



UNIVERSITY
OF
JOHANNESBURG

COPYRIGHT AND CITATION CONSIDERATIONS FOR THIS THESIS/ DISSERTATION

 creative
commons



- Attribution — You must give appropriate credit, provide a link to the license, and indicate if changes were made. You may do so in any reasonable manner, but not in any way that suggests the licensor endorses you or your use.
- NonCommercial — You may not use the material for commercial purposes.
- ShareAlike — If you remix, transform, or build upon the material, you must distribute your contributions under the same license as the original.

How to cite this thesis

Surname, Initial(s). (2012) Title of the thesis or dissertation. PhD. (Chemistry)/ M.Sc. (Physics)/ M.A. (Philosophy)/M.Com. (Finance) etc. [Unpublished]: [University of Johannesburg](https://ujcontent.uj.ac.za/vital/access/manager/Index?site_name=Research%20Output). Retrieved from: https://ujcontent.uj.ac.za/vital/access/manager/Index?site_name=Research%20Output (Accessed: Date).

**A Banking Perspective on the Constitutional right to housing with emphasis on
mortgage agreements**

by

DIMAKATSO MANGENA

STUDENT NUMBER

200608534

Submitted in partial fulfilment of the requirements for the degree

MASTER OF LAWS (LLM)

in

BANKING LAW

in the

FACULTY OF LAW

at the

UNIVERSITY OF JOHANNESBURG

SUPERVISOR: PROFESSOR JM OTTO

1 MARCH 2017

ACKNOWLEDGEMENTS

This dissertation is dedicated to my 8 year old niece Tshehofatso Mokoena. You have been through so much. Thank you for teaching our family to smile more often and forgive. I love you more than you know.

I thank you mommy for teaching me the importance of education. You always make the impossible possible and I cannot imagine life without you.

To my sister Tshidi you are an amazing mother. This dissertation would not have been completed without the support and encouragement that I received from you and mommy.

I am so honoured to have done this dissertation under the supervision of the former Dean of Law professor Jannie Otto. I thank you professor for your valuable comments and taking this journey with me. It was an absolute pleasure working with you.

Last but not least I would like to thank my employer First National Bank for funding my studies. I will forever be grateful.



Abstract

The purpose of this dissertation is to analyse the impact of section 26 of the Constitution on the sale in execution of mortgaged immovable property by the bank as a judgement creditor.

When a debtor defaults on payments due in terms of the mortgage agreement, the bank usually approaches the court for default judgement and an order declaring the property executable. Over the past years obtaining a writ of execution declaring immovable property executable has been disputed as being an infringement of a debtor's right of access to adequate housing.

This dissertation starts off by discussing the importance of the housing clause in the Constitution and the commercial value of mortgage finance.

Case law dealing with the constitutionality of the sale in execution of mortgaged immovable property will be discussed and from these case discussions it becomes apparent that mortgage foreclosure law has changed as the bank needs to adhere to certain procedural requirements when proceeding with the enforcement of a mortgage debt. Furthermore an order declaring a debtor's residential immovable property executable, infringes on the debtor's constitutional right of access to adequate housing, therefore judicial oversight is required before such an order can be granted.

Judicial oversight is necessary to ensure that all the relevant circumstances are considered before a decision is made for a debtor's home to be sold in execution. It ensures that there is a proportionate relationship between the purpose of the sale of a debtor's home and the effect that such a sale has on the debtor's rights. Judicial oversight also ensures that the sale in execution process is not abused and will be used as a last resort.

The banks, as mortgagees now have a duty to ensure that all other less drastic means of debt recovery are used before approaching a court of law for an order declaring the debtor's home executable.

There are various ways in which a bank can recover the mortgage debt without proceeding with the debt enforcement process. These alternatives are considered in this dissertation and should be used by the bank first, before a decision to proceed with legal action is made.

If these alternatives fail and there are no viable alternatives to execution then an order declaring the debtor's property executable may be granted.

Although the law of mortgage finance has changed as a result of section 26 of the Constitution and the bank's right to call up the bond is limited, the important role that the bank plays in providing mortgage finance and its security rights are still recognised.



Table of Contents

1	Introduction	7
2	Background	9
2.1	Right of access to adequate housing	9
2.2	Mortgage law	11
3	Case law	15
3.1	<i>Jaftha v Schoeman; van Rooyen v Stoltz</i>	15
3.2	<i>Standard Bank of SA Ltd v Snyders</i>	17
3.3	<i>Nedbank v Mortinson</i>	18
3.4	<i>Standard Bank of SA Ltd v Saunderson</i>	19
3.5	<i>Absa Bank Ltd v Ntsane</i>	20
3.6	<i>Gundwana v Steko Developments</i>	22
3.7	<i>FirstRand Bank v Folscher</i>	23
3.8	<i>Standard Bank of South Africa Ltd v Bekker</i>	27
4	Discussion	31
5	Alternative forms of debt recovery	36
5.1	Mechanisms available in the National Credit Act.....	36
5.2	Private sale	39
5.3	Reaction to default and efficiency of the bank.....	41
6	Conclusion.....	44
7	Bibliography.....	46

1 Introduction

The Constitution is the supreme law of South Africa.¹ The bill of rights in chapter two of the Constitution enshrines the rights of all people in our country. These rights, however, are not absolute and may be limited if such a limitation is reasonable and justifiable.²

This dissertation will focus on one of the rights entrenched in chapter two of the Constitution, specifically section 26, which deals with the right of access to adequate housing. Section 26 of the Constitution places a positive duty on the state to take steps to ensure that South Africans have access to adequate housing and, on the other hand, it places a negative duty on every person, including juristic persons, to ensure that the right of access to adequate housing is not infringed.³

Although mortgage finance plays an important role in our society and economy and ensures that the state meets its obligation to provide housing, it may infringe on a mortgagor's right of access to adequate housing. This is because a mortgage bond registered at the Deeds Office entitles the mortgagee to sell the mortgaged immovable property in execution when the mortgagor is in default. As stated in *FirstRand Bank v Folscher*:⁴

“It has been common practice since 1902 in the courts of the old Transvaal, at least, to allow the registrar not only to grant judgements by default, but also declare immovable property, specifically hypothecated as security for the judgement debt, executable, and to grant writs of execution against immovable property.”

In light of the above statement, it is clear that in terms of the common law, a writ against mortgaged immovable property can be issued without judicial oversight. The disadvantage of such a practice is that there may be a possibility of the mortgagor losing his home even if there are other means of settling his debt.⁵ Thus, issuing a writ of execution against

¹ The Constitution of the Republic of South Africa 1996.

² s36 *ibid*.

³ Brits “Protection for homes during mortgage enforcement: human rights approaches in South African and English law” 2015 *SALJ* 566 584.

⁴ 2011 4 SA 314 (GNP) 7.

⁵ Brits and Van der Walt “Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the National Credit Act (part 2)” 2014 *TSAR* 508 508.

mortgaged immovable property without judicial oversight may lead to abuses and unjustified violation of the mortgagor's constitutional right of access to adequate housing.⁶

While debt enforcement is important because it provides the funds that are needed for the acquisition of a home and it recognises the mortgagee's contractual and proprietary rights,⁷ over the past years the legal process in obtaining a writ of execution declaring mortgaged immovable property executable has been disputed as being an infringement of a mortgagor's right of access to adequate housing. It is now an established principle of our law that the sale in execution of mortgaged immovable property is permissible, provided that when the mortgagee seeks to obtain a writ of execution there is judicial oversight and all relevant circumstances are taken into account.⁸ This legal principle exists as a result of section 26 of the Constitution and the numerous cases that have been heard by our courts dealing with the constitutionality of the sale in execution of mortgaged immovable property.

These cases will be discussed as well as the effect that they have on the bank as a mortgagee. Balancing the interests of the mortgagee and mortgagor will be considered. Based on the writer's experience in the banking industry the ways in which the bank as a mortgagee can prevent infringing the mortgagor's constitutional right of access to adequate housing will also be discussed.



⁶ Brits n 3 above 583.

⁷ Brits "Sale in execution of mortgaged homes may result in arbitrary deprivation of property" 2013 *SAJHR* 536 544-545.

⁸ See *Gundwana v Steko Development & Others* 2011 3 SA 608 (CC).

2 Background

2.1 Right of access to adequate housing

Section 26 of the Constitution reads as follows:

- “26 (1) Everyone has the right to have access to adequate housing;
- 26 (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right;
- 26 (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.”⁹

The purpose of having the housing clause in the Constitution is to ensure that the injustices of our past are adequately addressed. The policies implemented by the apartheid government limited where Black South Africans could live. These policies removed and relocated Blacks in order to maintain White power by subverting the political and economic power of Black people. The apartheid government not only limited Black land ownership in 86% of the country, it also limited the ability of Blacks to live and work anywhere outside of the home lands.¹⁰ Thus, under the apartheid government a concerted effort was made to deny Black people access to land title. Urban home ownership for Black people was systematically removed and Black people were made temporary residents in the urban areas.¹¹

For instance, the Group Areas Act¹² resulted in Black people being forcibly evicted from their homes, without any compensation and taken to remote areas that made it difficult for them to find employment and access education. The Prevention of Illegal Squatting Act¹³ enabled land owners to demolish structures on their land and evict people without a court order.¹⁴

These policies led to severe housing shortages, economic marginalisation, inadequate housing, and severe overcrowding, especially in the informal settlements. The consequences

⁹ n 1 above.

¹⁰ Wertman “There’s no place like home: access to housing for all South Africans” 2015 *Brooklyn Journal of International Law* 719 723.

¹¹ Marais and Cloete “Financed homeownership and economic downturn in South Africa” 2015 *Habitat International* 261 263.

¹² 41 of 1950.

¹³ 52 of 1951.

¹⁴ Chenwi “Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions” 2008 *Human Rights Law Review (HRLR)* 105 113.

of the apartheid government's land policies were described as follows in *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd*:¹⁵

“The problem of homelessness is particularly acute in our society. It is a direct consequence of the apartheid urban planning which sought to exclude African people from urban areas, and enforced this vision through policies regulating access to land and housing which meant that far too little land and too few houses were supplied to African people. The painful consequences of these policies are still with us eleven years into our democracy, despite government's attempts to remedy them. The frustration and helplessness suffered by many who still struggle against heavy odds to meet the challenge merely to survive and to have shelter can never be underestimated.”

The purpose of section 26 of the Constitution was explained in *Jaftha v Schoeman; Van Rooyen v Stoltz*¹⁶ as follows:

“Section 26 must be seen as making that decisive break from the past. It emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy. The indignity suffered as a result of evictions from homes, forced removals and the relocation to land often wholly inadequate for housing needs has to be replaced with a system in which the state must strive to provide access to adequate housing for all and, where that exists, refrain from permitting people to be removed unless it can be justified.”

The constitutional right of access to adequate housing aims at ensuring that unnecessary evictions do not take place, as this may result in people being left homeless. Homelessness usually causes psychological and physical distress, increased poverty and hardship, which are a violation of human rights.¹⁷ It is thus very important to scrutinize legislation that allows people to be evicted from their homes.¹⁸

In summary, the purpose of section 26 of the Constitution is to eradicate the legacy of apartheid and promote the values of human dignity, equality, and freedom¹⁹ by ensuring that people are not evicted from their homes without a court order and requiring the court to consider all the relevant circumstances before granting an eviction order.²⁰

¹⁵ 2005 8 BCLR 786 (CC) 36.

¹⁶ 2005 (1) BCLR 78 (CC) 29. Herein after referred to as *Jaftha*.

¹⁷ n 14 above 107.

¹⁸ *ibid* 114.

¹⁹ Van der Walt “Property, social justice and citizenship: property law in post-apartheid South Africa” 2008 *Stell LR* 325 326.

²⁰ n 14 above 116.

2.2 *Mortgage law*

Real security is a limited real right that a creditor has over a thing belonging to a debtor in order to secure performance of an obligation. The advantage of real security is that the creditor may obtain an attachment order and sell the thing in execution upon default by the debtor. The proceeds of the sale will then be used to satisfy the debt. The creditor also has a claim as a secured creditor in insolvency proceedings.²¹ A mortgage bond is a form of real security.

One of the functions of a bank is offering mortgage finance to a consumer. A mortgage bond grants the mortgagee a limited real right over the immovable property of the mortgagor in order to secure payment of the home loan which the mortgagor owes to the mortgagee.²²

Mortgage finance is a debt (home loan) created by a contract (mortgage agreement). In terms of the agreement the home loan is secured by a mortgage bond over the immovable property.²³ The security provided by a mortgage is only available upon registration of the mortgage bond at the Deeds Office. The advantages of a mortgage bond are that the mortgagor may not confer any further real rights on the property without the written consent of the mortgagee and the property is the object of execution upon default.²⁴

Section 1 of the National Credit Amendment Act²⁵ defines a mortgage as a mortgage registered by the registrar of deeds over immovable property that serves as a continuing covering security for a mortgage agreement. A mortgage agreement is defined as a credit agreement that is secured by the registration of a mortgage bond by the registrar of deeds over immovable property.

Mortgage finance is an important part of economic life, as it enables people to purchase homes which will result in capital growth in the future. It also enables the state to achieve its

²¹ Nagel *Commercial Law* (2015) 410.

²² *ibid* 415. See also n 5 above 508.

²³ Brits (n7) 537.

²⁴ Nagel (n21) 415 and 417. See also Kritzinger *Principles of the law of Mortgage, Pledge and Lien* (1999) 20.

²⁵ 19 of 2014. See also Otto *The National Credit Act Explained* (2016) 26 -27.

goal of providing homes to poor people.²⁶ Furthermore, a home is an asset and representation of wealth.²⁷

In *FirstRand Ltd v Seyffert*²⁸ the importance of granting mortgage finance was explained as follows:

“It also needs to be borne in mind that responsibly granted credit has a multiplier effect in an economy. For example money lent to build a house is used not only to pay the wages of the builders but also to buy materials (and, in so doing, pays the wages of those who produced the materials). These payments by the borrower who is building a house find their way back into the banking system as deposits and are lent out again. Thus the system multiplies, depending on the reserve ratios that the banks, either voluntarily or by regulation, maintain. In other words, money lending not only creates wealth but jobs as well.”

The value and commercial importance of mortgage finance was also confirmed by the Supreme Court of Appeal in *Standard Bank of SA Ltd v Saunderson*²⁹ wherein Cameron JA stated 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. We were told by the appellant bank that in August 2005 loans secured by mortgage bonds on residential property in this country amounted to almost R500 billion.”

In addition to the above, a home is a place where one feels content and safe. As correctly pointed out in *Port Elizabeth Municipality v Various Occupiers*:³⁰

“Section 26(3) acknowledges 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 space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world.”

²⁶ n 7 above 545.

²⁷ *ibid* 537.

²⁸ 2010 JDR 1208 (GSJ) 10.

²⁹ 2006 2 SA 264 (SCA) 1.

³⁰ 2004 12 BCLR 1268 (CC) 17.

When the debtor defaults on payments due in terms of the mortgage bond agreement, the bank usually approaches the court for default judgement and an order declaring the property executable. Unlike unsecured loans, where other assets can be sold to satisfy the debt, the mortgagee is entitled to sell the debtors immovable property regardless of the fact that there are other means of satisfying the debt like selling the debtor's movable assets.³¹

As a professional in the banking industry I have noted that standard form mortgage agreements read as follows:

Should the customer be in default of this agreement then the mortgagee may at its option claim immediate repayment of the full outstanding balance or terminate this agreement, upon which all amounts owing to the mortgagee by the customer shall then be payable in full. The mortgagee may institute proceedings for the recovery thereof and for an order declaring the property immediately executable.

This is what is referred to as the acceleration clause. The latter is a provision in a contract that permits the lender to accelerate payment of the outstanding balance upon the happening of a certain event.³² In the case of mortgage finance the mortgagee will demand payment of the outstanding balance when the mortgagor is in default.

A mortgagee who wishes to exercise his rights to sell the mortgaged immovable property in execution may do so in terms of the rules of court, specifically rule 66 of the Magistrates Court Act³³ and rule 45 of the High Court Rules.

Section 66(1) of the Magistrates Court Act and rule 36(1) of the Magistrates Court Rules before the decision in *Jaftha*³⁴ made it possible for the clerk of the court to issue a warrant of execution against the debtor's immovable property. These legal processes therefore allowed for execution of the immovable property of a debtor to take place without judicial oversight.³⁵

The old rule 45(1) of the High Court rules provided that if there is a *nulla bona* return from the sheriff or judgement was granted by the registrar in terms of rule 31(5) of the High Court

³¹ n 7 above 548.

³² Henkel and Seltzer "Acceleration clauses in mortgages: misuse during periods of tight money" 1980 *American Business Law Journal* 441 441.

³³ 32 of 1944.

³⁴ n 16 above par 15.

³⁵ *ibid.*

rules then the debtor's immovable property could be sold in execution. Therefore, the said rule allowed for execution of the immovable property of a debtor to take place without judicial oversight.³⁶

The purpose of these rules of court was to relieve judges of high caseloads. This was confirmed in *Standard Bank of SA Ltd v Ngobeni*:³⁷

“The purpose ... 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 judgement in uncomplicated default matters where he simply checked that all administrative and formal steps have been taken to justify a judgement.”

Section 26 of the Constitution not only limits the mortgagee's right to sell the mortgaged immovable property in execution, it has also introduced a new procedural dimension to the execution process.³⁸ The latter, including the impact of section 26 of the Constitution on mortgage agreements as it has emerged from various cases over the past decade, will be analysed and discussed in chapter 3 below.



³⁶ Du Plessis “Judicial oversight for sales in execution of residential property and the National Credit Act” 2012 *De Jure* 532 533-534.

³⁷ 1995 3 SA 234 (V) 235 C. See also Juma “Mortgage bonds and the right of access to adequate housing in South Africa: *Gundwana v Steko Development & others* 2011 (3) SA 608 (CC)” 2012 *Journal for Juridical Science* 1 3.

³⁸ Scholtz *Guide to the National Credit Act* 2008 par 12.19.

3 Case law

3.1 *Jaftha v Schoeman; van Rooyen v Stoltz*³⁹

The two appellants were poor and uneducated individuals who had obtained their homes by means of a state subsidy. The appellants had unsecured loans for R50-00 and R190-00 and since they had insufficient movable property that could be used to settle their debt, their immovable property was sold in execution.

The appellants, relying on section 26(1) of the Constitution, sought to declare section 66(1)(a) of the Magistrates Court Act unconstitutional, as it authorised the clerk of the Magistrates Court to issue a writ of execution against immovable property if there was insufficient movable property to satisfy the debt. The appellants were concerned about the fact that a writ of execution against immovable property could be issued without judicial oversight. The appellants were of the view that section 66(1)(a) of the Magistrates Court Act infringed on their constitutional right of access to adequate housing.

The court had to determine whether section 66(1)(a) of the Magistrates Court Act was unconstitutional because it allowed the appellants' homes to be sold in execution to satisfy the appellants' insignificant unsecured debts. In reaching its decision the court considered the right to adequate housing under international law, security of tenure in our historical context and the limitation clause contained in section 36 of the Constitution.

The court could not see how the appellants' small debts justified the sale in execution of their homes.⁴⁰ However, this did not mean that every sale in execution to satisfy a small debt shall be unreasonable.⁴¹

The court held that, in deciding whether a debtor's immovable property should be sold in execution the courts should take cognisance of the plight of a debtor who stands to lose his security of tenure. On the other hand, the interests of creditors should not be overlooked and

³⁹ n 16 above.

⁴⁰ *ibid* par 40.

⁴¹ *ibid*.

there is a need for poor communities to take financial responsibility for owning a home.⁴² Thus, the consideration of the legitimacy of the sale in execution must be seen as a balancing process.⁴³

The court held that the limitation of the right of access to adequate housing can only be justified if there is judicial oversight, where the court considers all the relevant circumstances.⁴⁴ In order to remedy the lack of judicial oversight during the sale in execution process, the following phrase was to be read in section 66(1)(a) of the Magistrates Court Act: “A court after consideration of all the relevant circumstances, may order execution.”⁴⁵

The court also provided guidelines to assist courts when exercising their discretion. The guidelines are as follows:⁴⁶

- a) Compliance with the procedure laid down by the rules of court;
- b) whether there are other reasonable ways in which the debt can be paid to prevent the sale of the property;
- c) if there has been compliance with the court rules and there is no other way to satisfy the debt other than the sale in execution of the debtor’s home then the sale in execution may be appropriate unless ordering the sale in execution, based on the circumstances of the case, would be grossly disproportionate.
- d) the size of the debt;
- e) the circumstances in which the debt arose;
- f) availability of other means to satisfy the debt other than the sale of a debtor’s home;
- g) any attempts made by the debtor to pay off the debt;
- h) the financial situation of the debtor;
- i) the amount of the debt;
- j) whether the debtor is employed and has a source of income to pay off the debt; and
- k) any other factor relevant to the particular case before the court.

⁴² *ibid* par 42 and 53.

⁴³ *ibid* par 42.

⁴⁴ *ibid* par 54-55 and par 61.

⁴⁵ *ibid* par 64.

⁴⁶ *ibid* par 60.

As a result of the decision in *Jaftha* there was uncertainty as to whether the decision of the Constitutional Court also applied to mortgage finance because, unlike an unsecured debt, the debtor voluntarily bonds his property.

3.2 *Standard Bank of SA Ltd v Snyders*⁴⁷

The defendants had concluded mortgage agreements with the bank and owed the bank money in terms of their agreements. The bank applied for default judgement in terms of rule 31(5) of the Uniform Rules of Court. The registrar refused to grant an order declaring the properties executable due to the Constitutional Court's decision in *Jaftha*.

The matter was then referred to an open court for hearing and the court had to consider whether the registrar of the High Court could grant an order declaring the debtor's immovable property executable if default judgement was granted. The court also had to determine whether there was a legal duty on the bank to advise a debtor in the summons of his rights in terms of section 26 of the Constitution.

The court held that when an execution order is requested in terms of rule 31(5) of the Uniform Rules of Court, no judicial oversight is required because there is a need to ensure that litigants resolve their differences in a speedy and inexpensive manner.⁴⁸ Furthermore, rule 31(5) did not prohibit judicial oversight, in fact the said rule allows the court to consider the matter if referred to it by the registrar.⁴⁹

The court held that the decision in *Jaftha* and section 26(3) of the Constitution require the courts to consider all the relevant circumstances before granting an execution order.⁵⁰ In order to ensure that the court considers all the relevant circumstances before granting an execution order, the bank must in its summons show that the facts alleged in the summons justify an order in terms of section 26(3) of the Constitution.⁵¹

⁴⁷ 2006 2 SA 537 (C).

⁴⁸ *ibid* par 12.

⁴⁹ *ibid* par 13.

⁵⁰ *ibid* par 22.

⁵¹ *ibid* par 24.

The bank's claim failed because the summons did not make an allegation stating that the facts in its summons are sufficient to justify an order in terms of section 26(3) of the Constitution.⁵²

3.3 *Nedbank v Mortinson*⁵³

The defendant defaulted on payments due in terms of the mortgage agreement. The bank applied for default judgement and requested for an order declaring the property executable. The registrar was uncertain as to whether he could grant the execution order and referred the matter to court.

The court had to consider if the registrar of the High Court could grant an order declaring the debtor's immovable property executable if default judgement was granted.

The court held that the execution of residential property in terms of rule 31(5) is a limitation of the debtor's constitutional rights in terms of section 26 of the Constitution.⁵⁴ However, the limitation of this right is justified if the debtor hypothecated his immovable property.⁵⁵ This is because the debtor was a party to a contract that places his property at risk should he default on payments.⁵⁶ Therefore, the registrar could declare specially hypothecated immovable property executable.⁵⁷

The court held that in cases where the creditor seeks to declare the specially hypothecated immovable property executable and the amount claimed falls within the jurisdiction of the Magistrates Court, then the registrar must refer the matter to the court in terms of rule 31(5)(b)(vi).⁵⁸

The Uniform Rules of Court, unlike the Magistrates Court Rules, protect the debtor because rule 31(5)(d) allows the court to reconsider the judgement or direction given by the registrar within 20 days after the debtor acquires knowledge of the judgement or direction.⁵⁹ A debtor who participates in commercial activity to the extent that he hypothecates immovable

⁵² *ibid* par 25.

⁵³ 2006 2 SA 506 (W).

⁵⁴ *ibid* par 22.

⁵⁵ *ibid* par 33.

⁵⁶ *ibid* par 25.

⁵⁷ *ibid* par 38.

⁵⁸ *ibid* par 33.2.

⁵⁹ *ibid* par 26.

property has access to legal advice and thus, ought to be aware of rule 31(5)(d). However, in an effort to accommodate debtors who are not aware of the said rule the court held that the writ of execution must draw the debtor's attention to the rule.⁶⁰ Furthermore, the debtor is protected by rule 31(5)(b)(vi) which allows the registrar to refer an application for default judgement to an open court for a hearing.⁶¹

The court further held that where the creditor applies for default judgement and an order declaring the specially hypothecated immovable property executable the affidavit must specify the amount of the arrears outstanding on the date of application for default judgement, whether the hypothecated property was acquired by state subsidy or not, whether as far as the creditor is aware the property is occupied or not, whether the property is occupied for commercial or for residential purposes and whether the debt sought to be enforced was incurred to acquire the property or not.⁶²

Furthermore, the court held that, cases where the movable property is insufficient to settle the debt will be bound by the decision of the Constitutional Court in *Jaftha*.⁶³ The words "and a court, after consideration of all the relevant circumstances" must be inserted after "movable property" in rule 45(1).⁶⁴

3.4 *Standard Bank of SA Ltd v Saunderson*⁶⁵

The bank sought to appeal against the decision of the court a quo. The latter held that, if the bank wished to have the immovable property used as security for the home loan declared executable, the allegations made in the summons had to be sufficient to justify the execution order in terms of section 26(3) of the Constitution. The court had to decide on whether the bank had a duty to justify the execution orders.

The court was of the view that the case before it was different from *Jaftha* because the defendants agreed in the mortgage agreement to have their immovable property used as

⁶⁰ *ibid* par 27.

⁶¹ *ibid* par 29.

⁶² *ibid* par 33.1.

⁶³ *ibid* par 38.

⁶⁴ *ibid* par 39.

⁶⁵ n 29 above.

security for the home loan and therefore, compromised their rights of ownership.⁶⁶ Thus, the court held that if there is no abuse of court procedure the registrar of the court can grant an order declaring immovable property executable.⁶⁷

The mere fact that the bonded property was residential property was not enough to conclude that there will be an infringement of section 26(1) of the Constitution.⁶⁸ However, where the debtor raised a constitutional objection based on section 26(1) of the Constitution the registrar has a duty to refer the matter to court for hearing.⁶⁹

The court held further that it is the duty of the defendants to show that the granting of the execution orders will infringe their right of access to adequate housing. Once this allegation is made the bank will have to justify the granting of the orders.⁷⁰ The defendants never alleged or proved that the execution orders would infringe on their right in terms of section 26(1) of the Constitution, therefore there was no duty on the bank to justify the granting of the execution orders and the appeal was upheld.⁷¹

The court also held that the summons which claims for an order to have immovable property declared executable must draw the defendant's attention to his constitutional right in terms of section 26(1).⁷² The summons must also state that should the defendant believe that the execution order will infringe on his right in term of section 26(1) of the Constitution, then it is the defendant's duty to place information supporting that allegation before the court.⁷³

3.5 *Absa Bank Ltd v Ntsane*⁷⁴

When the bank applied for default judgement, the defendants' home loan account was in arrears of R18-46. The bank claimed the outstanding balance amounting to R62 042-43. The court declined the application for default judgment for the full amount outstanding on the bond and held that the insistence by the bank to enforce the execution against the immovable

⁶⁶ *ibid* par 18.

⁶⁷ *ibid* par 19 and 22.

⁶⁸ *ibid* par 20.

⁶⁹ *ibid* par 23 and 24.

⁷⁰ *ibid* par 20.

⁷¹ *ibid* par 21.

⁷² *ibid* par 25.

⁷³ *ibid* par 27.

⁷⁴ 2007 3 SA 554 (T).

property which is the only home that the defendants have, under circumstances where there are easier ways to obtain payment of the arrears, without prejudice to the bank's rights, constitutes an abuse of the system and the process of the court.⁷⁵

The court also held that it would be in conflict with section 26 of the Constitution to enforce the right to execute against immovable property because the unpaid amount was so small. In addition to the above, when considering the monies that the defendants had paid to the bank the latter had not suffered any loss on the secured loan.⁷⁶

The court held that the prejudice suffered by the debtor must be weighed against the prejudice that the bank will suffer if the agreement is rendered commercially ineffective.⁷⁷ The bank's right to commercial activity and to enforce legal agreements must be balanced against the defendants' constitutional right to adequate housing.⁷⁸ In considering the conflicting rights the court must consider all the relevant information, including the value of the bonded property, the past history of payments made by the debtor, the amount outstanding on the bond, any assets that the debtor might possess other than the immovable property, any other debts which the bondholder was aware of such as arrear rates and municipal taxes, whether the debtor was or was not employed.⁷⁹

The court further held that a court is entitled to refuse to grant execution against immovable property where the result is unfair to the home owner.⁸⁰ A gross unfairness might be perpetrated against the defendants if an enforced sale in execution were to obtain a price less than the market value while a controlled sale might obtain a much higher price.⁸¹

Due to these cases Rule 46 of the Uniform Rules of Court was amended on 24 December 2010 and reads as follows:

“No writ of execution against the immovable property of any judgment debtor shall issue until-

- (i) a return shall have been made of any process which may have been issued against the immovable property of the judgment debtor from which it appears that the said person has no

⁷⁵ *ibid* par 85.

⁷⁶ *ibid* par 43 and 44.

⁷⁷ *ibid* par 69 and 70.

⁷⁸ *ibid* par 71 and 72.

⁷⁹ *ibid* par 73.

⁸⁰ *ibid* par 79.

⁸¹ *ibid* par 83.

sufficient movable property to satisfy the writ; or

- (ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall have been issued unless the court, having considered all the relevant circumstances, orders execution against such property.”

The effect of this rule will be discussed in paragraph 3.7 below in light of the *Folscher*⁸² decision.

3.6 *Gundwana v Steko Developments*⁸³

In 2003 the registrar of the court granted default judgement and an order declaring the applicant’s property executable. The bank, however, did not sell the property in execution immediately, so the applicant continued to live in the property and made sporadic payments over the years.

In August 2007 the applicant discovered that her property was going to be sold in execution. Although the applicant paid the outstanding amount, her property was sold in execution to Steko Developments. The latter obtained an eviction order and was in the process of evicting the applicant. Since the applicant was of the view that the power granted to the registrar was constitutionally invalid, the applicant requested that the default judgement obtained in 2003 be rescinded. The Constitutional Court had to determine if the registrar in terms of rule 31(5) of the High Court Rules could issue an order declaring the mortgaged property executable.⁸⁴

The bank was of the view that the applicant was not subject to the protection of the *Jaftha* decision. The bank alleged that unlike the *Jaftha* case the applicant provided her property as security for the mortgage debt and thus put herself at risk of losing her property.⁸⁵ The bank also submitted that the applicant was protected by rules 31(5)(b)(vi) and 31(5)(d) of the High Court Rules, which allow for the registrar and the debtor to refer a matter to an open court.⁸⁶

⁸² n 4 above.

⁸³ 2011 3 SA 608 (CC).

⁸⁴ *ibid* par 2.

⁸⁵ *ibid* par 42.

⁸⁶ *ibid* par 50.

The Constitutional Court rejected the bank's submissions and held that the constitutional validity of the rule cannot depend on the subjective position of a particular applicant. It is either objectively valid or not.⁸⁷ Entering into a mortgage agreement does not mean that the applicant accepted that the mortgage debt would be enforced without the court making a decision on the matter and that the applicant waived her constitutional rights in section 26(1) and (3) of the Constitution.⁸⁸

The court further held that the sale in execution process is part of economic life, however, the disproportionality between the means used in the execution process to ensure that the debt is settled and other available means might lead to problematic results. In allowing execution against immovable property, due regard should be had of the impact that this may have on judgment debtors who are poor and at risk of losing their homes. If the judgment debt can be satisfied in a reasonable manner, without involving those drastic consequences, that alternative course should be judicially considered before granting execution orders.⁸⁹ However, a sale in execution is inevitable if there are no proportionate means available to obtain the same result.⁹⁰

The execution of an individual's immovable property requires evaluation.⁹¹ Therefore, the court held that judicial oversight is required to make a decision as to whether the infringement of the section 26(1) right is justified so that the mortgaged property can be sold in execution.⁹² Thus, the rules of court were to be amended to provide that a writ of execution may only be issued once the court has taken into account all the relevant circumstances.

3.7 *FirstRand Bank v Folscher*⁹³

The court had to deal with the interpretational and practical questions of the amended rule 46 of the Uniform Rules of Court to give direction to legal practitioners.⁹⁴ The court sought to provide clarity on the relevant circumstances that a court must take into account before issuing a writ of execution against a judgement debtor's immovable property, the manner in

⁸⁷ *ibid* par 43.

⁸⁸ *ibid* par 44.

⁸⁹ *ibid* par 53.

⁹⁰ *ibid* par 54.

⁹¹ *ibid* par 50.

⁹² *ibid* par 49.

⁹³ n 4 above.

⁹⁴ *ibid* par 4.

which the relevant circumstances had to be placed before a court and the information to be provided to the debtor before the application for default judgement and writ of execution.

The court held that primary residence is the same as the home of a person therefore there is no conflict between the amended rule 46 and the *Gundwana* judgement.⁹⁵ Judicial oversight is necessary if the immovable property to be sold in execution is the debtor's residential property or only dwelling that the debtor owns. The rule does not apply to a debtor's holiday home or second house which the debtor does not occupy.⁹⁶ The term judgement debtor means a person or an individual. Therefore, the immovable property owned by a company, a close corporation or a trust, of which the member, shareholder or beneficiary is the beneficial occupier, is not protected by the amended rule even if the immovable property is the only residence of the shareholder, member or beneficiary.⁹⁷

The court further held that relevant circumstances mentioned in section 26(3) of the Constitution means legally relevant circumstances.⁹⁸ The court must always bear in mind that the debtor facing execution and subsequent eviction should not be a victim of abuse of the process.⁹⁹ The creditor's conduct does not have to be wilfully dishonest and vexatious to constitute abuse.¹⁰⁰ Furthermore, the consequence of granting a writ, although in good faith, may be unfair because the debtor may lose his home while there are other means of satisfying the debt.¹⁰¹ Thus, the following factors should be taken into account by the court when deciding whether or not to issue a writ of execution:¹⁰²

- a) Whether the mortgaged property is the debtor's primary residence;
- b) the circumstances under which the debt was incurred;
- c) the outstanding arrears on the home loan account when the bond was called up;
- d) the arrears on the date default judgement is sought;
- e) the total amount owing;
- f) the debtor's payment history;
- g) the relative financial strengths of the creditor and the debtor;

⁹⁵ *ibid* par 22.

⁹⁶ *ibid*.

⁹⁷ *ibid* par 32.

⁹⁸ *ibid* par 33.

⁹⁹ *ibid* par 40.

¹⁰⁰ *ibid*.

¹⁰¹ *ibid*.

¹⁰² *ibid* par 41.

- h) whether any possibilities exist that the debtor's liabilities to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence;
- i) the proportionality of the prejudice that the creditor would suffer if the writ of execution is not granted compared to the prejudice that the debtor would suffer if execution went ahead and he loses his home;
- j) whether the section 129 notice in terms of the National Credit Act was issued before instituting legal proceedings;
- k) the debtor's reaction to the abovementioned notice, if any;
- l) the period of time that elapsed between delivery of such notice and the institution of the action;
- m) whether the property sought to be declared executable was acquired by means of a state subsidy;
- n) whether the property is occupied or not;
- o) if the property is in fact occupied by the debtor;
- p) whether the immovable property was acquired by funds advanced by the creditor or not;
- q) whether the debtor will lose his access to adequate housing as a result of the sale in execution of his home;
- r) whether there is any indication that the creditor has instituted action with an ulterior motive or not; and
- s) the position of the debtor's dependants and the other occupants of the house although in each case these facts will have to be established as being legally relevant.

The court also held that the enquiry as to whether the writ of execution order should be granted must be fact-bound to identify the criteria that are relevant for a particular case.¹⁰³

With regards to the manner in which the relevant information must be placed before a court, the court held that if the debtor opposes the creditor's application for a writ to be issued, then the debtor has a duty to inform the court of any factor that should be taken into account.¹⁰⁴ In the ordinary course of events the creditor will be able to inform the

¹⁰³ *ibid.*

¹⁰⁴ *ibid* par 42.

court of the history of creation of the debt and the repayment thereof.¹⁰⁵ The creditor may also be able to comment on the debtor's ability to effect payment of any arrears, by means other than allowing execution against a debtor's home.¹⁰⁶ In default proceedings the creditor has a duty to disclose all the facts that may assist the court to come to a conclusion.¹⁰⁷

The court issued a practice directive stating that if the summons is preceded by a notice in terms of section 129 of the National Credit Act such a notice must notify the debtor that should legal action be instituted and judgement be obtained against him, execution against the debtor's primary residence will follow and will usually lead to the debtor's eviction from such home.¹⁰⁸

The court further held that when legal action is taken to enforce a debt secured by a hypothec over the debtor's immovable primary residence, then the summons must inform the debtor of his rights in terms of section 26 of the Constitution.¹⁰⁹ A writ of execution should include a reference to the provisions of rule 31(5)(d) as determined in *Mortinson*, to ensure that the debtor is aware of his or her rights;¹¹⁰ Furthermore, the amendment to rule 46 does not apply in retrospect. However, the declaration of constitutional invalidity of the granting of a writ of execution by a registrar applies in retrospect.¹¹¹

The court also held that a creditor that applies for default judgement either to the court or registrar must file an affidavit reflecting the relevant circumstances identified by the court in paragraph 19.¹¹² A creditor applying to court for the granting of a writ of execution, after obtaining judgment by default, must file an affidavit setting out all the applicable circumstances enumerated in paragraph 41 of this judgement, of which the creditor is aware or is able to reasonably establish from the information at its disposal.¹¹³ A creditor instituting action may include a prayer in the summons requesting for a writ of execution to be granted, provided that the relevant circumstances mentioned in paragraph 41 of this

¹⁰⁵ *ibid* par 43.

¹⁰⁶ *ibid*.

¹⁰⁷ *ibid*.

¹⁰⁸ *ibid* par 47 and 53.

¹⁰⁹ *ibid* par 52.

¹¹⁰ *ibid* par 47.

¹¹¹ *ibid* par 49.

¹¹² *ibid* par 54.

¹¹³ *ibid* par 55.

judgement are recorded therein.¹¹⁴ This information is to be verified by affidavit when an application for default judgement is made. Such application for default judgement must be referred to the High Court if the granting of a writ of execution is sought at the same time.¹¹⁵

3.8 *Standard Bank of South Africa Ltd v Bekker*¹¹⁶

Due to the amendment of rule 46 of the Uniform Rules of Court and conflicting judgements it was unclear what information the mortgagee had to provide to the court for a writ of execution to be issued. Thus, the court requested the counsel representing the mortgagees in five default judgement applications to formulate specific questions for the court to address. The questions were as follows:¹¹⁷

- a) What were the relevant circumstances to which the court had to have regard before ordering execution against mortgaged property to satisfy the debt secured by such mortgage?
- b) Who had to plead such circumstances?
- c) Did the amended rule 46(1) have the effect of setting up any substantive requirement on the part of the plaintiff in order to obtain the relief sought, namely the enforcement of contractual rights and obligations?

The court held that it would be futile to indicate the circumstances that a court must consider before issuing a writ of execution because the Constitutional Court in both the *Jaftha* and *Gundwana* cases declined to provide a definitive indication of what the relevant circumstances may be in such an evaluation. The court, however, affirmed that the circumstances must be legally relevant.¹¹⁸ In both the *Jaftha* and *Gundwana* cases the evidence of the facts, which supported the allegation that the debtor's section 26 rights would be implicated, was provided by the debtor and not the creditor.¹¹⁹

The circumstances that should be taken into account include those that would be relevant in

¹¹⁴ *ibid* par 56. For a list of the relevant circumstances see pages 24 and 25 above.

¹¹⁵ *ibid*.

¹¹⁶ 2011 6 SA 111 (WCC).

¹¹⁷ *ibid* par 5.

¹¹⁸ *ibid* par 10.

¹¹⁹ *ibid*.

matters arising for consideration under section 26(3) of the Constitution.¹²⁰ The amendment to rule 46(1)(a) gives effect to the constitutional principles enunciated in the *Jaftha* and *Gundwana* cases.¹²¹

The court held that the Constitutional Court has not prescribed what the content of the evaluation required in terms of rule 46(1)(a) should be nor has it advised how or by whom the relevant evidence for the required evaluation should be placed before the court in a default judgement situation, save by suggesting that the directives issued in the *Saunderson* and *Mortinson* cases to ensure that the defendants are alerted to the possibility of the impact that the judgement may have on their fundamental rights may be of assistance.

The court held that the following observations made by the Constitutional Court provide important guidance namely:

- a) In the *Gundwana* case the Constitutional Court emphasised that the constitutional requirement for judicial oversight did not challenge the principle that the creditor is entitled to execute upon the assets of a debtor;¹²²
- b) in the *Gundwana* case the Constitutional Court endorsed the observation that it made in *Jaftha* that if the debtor had willingly put his home as security for the debt, a sale in execution should ordinarily be permitted unless the application for a writ of execution amounted to an abuse of court procedure;¹²³
- c) the endorsement in *Gundwana* of the remarks made in paragraph 58 of the *Jaftha* case confirms that in absence of unusual circumstances, or an abuse of process, execution against the mortgaged property which is the home of a mortgagor is constitutionally justified even if it may infringe on the debtor's section 26 rights.¹²⁴

The court referred to the practical directive given in the *Saunderson* case that the summons must alert the defendant to section 26 of the Constitution. The court held that the object of the practice note is to alert defendants whose rights in terms of section 26 of the Constitution could be infringed by execution against the mortgaged property to bring the relevant facts to

¹²⁰ *ibid* 13.

¹²¹ *ibid*.

¹²² *ibid* par 15.

¹²³ *ibid* par 16.

¹²⁴ *ibid* par 17.

the court's attention. Any court would have regard to such facts in whatever context the defendant might bring them forward, whether in a plea, letter, or by personal appearance at the application for judgement.¹²⁵

The court also acknowledged the economic importance of mortgage finance and mentioned that it would be counterproductive to impede the effective functioning of mortgage finance by introducing novel and onerous procedural impositions on mortgagees seeking to exercise their contractual rights of security.¹²⁶ Unnecessarily imposing constraints that would make obtaining execution orders that the Constitutional Court has confirmed should ordinarily follow in foreclosure cases, significantly more costly or cumbersome would, in the end, only be to make access to mortgage finance more difficult, and rebound against the wider realisation of rights under section 26(1) of the Constitution.¹²⁷

The court further held that the provisions of chapter 6 of the National Credit Act are applicable even to mortgage agreements concluded before its commencement. Furthermore, the provisions of chapter 4 part D of the National Credit Act, which penalise credit providers who extend credit recklessly, are applicable to all mortgage agreements concluded with natural persons after 1 June 2007.¹²⁸

The court held that there may be a duty on the court to act proactively to obtain whatever additional information that might appear relevant for the purpose of consideration in terms of rule 46(1) if, in a particular case, some or other feature of the matter flashes warning signs.¹²⁹ According to the court, the defendants are the persons best informed and able to advise the court of any facts or circumstances that will serve as proof that execution against the property that is their home might result in an unjustifiable infringement of their section 26 rights.¹³⁰

The mere fact that the property concerned is the home of the defendant does not by itself justify an inference that section 26 rights are implicated.¹³¹ Thus, the court should be able to know from the summons whether or not the application for an order authorising execution

¹²⁵ *ibid* par 19.

¹²⁶ *ibid* par 20.

¹²⁷ *ibid*.

¹²⁸ *ibid* par 21 and 22.

¹²⁹ *ibid* par 25.

¹³⁰ *ibid* par 26

¹³¹ *ibid*.

against immovable property concerns the property that is the defendant's primary residence.¹³² In matters in which the plaintiff is unable to make such an allegation positively because of a lack of knowledge that much should be stated in the summons. In such cases the court will scrutinise the matter and assume that the property may be the defendant's primary residence, unless it is clear from other indications in the court papers.¹³³

Furthermore, in a case in which execution is sought against hypothecated property, the mortgagee should, in cases in which the secured debt was repayable in periodic instalments, include in the summons allegations setting out the amount of such instalments and the amount in which payment in terms of such instalments was in arrears at the time of foreclosure or the issue of summons.¹³⁴ In matters in which the amount in arrears was relatively low at the time of foreclosure the plaintiff should set out in its summons allegations which might support the resort to direct realisation of the security as reasonable and appropriate in the circumstances.¹³⁵

Allegations that execution against the hypothecated property would infringe the debtor's constitutional rights or that the application for a writ of execution is an abuse should, in principle, be pleaded by the defendant, and any rebutting allegations by the plaintiff.¹³⁶

The court held that rule 46(1)(a), in its current form, does not give rise to any new substantive obligation on mortgagees seeking orders for execution against hypothecated property.¹³⁷ In fact rule 46(1) gives effect to the constitutional requirement that execution against immovable property that is a judgment debtor's home may potentially entail an infringement of section 26 rights and must therefore occur only under judicial oversight.¹³⁸

¹³² *ibid* par 27.

¹³³ *ibid*.

¹³⁴ *ibid* par 29.

¹³⁵ *ibid*.

¹³⁶ *ibid* par 30.

¹³⁷ *ibid*.

¹³⁸ *ibid*.

4 Discussion

It is apparent from the above case law that concluding a mortgage agreement does not mean that the debtor waives his rights in section 26(1) and (3) of the Constitution. The directives issued in the *Mortinson* and *Saunderson* cases are important and still relevant.

The sale in execution of a debtor's property infringes a debtor's right of access to adequate housing enshrined in section 26 of the Constitution. The old rules of the Magistrates Court and the High Court dealing with sales in executions were in contravention of section 26(3) of the Constitution because in terms of these rules the mortgagee was able to obtain an execution order without any judicial oversight. This meant that an execution order authorising the sale of a debtor's residential property could be granted without the court considering all the relevant circumstances.

These rules of court have been amended and as a result judicial oversight is required when a mortgagee seeks an order declaring a debtor's residential property executable. Judicial oversight is necessary in such cases as it will ensure that mortgagees do not abuse the sale in execution process that has the effect of rendering the mortgagor homeless,¹³⁹ causing social disruption and negatively impacting on a range of human rights.¹⁴⁰

Judicial oversight also ensures that the sale in execution process is used as the last resort and that the court reconciles the opposing claims in a fair and equitable manner by taking into account all the relevant circumstances and the interests of both the mortgagor and mortgagee.¹⁴¹

Judicial oversight is necessary in execution proceedings, as the court can make a decision as to whether the infringement of a debtor's right of access to adequate housing is justified in terms of section 36(1) of the Constitution,¹⁴² which reads as follows;

¹³⁹ n 38 above par 12.19.

¹⁴⁰ n 14 above 136.

¹⁴¹ Rautenbach "Constitutional Court decisions on the bill of rights 2004" 2005 *TSAR* 169 185.

¹⁴² n 3 above 585.

“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 the relevant factors, including:

- a) The nature of the rights;
- b) the importance of the purpose of the limitation;
- c) the nature and the extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.”¹⁴³

Section 36(1) of the Constitution requires that there be a proportionate relationship between the purpose of limiting the right and the impact that the limitation of the right will have on the debtor.¹⁴⁴ It also requires that the infringement of the right should be prohibited if there are less drastic measures that can be used to achieve the same purpose.¹⁴⁵

Thus, when deciding if the sale in execution justifies the infringement of the debtor’s right of access to adequate housing, the court needs to consider all the relevant circumstances and weigh the debtor’s and creditor’s interests. This is referred to as the proportionality test which depends on the facts of each case.¹⁴⁶

This was confirmed in the *Folscher* case, where the court held that:

“a comparison must be drawn between the proportionality of prejudice that the creditor might suffer if execution were to be refused and the prejudice the debtor would suffer if execution went ahead and he lost his home.”¹⁴⁷

The balance between the two conflicting interests is established by placing a duty on mortgagors to raise and prove the existence of a threat to their rights in terms of section 26 of the Constitution.¹⁴⁸ The duty of the mortgagee will be to prove to the court that the violation

¹⁴³ n 1 above.

¹⁴⁴ Brits and Van der Walt “Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the National Credit Act (part 1)” 2014 *TSAR* 280 293-294.

¹⁴⁵ *ibid* 294.

¹⁴⁶ n 14 above 125 and 135. See also *Folscher* case par 41.

¹⁴⁷ n 4 above par 41.

¹⁴⁸ n 19 above 332.

of the mortgagor's section 26 rights is justifiable.¹⁴⁹ The court must then consider the justification of allowing the execution taking into account the relevant circumstances.¹⁵⁰

Section 26(3) of the Constitution, the case law discussed in chapter 3 and the amended rule 46 of the Uniform Rules of Court have numerous impacts on the bank as a mortgagee. Firstly, the bank may be deprived of its security where a court refuses to grant the execution order due to the fact that the mortgagor will be prejudiced if his property is sold in execution. Secondly, the bank now has a duty to find other means to recover the debt regardless of the fact that the residential properties of mortgagors are available as security.

In addition to the above, banks are now burdened with having to comply with certain procedural requirements before an execution order can be granted. For instance, the bank has a duty to do the following:

- Make reference to section 26 of the Constitution in the summons and the section 129 notice;
- make sure that the sale in execution process is used as the last resort, which means that the mortgagee must then prove to the court that all other means available to recover the debt were attempted;
- provide the court with relevant information like the details of the debt including the instalment amount and arrears amount at the time of default. How the property in question was acquired and the nature of the property (commercial or residential); and
- provide the court, especially in default proceedings, with all the relevant information so that the court can make a decision. In such cases mortgagees are placed in a difficult position, as they will be required to provide information that might not necessarily be within their knowledge i.e. the bank would not know if the mortgagor lives in the property that it intends to sell in execution and the effect that the sale in execution will have on the mortgagor's family.

Before the *Jaftha* case and the amendment to rule 46 of the Uniform Rules of Court the mortgagees were not burdened with these procedural requirements.

¹⁴⁹ n 144 above 292.

¹⁵⁰ n 19 above 332.

It seems that the strict application of the common law to call up the bond, cancel the entire mortgage agreement, claim the outstanding balance and insist on execution of the mortgagor's property without seeking other ways to rectify the arrears no longer applies. Therefore, the acceleration right is no longer absolute.¹⁵¹ Furthermore, the rule allowing the mortgagee to enforce its rights in terms of the mortgage agreement, regardless of how small the amount in arrears is, is not guaranteed as a result of the interpretation of the housing clause in the *Ntsane* case.¹⁵² The size of the arrears is now a circumstance that the court considers when deciding if an execution order should be granted.

The developments in the law relating to the sale in execution of mortgaged property have changed the traditionally unqualified right of the mortgagee into one that is qualified by human rights norms that do not form part of the mortgage agreement between the parties and the private law rules that regulate the relationship.¹⁵³ Hence, it is safe to say that due to these changes in our law the certainty and predictability of mortgage agreements is compromised. This is because the mortgage agreement not only concerns the parties to the agreement but also the public at large as considerations of public policy have an impact on the agreement. Thus, the freedom to contract does not exist in its pure form when it comes to mortgage agreements. This comes as no surprise because as early as the 19th century it has been accepted that contractual autonomy is not absolute.¹⁵⁴ Contractual autonomy is further eroded by the Constitution that allows the courts to develop the common law and consumer legislation that prescribes standards on the form and terms of a contract. This calls into question the power of the parties to conclude an unassailable contract that is free from judicial interference.¹⁵⁵

Even though it appears that the law relating to the sale in execution of mortgaged immovable property has been developed to give effect to the Constitution and favours considerations of public policy, greater recognition of the interests of the home owner does not disregard or undermine the mortgagee's commercial interest in the property. Greater recognition of the mortgagor's interests simply delays the sale in execution of the mortgagor's home.¹⁵⁶

¹⁵¹ n 5 above 517.

¹⁵² n 3 above 589.

¹⁵³ *ibid* 593.

¹⁵⁴ n 37 above 16.

¹⁵⁵ *ibid*.

¹⁵⁶ n 19 above 332.

It is also clear from the court's decision in the *Gundwana* case that it is not in dispute that mortgage finance, which may lead to the sale in execution of a debtor's home, is an important part of our economic life therefore; the sale of the debtor's residential property may be inevitable. Juma disagrees with the decision of the Constitutional Court in the *Gundwana* case. He is of the view that the court's decision imposes an additional burden on the mortgagee than was intended when the contract was negotiated. This approach can only have a negative effect on the possibilities of securing finance for new home buyers.¹⁵⁷

Although it is correct that mortgagees now have an additional burden, it is not correct to state that such a burden will have a negative effect on new home buyers. Reason being that mortgage finance is a very important part of the bank's business which enables the bank to make a profit. Thus, the bank is more open to ensuring that it complies with its legal obligations when collecting on a debt as opposed to refraining from granting mortgage finance.

The bank can avoid infringing a debtor's section 26(1) right by first making use of the debt relief mechanisms available in the National Credit Act instead of immediately making a decision to sell the debtor's mortgaged immovable property in execution.¹⁵⁸ The debt relief mechanisms available in the National Credit Act and other alternative forms of debt recovery will be discussed in chapter 5 below.

¹⁵⁷ n 37 above 17.

¹⁵⁸ n 5 above 509.

5 *Alternative forms of debt recovery*

The debt enforcement process has dire consequences because the debtor will not only lose his home but will be liable for legal fees and a large shortfall amount. The debtor will also have a judgement listing that will remain at the credit bureau for five years.¹⁵⁹

Having a poor credit record means that it will be difficult for the debtor to find employment therefore, the debtor will not have an income. If the debtor is employed it will be difficult to find another job that pays a better salary. The debtor's car insurance will be high and it will be difficult for the debtor to obtain finance and rent a property.

From the above, it is evident that the debt enforcement process increases the debtor's financial burden and makes it difficult for the debtor to obtain any form of finance, including mortgage finance. A debtor's prospect of obtaining a home in the future after the sale in execution of his property is highly unlikely, which means that the debtor's right of access to adequate housing is limited. It is thus very important for the bank to seek alternative means to collect the debt and ensure that the debt enforcement process, which will lead to the sale in execution of the debtor's home, is used as the last resort.

5.1 *Mechanisms available in the National Credit Act*

The purpose of the National Credit Act is to promote and advance the social and economic welfare of South Africans and to promote a fair, transparent, competitive, sustainable, responsible and accessible credit market and industry, and to protect consumers.¹⁶⁰ In order to achieve this, the National Credit Act has mechanisms in place to prevent consumers from being over indebted and provides mechanisms to deal with over-indebtedness.

Although the National Credit Act does not protect the debtor's constitutional right of access to adequate housing, its purpose is to alleviate over-indebtedness, which is usually the cause of mortgage default,¹⁶¹ by introducing the debt review process.

¹⁵⁹ n 25 above regulation 17.

¹⁶⁰ *ibid* section 3.

¹⁶¹ n 5 above 518-519.

The debt review process can be initiated in terms of sections 85 or 86 of the National Credit Act. In terms of section 85 the debt review process is initiated by an allegation made by the debtor during court proceedings that he is over-indebted. The court may then refer the matter to a debt counsellor for consideration or declare that the debtor is over-indebted.¹⁶²

Section 86 on the other hand, provides that before a credit provider proceeds with legal action a debtor may apply to a debt counsellor to be declared over-indebted.¹⁶³ When the debt counsellor accepts the debtor's application the debt counsellor must inform the credit provider about the application. The debt review application process must be complete within 60 business days, if it is not complete within the abovementioned time, then the credit provider can have the debt review process terminated by way of notice.¹⁶⁴

When a debtor applies to be placed under debt review in terms of section 86 the debt counsellor will determine if the debtor is over-indebted. If it is concluded that the debtor is not over-indebted but struggling to pay his debts on time, then the debt counsellor can request that the debtor and the credit provider enter into an agreement to reschedule the debt. If the debt counsellor finds that the debtor is over-indebted then the debt counsellor can recommend to the Magistrates Court that the agreement be declared reckless, rearrange the debt or reschedule the debt.¹⁶⁵

When a debtor applies to be placed under debt review the credit provider may not proceed with legal action until the debtor is in default and:

- The debt counsellor rejects the application for debt review;
- the court has held that the debtor is not over-indebted;
- the court has made an order of rearrangement or the credit provider and consumer have reached a rearrangement agreement and the debtor's obligations under the rearranged credit agreements have been fulfilled; or
- the consumer defaults on the rearrangement.¹⁶⁶

¹⁶² n 25 above 70.

¹⁶³ n 25 above section 86(2).

¹⁶⁴ *ibid* section 86(10).

¹⁶⁵ *ibid* section 86(7).

¹⁶⁶ *ibid* section 88 (3). See also n 25 112.

The debt review process enables a debtor to rearrange his debts and benefits both the parties as the credit provider receives payments, although reduced, and the debtor keeps his home. This means that the debtor's right of access to adequate housing is protected. In *FirstRand Bank v Maleke*¹⁶⁷ the court encouraged that the debt review process should be considered first, before proceeding with legal action.

The debt review process also allows the debtor to recover from his state of indebtedness and provides him with time to consider other options available that will assist him in settling his debts. For instance, while the debtor pays the reduced instalment he can look for a job that will pay him a better salary or he can attempt to sell the property privately at its market value.¹⁶⁸

The debt enforcement process can be interrupted by sections 129(3) and (4) of the National Credit Act which provides debtors who are in default with the opportunity to reinstate their credit agreements. This debt relief mechanism gives debtors a last opportunity to prevent the sale in execution of their homes. As a result of section 129(3) of the National Credit Act the debtor can prevent and reverse a credit provider's decision to foreclose by complying with the requirements for reinstatement.¹⁶⁹ Thus, the acceleration clause is now limited by the principle of reinstatement.¹⁷⁰

A debtor may reinstate a mortgage agreement after judgement has been granted and a writ of execution has been issued.¹⁷¹ In terms of *Nkata v FirstRand Bank Ltd*¹⁷² a debtor may reinstate a mortgage agreement even though the property has already been sold in execution but the proceeds have not yet been realised.

In terms of section 129(4) of the National Credit Act a credit agreement can be reinstated if the debtor to pays all overdue amounts, the credit providers default charges and the credit provider's reasonable costs for enforcing the agreement.¹⁷³

¹⁶⁷ 2010 1 SA 143 (GJ) par 5.4 and 17.

¹⁶⁸ n 7 above 552.

¹⁶⁹ Brits "Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act" 2013 *Stell LR* 165 165.

¹⁷⁰ *ibid* 167-169.

¹⁷¹ *ibid* 179. See also 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* 75 87.

¹⁷² case no CCT 73/2015 (CC) (unreported) par 131.

¹⁷³ Louw "Banks beware: reinstatement of mortgage loan agreements" 2016 *De Rebus* 52.

Reinstating a credit agreement means that the debtor's home will be returned to the debtor and no sale in execution will take place. Furthermore, the mortgage agreement will continue to operate as it did before the default occurred.¹⁷⁴ Banks should always remind their customers who are facing legal action of their right in terms of sections 129(3) and (4) of the National Credit Act.

5.2 *Private sale*

The big four banks in South Africa offer financially distressed customers an option to sell their properties privately, quickly, and at a market related price. The aim of the private sale program is to alleviate customers from financial distress while at the same time ensuring that the home loan debt is paid off.¹⁷⁵ With the private sale program the bank works together with the distressed customer to sell his property by advertising the property online and appointing estate agents to market and sell the property.

The benefits of selling the property privately are that the selling price will be higher than the auction price. This is good for both the bank and its customer because the home loan debt may be paid off in full or if there is a shortfall, the shortfall amount will be low. The debtor will also conclude an acknowledgement of debt for the shortfall amount and the bank will not institute legal action.

If there are any profits made on the private sale then the excess funds will be paid over to the debtor meaning that the debtor will not only be free from debt but he will also have funds that he can use to rent a property or purchase a cheaper property. Thus, the debtor will no longer be financially burdened and will have access to adequate housing. The private sale program also alleviates the debtor from enduring lengthy and costly legal processes. The debtor will not have further adverse listings at the credit bureau which will enable him to obtain finance.

¹⁷⁴ n 182 above 167-169. See also n 184 85.

¹⁷⁵ <https://www.absa.co.za/personal/borrow/for-a-home/helpusell/> visited on 16-10-2016.

<http://www.standardbank.co.za/portal/site/standardbank/menuitem.7be31f1eb20ecb95d0820af5d10909a0/?vgnextoid=ad5a34fb21795510VgnVCM1000009a90900aRCRD&vgnnextfmt=default> visited on 07-02-2017.

<https://www.fnb.co.za/home-loans/quick-sell-and-repossessed-properties.html> visited on 16-10-2016.

<https://www.nedbank.co.za/content/nedbank/desktop/gt/en/personal/loans/home-loans/payment-problems/nedbank-assisted-sales.html> visited on 07-02-2017.

It is always a better option for a financially distressed debtor to opt for the private sale program because the banks usually use large estate agent companies with many years of experience in the property business. The services of these estate agents are professional and the debtor can be confident that his property will sell because of the extensive advertising and marketing campaigns which attract more buyers. Unlike a sale in execution that has very limited advertising.

The buyers in a private sale are willing to pay the market-related price, whereas the buyers in a sale in execution have an intention of purchasing the property at a very low price. More buyers due to extensive marketing and advertising means that there will be competition and the property may sell at a high price.

The banks usually offer a discount on the estate agent's commission and the attorney cancellation and transfer costs. Therefore, with the private sale program the debtor saves monies he could have spent on litigation costs, attorney transfer and cancellation costs, estate agent's commission and the costs involved in marketing and advertising a property.

Unlike a sale in execution which is a forced sale the private sale program is voluntary and as a result the debtor remains in control of the entire process. The debtor can insist that the property be sold at a price above the outstanding home loan balance and the debtor is allowed to decline offers that he deems to be unsatisfactory.

In addition to the above, both the debtor and the bank benefit from the private sale program as the outstanding balance will be paid off and the debtor will be relieved of the debt. The relationship between the debtor and the bank is not hostile and the bank does not have to proceed with debt enforcement and deal with the burden of having to explain to the court that the infringement of a debtor's right to adequate housing is justified.

The private sale program is quick and simple, all that the debtor is required to do is complete the agreement authorising the bank's estate agents to sell his property. The agreement is usually for six months and the debtor is usually required to provide the estate agent with the relevant information regarding the property, allow access to his property during the viewing

times set by the estate agent, keep the property neat and continue paying the instalment amount due on the home loan account while the property is still on the market.

In light of the above, it is clear that the private sale program is a better option than proceeding with legal action and selling the debtor's property in execution. The only problem is that only a few customers are aware of this program. It is my view that the banks should do more to ensure that their customers are aware of the program. Explaining the private sale program on their websites is simply not enough. The banks must make it a priority to educate their customers about the benefit of selling their properties privately when experiencing financial difficulty.

Banks should not only focus on informing the customers, whose home loan accounts are in arrears, that debt enforcement will follow should they fail to make payment. The banks must also inform their debt stressed customers about the benefit of the private sale program. More brochures explaining the benefits of the private sale program should be available at the banks' branches. Such brochures should be attached to the statements of those customers whose accounts are in arrears. The call centre agents tasked with contacting customers to inform them about the arrears on their home loan accounts or those agents that receive calls from financially distressed customers must inform customers about the private sale program and its benefits.

5.3 *Reaction to default and efficiency of the bank*

The way in which the bank reacts when a customer defaults on his home loan account is important and may prevent the debt enforcement process. Although the bank does contact customers telephonically when their home loan accounts are in arrears the bank usually makes the call when the arrears amount is very high. Thus, the bank reacts to the default status at a very late stage when the customer does not have the funds to settle the high arrears in full. Banks should react quickly when the home loan account reaches default status even if the customer has missed just one payment. The banks must be careful not to just communicate the default status by sending out a letter because there is never a guarantee that the customer receives this letter.

A telephone call is the best method of communicating the default status as the bank's call centre agent can provide the customer with information on how to cure the default status and at the same time the customer is given the opportunity to ask questions and raise his concerns. With a letter the customer cannot immediately receive answers to questions that he has relating to the content of the letter and the bank loses out on the opportunity to immediately conclude a payment arrangement with the customer.¹⁷⁶

The banks are open to entering into suitable payment arrangements before proceeding with legal action. The payment arrangement that the bank will conclude with the customer will be based on the customer's financial position at the time. Therefore the customer will be required to provide the bank with proof of his income and expenditure. After considering the customer's financial position the bank may decide to grant the customer a six months or three months moratorium which is commonly referred to as a payment holiday. This type of payment arrangement grants the customer a payment break and he will only resume payments on a specified date. When the customer resumes payment he is expected to pay increased monthly instalments. It is also possible for the bank to reschedule a home loan by extending the customer's loan term and reducing the instalment amount. The customer may also make an arrangement to pay the arrears amount over a period of time. With this type of arrangement the customer pays the monthly instalments plus an additional amount until the arrears are cleared.

When concluding a payment arrangement the bank will conclude an agreement with the customer recording the applicable terms and conditions. Should the customer fail to make payment then the payment arrangement will be cancelled.

It is also a good idea for the bank to have processes in place to prevent the home loan account from reaching default status. For instance the bank can do the following:

- Insist that customers pay the monthly instalments by way of debit order and not cash payments. The disadvantage of cash payments is that such payments are solely in the control of the customer who may make late payment or pay a lower instalment

¹⁷⁶ Marais, Botes, Pelser & Venter "The non-payment of mortgage bonds in South Africa: the voice of defaulters" 2005 *Acta Structilia* 1 17.

amount. This will cause the account to fall into arrears whereas with a debit order the correct amount will be debited timeously;

- debiting the monthly instalment directly from the customer's salary. In this case the bank will have to obtain consent from the customer;
- ensuring that customers understand the importance of paying the monthly instalment on time and the consequences of not paying;
- encouraging customers to not miss any payments and to pay the monthly instalments on the agreed date by rewarding customers who have been consistent in paying their monthly instalments. Banks can use the rewards programs (earning points) as an incentive for customers to pay their monthly instalments; and
- penalise customers that fail to make payment by charging arrears interest for non-payment.¹⁷⁷



¹⁷⁷ ibid 19.

6 Conclusion

Prior to the enactment of the Constitution, the issuing of a writ of execution against immovable property was a procedural application without judicial oversight. In the *Jaftha* and *Gundwana* cases the Constitutional Court held that an order declaring a debtor's immovable property executable infringes on the debtor's constitutional right of access to adequate housing. Therefore judicial oversight is necessary to consider all the relevant circumstances before granting a writ of execution.

Judicial oversight ensures that credit providers follow the prescribed procedure and that the effect of the sale in execution on the debtor and his family is fair and constitutionally justifiable.¹⁷⁸ It is the duty of the court to determine whether there is a proportionate relationship between the purpose of the limitation and the effect that the limitation would have on the debtor's rights.¹⁷⁹ Judicial oversight aims at ensuring that debtors do not lose their homes unnecessarily as a result of abuses by credit providers.¹⁸⁰

The introduction of the proportionality test during the mortgage finance debt enforcement proceedings is not intended to favour the debtor's housing rights at the expense of the credit provider's commercial expectations and security rights because the role that the bank fulfils in providing mortgage finance is still fully recognised.¹⁸¹ Thus, the proportionality test seeks to balance the credit provider's commercial interests with the debtor's home interests.¹⁸²

Due to the changes in mortgage foreclosure law, the banks are now burdened with having to comply with certain procedural requirements. For instance, when proceeding with debt enforcement the bank must make reference to section 26 of the Constitution in the summons and the section 129 notice. The changes in mortgage foreclosure law have also limited the bank's acceleration right as the acceleration clause can only be used by the bank as a last resort after having considered other means to collect the home loan debt. The acceleration right is also limited because even if the bank cancels the mortgage agreement, claims that the entire debt is due and payable and obtains judgement to that effect the credit agreement may

¹⁷⁸ n19 above 333.

¹⁷⁹ n 3 above 594.

¹⁸⁰ *ibid* 595.

¹⁸¹ *ibid*.

¹⁸² n 19 above 333.

still be reinstated if the debtor pays the amounts mentioned in section 129 (4) of the National Credit Act.

The debt enforcement process which will eventually lead to a court of law granting an execution order against a debtor's home must be used by the bank as a last resort. The bank should only approach a court of law for an execution order once it has used all other means available to recover the debt. Debt recovery alternatives such as the debt review process introduced by the National Credit Act, the private sale program and concluding suitable payment arrangements with financially distressed debtors should be considered first before the bank proceeds with legal action.

However, it is also important to note that the sale in execution of a debtor's home is part of our economic life and can take place if all other less drastic means of recovering the debt have been used and still the default status cannot be rectified. Therefore, the recognition of a debtor's housing rights does not undermine the creditor's security rights or upset the debt enforcement process to the extent that the mortgage market will suffer unduly.¹⁸³



¹⁸³ n 3 above 595.

7 *Bibliography*

1 **Books**

Otto JM and Otto R-L *The National Credit Act Explained* LexisNexis Butterworths (2016)

Nagel CJ *Commercial Law* LexisNexis (2015)

Kritzinger KM and Khan E *Principles of the Law of Mortgage, Pledge and Lien* Juta & Co (1999)

Scholtz JW *Guide to the National Credit Act* LexisNexis Butterworths (2008)

2 **Articles**

Brits R and Van der Walt AJ “Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the National Credit Act (part 1)” 2014 *TSAR* 288

Brits R and Van der Walt AJ “Application of the housing clause during mortgage foreclosure: a subsidiarity approach to the role of the National Credit Act (part 2)” 2014 *TSAR* 508

Brits R “Protection for homes during mortgage enforcement: human rights approaches in South African and English law” 2015 *SALJ* 566

Brits R “Purging mortgage default: comments on the right to reinstate credit agreements in terms of the National Credit Act” 2013 *Stell LR* 165

Brits R “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* 75

Brits R “Sale in execution of mortgaged homes may result in arbitrary deprivation of property” 2013 *SAJHR* 536

Chenwi L “Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions” 2008 *Human Rights Law Review (HRLR)* 105

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

Louw G “Banks beware: reinstatement of mortgage loan agreements” 2016 *De Rebus* 52

Henkel J and Seltzer G “Acceleration clauses in mortgages: misuse during periods of tight money” 1980 *American Business Law Journal* 441

Juma L “Mortgage bonds and the right of access to adequate housing in South Africa: Gundwana v Steko Development & others 2011 (3) SA 608 (CC)” 2012 *Journal for Juridical Science* 1

Marais L and Cloete J “Financed homeownership and economic downturn in South Africa” 2015 *Habitat International* 261

Marais L, Botes L, Pelsler A and Venter A “The non-payment of mortgage bonds in South Africa: the voice of defaulters” 2005 *Acta Structilia* 1

Rautenbach IM “Constitutional Court decisions on the bill of rights-2004” 2005 *TSAR* 169

Van der Walt AJ “Property, social justice and citizenship: property law in post-apartheid South Africa” 2008 *Stell LR* 325

Wertman CA “There’s no place like home: access to housing for all South Africans” 2015 *Brooklyn Journal of International Law* 719

3 Case law

Absa Bank Ltd v Ntsane 2007 3 SA 554 (T).

FirstRand Bank v Folscher 2011 4 SA 314 (GNP)

FirstRand Bank Ltd v Seyffert 2010 JDR 1208 (GSJ)

FirstRand Bank Ltd v Maleke 2010 1 SA 143(GSJ)

Gundwana v Steko Developments and Others 2011 3 SA 608 (CC)

Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (1) BCLR 78 (CC)

Nedbank v Mortinson 2006 2 SA 506 (W)

Nkata v FirstRand Bank Ltd and Others case no CCT 73/2015 (CC) (unreported)

Port Elizabeth Municipality v Various Occupiers 2004 12 BCLR 1268 (CC)

President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd and Others 2005 8 BCLR 786 (CC)

Standard Bank of South Africa Ltd v Bekker and Another and four similar cases 2011 6 SA 111 (WCC)

Standard Bank of SA Ltd v Ngobeni 1995 3 SA 234 (V)

Standard Bank of SA Ltd v Saunderson 2006 2 SA 264 (SCA)

Standard Bank of SA Ltd v Snyders 2006 2 SA 537 (C)

4 **Legislation**

Constitution of the Republic of South Africa, 1996

Magistrates Court Act 32 of 1944

National Credit Amendment Act 19 of 2014

5 **Internet Sources**

<https://www.absa.co.za/personal/borrow/for-a-home/helpusell/> (16-10-2016)

<http://www.standardbank.co.za/portal/site/standardbank/menuitem.7be31f1eb20ecb95d0820af5d10909a0/?vgnextoid=ad5a34fb21795510VgnVCM1000009a90900aRCRD&vgnnextfmt=default> (07-02-2017)

<https://www.fnb.co.za/home-loans/quick-sell-and-repossessed-properties.html> (16-10-2016)

<https://www.nedbank.co.za/content/nedbank/desktop/gt/en/personal/loans/home-loans/payment-problems/nedbank-assisted-sales.html> (07-02-2017)

UNIVERSITY
OF
JOHANNESBURG