale of the family home,⁸¹ by virtue of section 3 of the Human Rights Act 1998 the court is required to consider fundamental rights recognised by the European Convention on Human Rights. These include not only children's rights but also the rights protected by Article 8 of Schedule 1 of the European Convention on Human Rights which provides that '[e]veryone has the right to respect for his private and family life, [and] his home'. In light of this it can be argued that fundamental rights other than those protected by section 26 of the Constitution merit earnest consideration.

In this respect it may also be appropriate to take into account a proposed amendment to The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 ('the PIE Act'), which will significantly alter the position where a mortgagee of immovable property, or the person to whom the property has been sold, seeks to evict a mortgagor who has defaulted. In terms of section 4(2) – (7) of the PIE Act, a court may not grant an order of eviction of an unlawful occupier of land unless written and effective notice of the proceedings, as prescribed by the PIE Act, has been served on the occupier and the municipality having jurisdiction, and the court is of the opinion that it is just and equitable to grant the order. The court must consider all the relevant circumstances, including the rights and needs of elderly persons, children, disabled persons and households headed by women and, where a person has been in occupation for more than six months, whether land has been or can reasonably be made available by a municipality or other organ of state for the relocation of the occupier. Thus, the effect of the PIE Act is that an occupier, having received an eviction notice from the landowner, is not obliged to immediately vacate the land but is entitled to 'hold over' until a court has determined whether it is just and equitable to grant the eviction order.

In *Ndlovu v Ngcobo; Bekker & Another v Jika*,⁸² the Court interpreted the PIE Act so as to extend its application to erstwhile lessees whose leases had been cancelled or terminated and to mortgagors upon foreclosure by the mortgagee of their bonds. However, the Draft Prevention of Illegal Eviction from and Unlawful Occupation of Land Amendment Bill 2006,⁸³ which has been approved by Cabinet and published for comment, seeks explicitly to exclude from the application of the Act occupiers of property who are erstwhile lessees or mortgagors. Thus, if the proposed amendment becomes effective,

80 See ss 14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996. See, also, IF Fletcher *The law of insolvency* 8ed (2002) 203ff; P Omar 'Security over co-owned property and the creditor's paramount status in recovery proceedings' 2006 MAR/APR *Conveyancer and Property Lawyer* 157.

81 Section 335A of the Insolvency Act 1986, as amended, requires the trustee in bankruptcy to apply under s 14 of the Trusts of Land and Appointment of Trustees Act 1996 to the bankruptcy court for an order authorising the sale of the family home. (Section 335A was inserted by the Trusts of Land and Appointment of Trustees Act 1996.)

82 2003 (1) SA 113 (SCA); [2002] 4 All SA 384

83 Published in General Notice 1851 in GG 29501 dated 22 December 2006.

even though it may be argued that the Legislature did not originally intend the provisions of the PIE Act to apply to a mortgagor, the practical effect is that it will deprive a mortgagor of a process which would otherwise have been followed to avoid his or her being rendered homeless. As the Centre for Applied Legal Studies comments, if the Bill is passed it 'may allow many ... people's housing needs to be completely ignored in court proceedings for their eviction, simply because, through no real fault of their own, they have defaulted on their ... bond. The local municipality will not be asked to consider the provision of alternative housing (even on an emergency basis). A court will be effectively blind to the possibility that its order will leave the occupier(s) homeless'.⁸⁴

3.2.2 *The effect of the National Credit Act 34 of 2005*

In the *ABSA Bank* case Bertelsmann J called for the banking and financial services sector to implement a compulsory arbitration process which courts could invoke in circumstances, such as those which arose in that case. It should be noted, however, that the National Credit Act 34 of 2005, which applies to a credit agreement which is a 'mortgage agreement'⁸⁵ and which became fully operative on 1 June 2007, effectively provides such a process.⁸⁶

In terms of section 130(2) of the National Credit Act, a credit provider may not approach the court for an order enforcing a credit agreement unless the consumer has been in default under that credit agreement for at least 20 business days and the credit provider has delivered to the consumer a notice,⁸⁷ and at least ten business days have elapsed⁸⁸ since delivery of that notice. The notice must draw the consumer's attention to the default and propose that he or she refer the credit agreement to a debt counsellor,⁸⁹ alternative dispute resolution agent,⁹⁰ consumer court, or ombud with jurisdiction,⁹¹ in order that the parties may resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date.

In terms of section 130(3) of the National Credit Act, in any proceedings commenced in a court in respect of a credit agreement, the court may adjudicate upon the matter only if it is satisfied that:

- the procedures required by the Act have been complied with;

84 See CALS's comment on the PIE Bill 2006 at www.law.wits.ac.za/cals/CALSPIESUBMISSION.pdf. See, also, the comments by COSATU, on an earlier draft of the PIE Bill, in 2003, at <http://www.cosatu.org.za/docs/2003/PIEAmendmentBillfinal.pdf>.

85 See ss 1 and 8(4)(d) of the National Credit Act 34 of 2005.

86 For a useful analysis of the effect of the provisions of the National Credit Act upon the enforcement of contracts, see RD Sharrock Para 1 of 'Contract' 2007(2) *Juta Quarterly Review*.

87 As contemplated in s 129(1).

88 And the consumer has either not responded or rejected the credit provider's proposals.

89 'Debt counsellors' must be registered in terms of s 44 of the National Credit Act.

90 An 'alternative dispute resolution agent', according to s 1, is a person who provides services to assist in the resolution of consumer credit disputes through conciliation, mediation or arbitration.

91 Section 1 provides that an 'ombud with jurisdiction' in respect of any particular dispute arising out of a credit agreement in terms of which the credit provider is a 'financial institution' as defined in the Financial Services Ombud Schemes Act No 37 of 2004 means an 'ombud' or the 'statutory ombud', as those terms are respectively defined in that Act, who has jurisdiction in terms of that Act to deal with a complaint against the financial institution.

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- there is no matter arising under the credit agreement, and pending before the National Consumer Tribunal, that could result in an order affecting the issues to be determined by the court;
- when the credit provider instituted action, the matter was not already before a debt counsellor, alternative dispute resolution agent, consumer court or the ombud with jurisdiction; or
- when the credit provider instituted action, the consumer had not
 - already surrendered property to him and that property was not yet sold;
 - agreed to a proposal, nor complied with a plan 92 to bring the payments under the agreement up to date; or
 - already brought the payments up to date.

The National Credit Act also provides for a consumer to apply to a debt counsellor for debt review,⁹³ and for a court, in any proceedings in which a credit agreement is being considered, to refer the matter directly to a debt counsellor with a request for an evaluation to be made of the consumer's circumstances. In either event, the debt counsellor may recommend to the Magistrate's Court in the former situation, and to the court which made the request in the latter, that the consumer should be declared over-indebted.⁹⁴ Where such a declaration is made, the court may order the re-arrangement of the consumer's obligations,⁹⁵ for example, by extending the period of the agreement and reducing the amount of each payment due, or by postponing the dates on which payments are due. Further, the Magistrate's Court, pursuant to the application for debt review, or any court in which a credit agreement is being considered, may declare that the credit agreement is 'reckless' and make an order setting aside all or part of the consumer's rights and obligations under the agreement, as it determines just and reasonable in the circumstances, or suspending the force and effect of the agreement until a date determined by it. A 'reckless' credit agreement, according to the Act,⁹⁶ is one where the credit provider, prior to making the agreement, failed to take reasonable steps to assess the consumer's general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement, and the consumer's debt repayment history under credit agreements, and the consumer's existing financial means, prospects and obligations. This also occurs where the credit provider entered into the agreement even though the preponderance of information available to him at that time indicated either that the consumer did not generally understand or appreciate his risks, costs or obligations under the agreement, or that entering into the agreement would make the consumer over-indebted.

Of significance in this regard, is that in the *Jafta* case the Court stated that

92 As contemplated in s 129(1)(a).

93 See s 86 of the National Credit Act.

94 See s 85 of the National Credit Act.

95 See s 87 of the National Credit Act.

96 See ss 80, 81, 83 and 84 of the National Credit Act.

the fact that a debtor might have incurred debts recklessly, knowing that he or she would never be able to repay them, would militate against a finding that execution is unjustifiable.⁹⁷ My submission is that this position ought to be re-evaluated in the light of this new dimension posed by the provisions of the more recently enacted National Credit Act, namely, that if the credit provider has been 'reckless' in extending credit he or she may not be entitled to enforce the terms of the agreement. If both the debtor, according to the analysis of Mokgoro J, in the *Jaftha* case, and the creditor, according to the provisions of the National Credit Act, have entered into the mortgage agreement 'recklessly', which of the above approaches should prevail in the balancing of their respective interests?

Further consideration should also be given to the options available to the mortgagee in circumstances where the mortgagor has committed recurrent breaches of contract. In the *ABSA Bank* case it emerged that over an eight year period the defendants had continually fallen into arrears with their loan repayments. ABSA Bank Ltd had recorded 110 computer entries reflecting the arrear status of the account. It was because of the trivial amount of the arrears, at the stage that summons was issued, that the Court refused to give effect to the acceleration clause and to grant an order declaring the property specially executable. While the arrear amount in that case was indeed trifling, one must acknowledge the importance to creditors of setting guidelines with respect to a minimum amount which should be in arrears for an infringement of section 26 rights to be justified.

It may also be noted that in terms of section 129 of the National Credit Act a consumer who has fallen into default may, at any time before the credit provider has cancelled the agreement, 'reinstate' the agreement by paying all amounts overdue and the credit provider's permitted default charges and costs. There does not appear to be any limit to the number of times which a consumer can rely on this provision. Thus, from the creditor's perspective, bearing in mind ABSA Bank Ltd's 110 computer entries reflecting the arrear status of the account, this aspect of the National Credit Act is problematic.

3.2.3 *Concluding remarks in relation to a domestic/home exemption*

Finally, an alternative exists whereby the Legislature creates a domestic/home exemption, such as those which apply, for instance, in the United States of America⁹⁸ and, in a sense, in the United Kingdom.⁹⁹ Naturally, this could only occur in South Africa after a thorough enquiry into all the issues and it is not

⁹⁷ At para 41 of the *Jaftha* case

⁹⁸ The United States of America has a homestead exemption, contained in the Bankruptcy Code (Title 11 of the United States Code), which exempts an owner's equity in a homestead up to a maximum value of \$18 450. §522 of the Bankruptcy Code provides that states may opt out of federal bankruptcy exemptions and apply their state exemptions in bankruptcy, which vary widely. Generally, mortgages cannot be eliminated inside or outside of bankruptcy, even where they are attached to property which is subject to an exemption.

⁹⁹ In England and Wales, an amendment brought about by the Enterprise Act 2002, which inserted a new s 313A in the Insolvency Act 1986, has introduced a type of home exemption up to a value of £1 000.

suggested as a 'ready solution' to the problem.¹⁰⁰ In the *Jaftha* case the Constitutional Court dismissed the concept of a blanket prohibition of sales in execution of a house below a certain value.¹⁰¹ The Court was of the view that such an exemption could lead to a 'poverty trap' which would prevent many poor people from improving their station in life because of an incapacity to generate capital of any kind. Also, in the Court's view, to impose a prohibition of this sort would pay insufficient attention to the interests of the creditor as it would potentially foreclose the possibility of creditors recovering debts owed to them by owners of excluded properties. A system is required which provides greater legal certainty and, for a potential creditor, more predictability in relation to the credit risk attached to a transaction which he or she contemplates. Any continued lack of certainty surrounding the circumstances in which a mortgagee may enforce its security rights, may lead to reluctance on the part of lending institutions to finance the purchase of houses, or to advance loans against the mortgage of houses in their favour. This could create, for those who as a result are refused finance, the very poverty trap which the Constitutional Court sought to avoid.

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¹⁰⁰ In the United States of America, the homestead exemption has posed problems. Abuse of the homestead exemption provisions necessitated legislative amendment by The Bankruptcy Abuse Prevention and Consumer Act of 2005 which came into effect on 20 April 2005. Also, more recently, a coalition of housing activists and civil rights groups has called for a six-month moratorium on foreclosures of mortgages. See http://www.mortgagenewsdaily.com/4132007_Forbearance.ass.

¹⁰¹ At para 51 of the *Jaftha* case

