Balancing the rights of creditors and consumers when a home is sold in execution: What procedures should be followed?

Zamanguni Sithabile Mazubane

215013497

This dissertation is submitted in fulfilment of the requirements for the degree of Master of Laws at the University of KwaZulu-Natal.

Supervisor: Prof Tanya Woker

February 2020

DECLARATION

I, Zamanguni Sithabile Mazubane declare that:

A. The research reported in this dissertation, except where otherwise indicated, is my original research.

B. This dissertation has not been submitted for any degree or examination at any other university.

C. This dissertation does not contain other persons' data, pictures, graphs or other information, unless specifically acknowledged as being sourced from other persons.

D. This dissertation does not contain other persons' writing, unless specifically acknowledged as being sourced from other researchers. Where other written sources have been quoted, then:

E. their words have been re-written, but the general information attributed to them has been referenced;

F. where their exact words have been used, their writing has been placed inside quotation marks, or indented and referenced.

G. Where I have reproduced a publication of which I am an author, co-author or editor, I have indicated in detail which part of the publication was written by myself alone and have fully referenced such publications.

H. This dissertation does not contain text, graphics or tables copied and pasted from the Internet, unless specifically acknowledged, and the sources being detailed in the dissertation/thesis and in the References sections.

Signed: 

ACKNOWLEDEGMENTS

I would like to thank my family for their unwavering support. To my mother, Hlengiwe, and my grandparents, Sebenzani and Mfanomncane; thank you for believing in me. You will always be my inspiration.

I would also like to thank my friends and colleagues for the encouragement and checking in on me from time to time. I truly appreciate all of you.

To Judge Malcolm Wallis, thank you for the invaluable lessons that helped me with my dissertation, and that I will take forward with me.

A very special thank you to my supervisor, Prof Tanya Woker, for your invaluable guidance and insight. You are also one of the most efficient people I know.

Last, but definitely not least, to God be the glory. Your grace has been abundant in my life and I am so thankful for this opportunity.

ABSTRACT

The sale in execution of the primary residence of a consumer has numerous implications. This is especially in light of section 26 of the Constitution of the Republic of South Africa, 1996 ('Constitution') which gives people the right to adequate housing and to not be arbitrarily evicted from their homes. The enactment of the National Credit Act 34 of 2005 ('NCA') which aims to balance the rights of creditors and consumers also impacted the procedure to sell homes in execution. In particular, section 129 of the NCA has pre-enforcement procedures whilst section 130 allows credit agreements to be reinstated if consumers can pay the overdue amounts and other costs in full. In addition, amendments were made to the Magistrates' Court Rules and the Uniform Rules of Court regarding the sale of consumers' homes. The new requirements introduced by the NCA and procedures introduced by the court rules resulted in a great deal of confusion with different courts and judges adopting different approaches.

Eventually, several matters which sought to sell consumers' homes in execution were heard in *Absa Bank v Mokebe and Related Matters* 2018 (6) SA 492 (GJ) ('*Mokebe* case'). Van der Linde J of the Gauteng Local Division of the High Court, used the power granted in section 14(1)(b) of the Superior Courts Act 10 of 2013 to, in consultation with the Judge President, discontinue the hearing of the matters before him and refer the matters to the full bench of the Division. In essence, the court held that a uniform approach must be taken by the judges of this Division regarding how they handle foreclosure matters.

This thesis investigates the procedure that creditors should follow before they are entitled to sell consumers' homes in execution. In order to do this, this thesis will examine the Constitution, NCA, court rules, practice notes and case law. More specifically, the persons that are the focus of the investigation are creditors that have a security right in the form of a mortgage bond over the home, versus consumers who have become overindebted and are no longer able to meet their obligations under the loan agreement that was entered into with the creditors. The recent landmark *Mokebe* case is examined in depth to determine what the current law is and how it can be improved. Furthermore, the effect of the *Mokebe* case in other High Court Divisions in the country will be briefly discussed. Lastly, this thesis sets out what consumers can do to prevent their homes being sold on public auction especially after they default in their payments.

This thesis will show that the procedure to sell homes in execution has drastically changed from the pre-constitutional to the current constitutional dispensation. However, it is submitted that the procedures can still be improved upon. This is because the right to adequate housing is an important socio-economic right which has been undervalued and overlooked. The courts have previously allowed execution of homes without considering the circumstances of consumers. The court rules allowed for this as the contractual rights of creditors were held at a higher standard than the socio-economic rights of consumers. It is argued that in the light of the NCA and its aims, there must be an appropriate balancing of the rights of creditors and consumers to create just outcomes. If we are to truly create a society based on 'human dignity, the achievement of equality and the advancement of human rights and freedoms' as expressed in the founding values of South Africa's Constitution and reiterated to a large extent in the NCA; foreclosure laws must also reflect that vision.

CONTENTS

CHAPTER 3: AFTER THE CONSTITUTION

CHAPTER 4: THE NATIONAL CREDIT ACT

CHAPTER 5: *ABSA BANK LIMITED v MOKEBE AND RELATED CASES*

CHAPTER 1
OVERVIEW

1.1 Conceptualisation of Key Terms

In the context of this thesis:

1. Creditors: are institutions or persons who are owed money by consumers and their right to be repaid is secured by a mortgage bond. They may also be referred to as credit providers, banks or mortgagees.
2. Consumers: are people who owe creditors money for a home loan and they have registered a mortgage bond over their home. They may also be referred to as debtors or mortgagors.
3. Home: refers to a person's immovable property where they primarily stay. This may also be referred to as their primary residence or house.
4. Home Loan: refers to a loan that a consumer gets, usually from a bank, to buy a home and the loan is secured by a mortgage bond. The consumer is required to repay the loan over a period of time (usually 20 or 30 years) in monthly instalments.
5. Sale in execution: refers to the legal process that takes place when properties are sold at a public auction by the sheriff of the court who has received instructions from an execution creditor (usually a bank). The creditor will take action against consumers who have failed to meet their monthly bond instalments. The property is sold to the highest bidder. The sale is not subject to the approval of either the consumer or the bank. This will also be referred to as foreclosure or execution.

1.2 Introduction and Background to Research Problem

A home is one of the most important assets that a person can buy. However, very few people are in the position to pay the cash price of a home. They must borrow money, usually from a bank, to do so and this is referred to as a home loan. A mortgage bond will be registered over

the consumer's home, which will give the creditor security if the consumer is unable to repay the money borrowed.[1] The mortgage bond functions as security for the debt to be paid. In other words, if the consumer defaults in payments and no settlement arrangement is agreed to, the creditor can proceed to execute against the consumer's assets, including the home, to use the proceeds of the sale to pay back the debt.[2]

At the time the consumer buys the home and registers the mortgage bond, the consumer can afford the home and repay the loan. Affordability assessments are dealt with in the National Credit Act ('NCA')[3] which governs money lending transactions in South Africa. The Act has introduced significant consumer protection measures, but it also seeks to balance consumer rights against the rights of creditors.[4]

The most important right that creditors have is the right to be repaid.[5] Hence, when consumers borrow money, they must repay it. However, for numerous reasons such as a weak economy or a situation arises that causes financial hardship to consumers, for example retrenchment or illness; consumers who were quite sure that they could afford to pay the money back suddenly find themselves in a position where they can no longer afford the repayments.[6] What happens then? Creditors are entitled to their money but for consumers, a home represents so much more than money. In fact, the Constitution of the Republic of South Africa ('Constitution')[7] protects consumers' right to have access to adequate housing.[8] Furthermore, no one may be deprived of property or evicted from housing without a court issuing an order after considering all the relevant circumstances.[9] These consumer rights conflict with creditors' rights to property and execution. Hence there is a need for a clear procedure which takes into consideration both the rights of creditors and the rights of consumers.

[1] *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ) para 1.
[2] TJ Scott & S Scott *Willes' Mortgage and Pledge in South Africa* 3 ed (1987) 5.
[3] Act 34 of 2005. All references to the Act or to sections of the Act are to the NCA, unless otherwise stated.
[4] Section 3(d) of the NCA. Also see *Rossouw v Firstrand Bank Ltd* 2010 (1) SA 439 (SCA) para 17; *SA Taxi Securitisation (Pty) Ltd v Mbatha* 2011 (1) SA 310 (GSJ) para 32.
[5] Section 3(c)(i) of the NCA.
[6] *Absa Bank Ltd v Mokebe* (note 1 above) para 3.
[7] Constitution of the Republic of South Africa, 1996. All references to the Constitution or to sections of the Constitution are to this Constitution, unless otherwise stated.
[8] Section 26(1) of the Constitution.
[9] Sections 25(1) & 26(3) of the Constitution.

1.3 Purpose of Study

This thesis will examine the procedure that creditors should follow before a house is sold in execution to satisfy the outstanding mortgage bond amount. More specifically, it will examine the implications if the house is the home of the consumer especially in light of the Constitution, NCA, court rules, and development of case law. The recent landmark judgment on this issue, *Absa Bank v Mokebe and Related Matters*,[10] (*'Mokebe* case*'*) will be examined in depth to determine what the current law is and to propose what should be done in future.[11]

1.4 Rationale for Study and Desired Outcomes

The issue of sales in execution of homes is an extremely topical one at present, especially since the right to adequate housing was entrenched in the Constitution and the introduction of the NCA which seeks to protect the rights of consumers. However, the courts have also been very clear that creditors have rights too and the courts must ensure a balancing of the rights between consumers and creditors.[12]

Over the years creditors have been heavily criticised for the processes that they have followed when it comes to reclaiming the money which they have lent to consumers. It has been argued that South Africa has some of the most abusive sale in execution practices in the world.[13] It has also been alleged that despite the introduction of the Constitution, over 100 000 families have lost their homes through the sale in execution process. This has been possible because creditors can easily obtain and enforce court judgments.

The NCA became operative in 2007 and it introduced new procedures which must be followed before creditors can proceed to claim an outstanding debt. These new procedures have had an impact on sales in execution. The court rules have also been amended to better protect the right of consumers to adequate housing. However, interpreting the law has led to

[10] *Absa Bank Ltd v Mokebe* (note 1 above). Also see *Absa Bank Limited v Njolomba and Related Cases* 2018 (5) SA 548 (GJ) para 3-4.

[11] A consumer can also lose their home if they become insolvent and their estate is sequestrated in terms of the Insolvency Act 24 of 1936. However, that is not the focus of this thesis.

[12] *Rossouw v Firstrand Bank Ltd* (note 4 above) para 17 & *SA Taxi Securitisation (Pty) Ltd v Mbatha* (note 4 above) para 32.

[13] Ryan C 'SA banks sued for R60bn in home repossession case' (2017) available at https://www.fin24.com/Companies/Financial-Services/r60bn-home-repossession-suit-against-banks-20170816 last accessed 8 October 2019. Also see DJ Shaw *The Constitutionality of Sale in Execution for less than market value or where alternatives are available* (Unpublished), LLD thesis, University of Witwatersrand (2019).

many problems and different courts have followed different procedures. This led to a Practice Manual[14] being issued in February 2018 which included a directive on 'foreclosure when property is or appears to be a defendant's primary home.' Thereafter, Van der Linde J, in consultation with the Judge President of the Gauteng Local Division of the High Court, asked some of the major banks and *amicus curiae* to address the full bench in the *Mokebe* case[15] in April 2018. The matter was subsequently heard in August 2018; the purpose of the hearing was to establish a uniform approach that the judges in that Division must take when they handle execution matters where a home could potentially be sold.

This thesis seeks to establish a procedure, which needs to be followed by creditors and the courts, when creditors seek to have consumers' homes sold in execution to satisfy mortgage bond debt. This includes establishing factors that the courts must consider in order to balance the rights of creditors and consumers in this situation. Another desired outcome of this thesis is to set out what consumers can do to prevent their homes being sold on public auction especially once they default in their monthly bond payments.

1.5 Research Questions

This thesis will commence by analysing the procedures which have traditionally been followed by creditors in order to have consumers' homes sold in execution. Then it will examine some of the judgments where the courts have grappled with Constitutional issues and the procedures introduced by the NCA. Finally it will propose procedures to follow in the future. In order to do this the following questions will be addressed:

1. What was the procedure that was followed for sales in execution of homes before the Constitution was adopted and what problems were encountered with the procedure?
2. How did the Constitution affect the procedure and as a result, what amendments were made to the procedure?
3. How did the NCA affect the procedure and as a result, what amendments were made to the procedure?

[14] Practice Manual of the Gauteng Local Division of the High Court of South Africa (2018), Government Gazette No.41257 (17 November 2017) 18. All references to the Practice Manual are to this one unless otherwise stated.
[15] *Absa Bank Ltd v Mokebe* (note 1 above).

4. How has the recent judgment in the *Mokebe* case interpreted or altered the current procedure?
5. Based on the outcomes of this research, what recommendations can this thesis make to improve the procedure?

1.6 Research Methodology

This will be a non-empirical study. The methodology entails a desktop study of various primary and secondary sources of law. This thesis will consider the Constitution, specific legislation, court rules and practice notes to describe the rights affected, the procedures, and the perceived problems with the manner in which consumers lost their homes. It will also consider decided cases to analyse how the courts have developed the procedures and where problems still exist. Furthermore, textbooks, journal articles and internet sources; including the databases of Juta Law, Lexis Nexis and Sabinet among others, will be accessed to provide the opinions of experts and interested parties in the credit industry, especially the banks. In particular, this study will focus on the situation where creditors have a mortgage bond over the homes of consumers who have become overindebted and are no longer able to meet their obligations under their mortgage agreements. This will all be done to explore and understand the history of the procedure, its impact on creditors and consumers and to propose amendments that should be included in future to enhance the procedure.

1.7 Structure of Thesis

The structure of this thesis flows from the research questions. **Chapter two** will discuss and analyse the procedure that was followed for sales in execution of homes before the Constitution was adopted. Additionally, the problems which were encountered with this procedure will be explained. **Chapter three** will unpack the constitutional right to adequate housing. The landmark cases which interpreted this right will be discussed. Other rights which affect consumers who may lose their homes will also be discussed, in particular, the right to dignity. **Chapter four** will discuss the NCA. This chapter will explore the reason for the NCA's introduction, how it seeks to protect consumers, the balancing of creditor and consumer rights, and the procedures in the Act. **Chapter five** will examine the *Mokebe* case and explain why it is important. The arguments of creditors, consumers and interested parties

as well as the decision of the court will be analysed. Other issues with the procedure which were not explicitly dealt with in the case will also be discussed. Lastly, **Chapter six** will offer a way forward. That is, based on the discussions above, it will recommend how creditors, consumers and the courts should deal with the sales in execution of homes in the future.

CHAPTER 2
BEFORE THE CONSTITUTION

2.1 Introduction

There are a number of reasons why consumers lose their homes.[16] For example, creditors may lend consumers money for whatever reason and that loan is not secured by a mortgage bond. If consumers default in payments and cannot repay the loan, creditors could institute proceedings to recover the money. The courts may grant judgment against consumers whose movable assets would then be sold to pay the debt. If the amount realised from the movable assets is insufficient, creditors could proceed to have consumers' immovable property, including their home, sold to pay the debt.[17]

Another example is when creditors lend consumers money to buy their homes, and mortgage bonds are registered as security over the homes in favour of such creditors. The parties to a mortgage bond agreement are formally known as the mortgagor (consumer) and the mortgagee (creditor). The home functions as security for the debt, and creditors have the right to retain a hold over the home until consumers have paid their debt in full. If consumers are in default, the creditors' rights extend to having the homes sold to recover the remaining debt from the proceeds of the sale.[18] Therefore, the value of creditors' security rights lay in them being able to enforce those rights. If their rights are not enforceable, they became meaningless.[19]

The focus of this chapter is to discuss the procedure that was followed by creditors to recoup outstanding debts before the introduction of the Constitution. These procedures have been heavily criticised because they often resulted in consumers losing their homes, the

[16] A consumer can also lose their home if they become insolvent and their estate is sequestrated using the Insolvency Act 24 of 1936. That, however is not the focus of this thesis.
[17] Uniform Rule 45(1). This is what happened in the case of *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others* 2005 (2) SA 140 (CC) which is discussed in detail chapter 3.
[18] TJ Scott & S Scott *Willes' Mortgage and Pledge in South Africa* (note 2 above) 5. This thesis focuses on these type of cases like *Standard Bank of South Africa Ltd v Saunderson & Others* 2006 (2) SA 264 (SCA) which is discussed in chapter 3.
[19] PJ Badenhorst *et al Silberberg and Schoeman's the law of property* 5 ed (2006) 363. See also the discussion of *Nedcor Bank Ltd v Kindo* 2002 3 SA 185 (C) 187-188.

homes being sold for minimal amounts and consumers still owing a large shortfall.[20] The Constitution was enacted in 1996 which includes the right to adequate housing and the right to dignity. Then the NCA was introduced in 2007. The NCA emphasises the need for consumer protection. Notwithstanding the introduction of these new laws, many of the procedures resorted to by creditors have continued into present times. Debt collection practices have not been completely overturned and many of the difficulties that consumers face when they are unable to repay their debts continue, despite the many safeguards which have been introduced. These practices have been challenged relying on the protections provided by the Constitution and the NCA. In order to understand the root cause of the problems, it is necessary to consider the practices that were in place before the Constitution was introduced. This chapter will commence by examining the contractual relationship that exists between creditors and consumers. Thereafter, the court procedure will be analysed by explaining the cause of action, locus standi, jurisdiction, summons, judgment and execution. In addition, the consumer's right of redemption will be discussed.

2.2 The Contractual Relationship

As discussed in the introduction, creditors and consumers enter into loan agreements in terms of which creditors lend consumers a certain amount of money to buy a home which signifies a place to live, relax and raise a family. This money must be repaid by consumers in instalments and a mortgage bond is registered over the home.[21] The purpose of the mortgage bond is to protect creditors in instances where consumers default in payments. In the event of such default, creditors are entitled to institute legal proceedings which could result in the sale of the home. The money received from the sale would pay creditors the full outstanding balance on the loan, legal costs and interest.[22]

So, the terms and conditions of loan agreements secured by mortgage bonds are essentially governed by the law of contract which is derived from the common law. Prior to the introduction of the Constitution and the NCA, creditors could draft contracts that would include clauses solely intended to protect their own interests.[23] Examples of such clauses

[20] See DJ Shaw LLD thesis (note 13 above). Also see Ryan C 'SA banks sued for R60bn in home repossession case' (2017) available at https://www.fin24.com/Companies/Financial-Services/r60bn-home-repossession-suit-against-banks-20170816 last accessed 8 October 2019.
[21] TJ Scott & S Scott *Willes' Mortgage and Pledge in South Africa* (note 2 above) 5.
[22] Ibid.
[23] D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* 2 ed (2012) 396.

include jurisdiction clauses and acceleration clauses where the whole debt became payable on default.[24] Consumers signed the contracts which set out the rights and duties of the parties and these contracts would state what creditors could do if consumers defaulted. Therefore, when consumers defaulted, the creditors and the courts were merely enforcing what consumers had agreed to.[25] The fact that the homes were more than just security for loans but also family homes, roofs over the consumers' heads and places of respite, was not a consideration.

An important principle in the law of contract is that of *pacta sunt servanda* which recognises that since parties are free to contract, they must be bound by the terms of their agreements.[26] In other words, contracts need to be honoured and the courts will enforce them because they were voluntarily entered into by the parties. It has been argued that by upholding the agreement, this promoted legal and commercial certainty which encouraged the economy to flourish.[27] The courts have held that the value of a mortgage bond lies 'in confidence that the law will give effect to its terms.'[28] For the purposes of this thesis, this is described as the traditional approach to enforcing a mortgage agreement; the courts simply enforced the terms of the contract because the parties were themselves bound.

The exception to the rule was when a term of the contract was against public policy or *contra boni mores.*[29] Although dealing with a completely different subject and heard in the post-constitutional era, the Constitutional Court in *Barkhuizen v Napier*,[30] held that 'while it is necessary to recognise the doctrine of *pacta sunt servanda*, courts should be able to decline the enforcement of…a clause if it would result in unfairness or would be unreasonable.'[31] This principle was recognised in the leading case of *Sasfin v Beukes* prior to the introduction of the Constitution.[32]

Paratie executie and *pactum commissorium* clauses are examples of clauses that

[24] Ibid 491.
[25] Ibid 405-406.
[26] Ibid 24.
[27] Ibid 21.
[28] *Standard Bank of South Africa Ltd v Bekker & Another* 2011 (6) SA 111 (WCC) para 3.
[29] FDJ Brand 'The Role of Good Faith, Equity and Fairness in South African Law of Contract – the Influence of the Common Law and Constitution' *SALJ* (2009) 71, 75.
[30] 2007 (5) SA 323 (CC).
[31] Ibid para 70.
[32] 1989 (1) SA 1 (A).

were held to be invalid and unenforceable by the courts.[33] In the context of foreclosure, such clauses allowed creditors to sell consumers' homes privately by circumventing the court's intervention. These clauses were found to be invalid because they amounted to creditors taking the law into their own hands which would unduly advantage creditors at the expense of consumers.[34] For instance, the costs of the sale could be arbitrarily calculated.

Another reason that the clauses were held to be invalid was because creditors could be mistaken about the consumers' default; selling the home without notifying consumers or approaching the court can create various legal problems.[35] From this limited discussion it can be seen that even prior to the introduction of the Constitution and the NCA, there were certain limitations imposed by the courts when it came to the procedures that creditors could follow before a home was sold to satisfy an outstanding debt. Nevertheless, creditors could have the home sold by instituting judicial proceedings for the full outstanding balance owed on the loan.[36] Now this thesis turns to discussing the procedure to sell homes in execution.

2.3 Cause of Action

The cause of action refers to the elements that an applicant or plaintiff must prove in order to be entitled to some sort of relief. These elements are determined by substantive law and they must be alleged on the papers before being proved in court on a balance of probabilities.[37]

If the debt is unsecured, creditors must prove that a loan agreement was entered into and the consumers breached this contract, which is usually that they did not repay the money loaned. The debt can also be secured by a mortgage bond. The mortgage bond is defined as a contract where immovable property is specially hypothecated and which, once registered in the deeds registry, creates a real right of security over the immovable property.[38] If the debt is secured by a mortgage bond, there are four essential elements to prove;

[33] *Iscor Housing Utility Co and Another v Chief Registrar of Deeds* 1971 1 SA 614 (T) 616E and 623; *Mardin Agency (Pty) Ltd v Rand Townships Registrar* 1978 (3) SA 947 (W) 954, *Vasco Dry Cleaners v Twycross* 1979 1 SA 603 (A) 611.
[34] Ibid.
[35] Ibid.
[36] TJ Scott & S Scott *Willes' Mortgage and Pledge in South Africa* (note 2 above) 203.
[37] S Pete et al *Civil Procedure: A Practical Guide* 2 ed (2015) 3.
[38] R Sharrock *Business Transaction Law* 9 ed (2016) 788.

1. A principal obligation i.e. the loan (the mortgage is an accessory);
2. immovable property that the mortgage attaches to;
3. a mortgage bond agreement that the parties enter into; and
4. registration of the mortgage bond.[39]

For a foreclosure claim, the cause of action that creditors relied on is based on a breach or non-fulfilment of a term/s in the mortgage bond agreement by consumers. This is usually non-payment of the loan amount or any interest which was due on the loan.[40] Prior to recent amendments which are discussed in detail later on in this thesis, there were two key clauses in mortgage bond agreements that entitled creditors to call up the bond and claim foreclosure. The first was a foreclosure clause, in combination with the second, which was the acceleration clause.[41] What is extremely important to note is that the clauses provided that the full outstanding balance on the loan would be due immediately, should consumers default on their instalments. In addition, creditors would then have a right to claim this full outstanding balance by calling up the bond.[42] If consumers were unable to pay the full outstanding balance, which was usually the case, executionary relief could be granted to sell the homes of consumers in execution to pay the judgment debt. This is regardless of the fact that the arrears were trifling or were brought up to date at the time of the sale.[43] The right to redemption was thus the only way to prevent the home being sold through a public auction. This right is discussed at the end of this Chapter.

In summary therefore, when consumers defaulted, creditors would have to prove that there was a valid mortgage bond agreement entered into and that they had performed in terms of that agreement, however, consumers had breached the agreement. In addition, creditors gave due notice to consumers asking for the breach to be remedied.[44] Another term for such a notice is a demand. Demand is defined as a formal request to ask a defaulting party to perform their legal obligation which includes payment of an outstanding debt. It was necessary to send this request to try and resolve the matter without involving the courts because formal litigation is very expensive.[45] Such notice had to be in writing and the terms

[39] Ibid & Deeds Registries Act 47 of 1937 .
[40] TJ Scott & S Scott *Willes' Mortgage and Pledge in South Africa* (note 2 above) 204.
[41] PJ Badenhorst et al *Silberberg and Schoeman's the law of property* (note 19 above) 364,367-368.
[42] See *Boland Bank Ltd v Pienaar and Another* 1988 (3) SA 618 (A).
[43] Ibid.
[44] TJ Scott & S Scott *Willes' Mortgage and Pledge in South Africa* (note 2 above) 205.
[45] S Pete et al *Civil Procedure: A Practical Guide* (note 37 above) 93.

of the mortgage bond agreement determined when it was given.[46] A demand could be sent by creditors or their attorneys who needed to take reasonable measures to ensure that the demand was received by consumers.[47]

2.4 *Locus Standi*

Locus standi is about a natural or juristic person's right to institute legal proceedings or to have legal proceedings instituted against them. The full term to describe this is *locus standi in iudicio*. The parties involved must have legal capacity and an interest in the matter which is direct and substantial.[48] This must be alleged on the papers and proved by the party suing.[49] Therefore, as with any court process, including foreclosure matters, creditors had to allege and prove that all parties had *locus standi*.

2.5 Jurisdiction

Jurisdiction refers to the competence and power of a court to hear and determine a matter brought before it.[50] Two aspects determine jurisdiction namely the 'persons' involved and 'causes arising.'[51] Before 1994, judicial proceedings to foreclose a home could be instituted in the Supreme Court or the Magistrates' Court,[52] depending on the amount of the capital claimed or if the parties consented in writing to the Magistrates' Court having jurisdiction.[53] The grounds that jurisdiction is based on must be set out on the papers by creditors.[54] However, creditors could still institute proceedings in the Supreme Court which always had concurrent jurisdiction, even if the amount involved fell within the Magistrates' Court jurisdiction, and they often did.[55]

---

[46] TJ Scott & S Scott *Willes' Mortgage and Pledge in South Africa* (note 2 above) 205-6.
[47] S Pete et al *Civil Procedure: A Practical Guide* (note 37 above) 93.
[48] Ibid 14. Also see DE Van Loggerenberd *Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa Vol II: The Rules* 10 ed (2011) Rule 6-17 for requirements to prove a direct and substantial interest.
[49] *Mars Inc v Candy World (Pty) Ltd* 1991 (1) SA 567 (A) 575.
[50] *Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board* 1950 (2) SA 420 (A) 424.
[51] *Ewing McDonald & Co Ltd v M & M Products* Co 1991 (1) SA 252 (A) 257E-G.
[52] Post 1994, the Supreme Court became the High Court.
[53] TJ Scott & S Scott *Willes' Mortgage and Pledge in South Africa* (note 2 above) 212. Also see section 29(1)(d) of the Magistrates' Court Act.
[54] *Malherbe v Britstown Municipality 1949* (1) SA 281 (C) 287. Grounds of jurisdiction may be found in section 28(1) of the Magistrates' Court Act or section 19 of the Supreme Court Act. Also see S Pete et al *Civil Procedure: A Practical Guide* (note 2 above) 71.
[55] The reasons for foregoing Magistrates' Court jurisdiction will be discussed further in Chapter 5 of this thesis.

Coetzee DJP in the case of *Standard Bank of South Africa v Shiba*[56] noted that when the Supreme Court was tasked with Magistrates' Court work, this could lead to administrative justice issues.[57] In particular;

> If [the problem is] left unchecked, it could become one of the last straws. It becomes a question of weighing up the desirability of keeping open the Supreme Court's doors for all causes at all times, which is something that every judge strains to the utmost to maintain, against the danger of fouling up the cogs of this very machine which must be kept in reasonable running order if it is to fulfil properly its function of performing very essential public work.[58]

In other words, the court rolls of the Supreme Court became very full when many matters that could be adjudicated in the Magistrates' Court, were instituted in the Supreme Court. However, the courts have held that they should be wary of turning litigants away if the matter falls within their jurisdiction. If court rolls become congested and this hampers the functioning of the courts, other solutions should be found.[59] The issue relating to jurisdiction of the courts has remained even in South Africa's democratic era. This will be discussed further in Chapter 5.

2.6 Summons

Judicial proceedings can commence in two ways. The first is by simple summons, and the second is by combined summons. The purpose of the summons is to inform consumers who became the defendants or respondents in the claim. If they dispute the claim, they must enter an appearance to defend.[60] The general rule has always been that a mortgage bond is a sufficiently liquid document for judgment to be granted on, so a simple summons could be issued.[61] This summons had to set out the cause of action that the creditor relied on and the courts held that copies of the home loan and the mortgage bond document had to be attached

[56] 1984(1) SA 153 (W).
[57] Ibid 156G.
[58] Ibid 156G-157A.
[59] *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) 820I.
[60] See Uniform Rule 17(1)&(2)(b) and Magistrates' Court Rule 5(1).
[61] TJ Scott & S Scott *Willes' Mortgage and Pledge in South Africa* (note 2 above) 213. Also see *Entabeni Hospital Limited v Van der Linde; First National Bank of SA Ltd v Puckriah* 1994 (2) SA 422 (N) 424H-I and *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) para 19.

to the summons. In addition, the originals had to be produced when judgment was requested.[62] Servive of summons is discussed further below and in Chapter 4 and 5.

2.7 Service

Prior to the introduction of the NCA, legal proceedings would commence by delivering court documents to consumers and the court had to be satisfied that such documents were received.[63] This was because consumers must have been aware that proceedings were being brought against them so the court could hear their side of the story. The Latin maxim, *audi alteram partem*, captured the need to hear the other side's version before coming to a decision.[64]

Sheriffs who were officials of the court had to deliver the documents that start legal proceedings, which are summons. The court rules stipulated various methods to effect service. The general rule was that personal service of documents had to be done where it was possible and other methods could be used where the receivers were untraceable or elusive.[65] Examples of other methods of service included leaving a copy at a person's business or place of employment or at the person's residence. Delivery could also be at the receiver's chosen *domicilium citandi et executandi* ('*domicilium*') or to a duly authorised agent.[66]

In mortgage cases, a standard term in the mortgage agreement was for consumers to either choose an address for delivery, or their *domicilium* would be chosen by default.[67] If the sheriffs could not serve the notice personally on consumers, then they would leave a copy at the address by affixing it to the door or gate. Thereafter, a return of service was filed.[68] If the court was not satisfied with the manner or effectiveness of service, then the court could order for other methods to be utilised.[69] Consumers then had to file their notice of intention to defend and their cases would continue normally.

However, in practice what usually happened was that many consumers would not file

---

[62] See *Volkskas Bank Limited v Wilkinson and Three Similar Cases* 1992 (2) SA 388 (C) 397I-398C.
[63] This is dealt with in Magistrates' Court Rule 9 and Uniform Rule 4. See S Pete et al *Civil Procedure: A Practical Guide* (note 37 above) 101-111 for a full discussion on what service entails.
[64] S Pete et al *Civil Procedure: A Practical Guide* (note 37 above) 101.
[65] *O'Donoghue v Human* 1969 (4) SA 35 (E).
[66] Uniform Rule 4(1)(a).
[67] See *Firstrand Bank Ltd v Powell, Firstrand Bank Ltd v Nsele & Another, Firstrand Bank Ltd v Herbst & Another* (2011/9130, 2011/20765, 2011/31969) [2012] ZAGPJHC.
[68] Uniform Rule 4(6)(a).
[69] Uniform Rule 4(10) and MC Rule 9(20).

their notice of intention to defend.[70] The creditor would proceed to lodge a request for default judgment. The relief sought would be an order for the accelerated full outstanding amount owed on the bond and thereafter, an order for executability. The request was lodged with the registrar or clerk of court.[71] Thereafter, if all the documents were in order and due process had been followed, the order/s would then be granted by the registrar or clerk of the court since the mortgage bond debt was considered a liquid amount.[72] When consumers finally became aware of the judgment against them, many of them would seek an order from the court to rescind the judgments, alleging that they never actually received the notices to institute legal proceedings.[73] This was very problematic if a consumer's family home could potentially be sold in execution when the proceedings came to an end.[74] Such consumers would be left without a place to live along with their dependants. Service of court documents is another issue that has continued to be problematic even after the Constitution came into effect and the introduction of the NCA. This issue will be further discussed in Chapter 4 and 5.

2.8 Judgment and Execution

Once creditors obtained judgment in their favour for the money judgment, they became the judgment creditors and consumers became the judgment debtors. Creditors could consider the arrangements made by consumers to prevent the sale in execution. If a lump sum was subsequently paid, the procedure could be stayed.[75] It is submitted that this was a good practice because it accommodated consumers who could have been legitimately facing a temporary financial setback such as retrenchment. The consumers who could make arrangements with the creditors therefore benefitted because they were able to keep their home.

However, the problem was that creditors were not obligated to accept a rearrangement or tender of payment of the arrears. This was a principle expressed in the

[70] An example is where Standard Bank instituted foreclosure applications against nine consumers and only one entered an appearance to defend. See *Standard Bank Ltd v Saunderson* (note 18 above).
[71] Magistrates' Court Rule 12(1)(a).
[72] See the discussion of the procedure in *Jaftha* (note 17 above) para 15.
[73] For example *Nkata v FirstRand Bank Ltd* 2016 (4) SA 257 (CC).
[74] This is discussed in depth in Chapter 3 and Chapter 5 of this thesis.
[75] J Fourie 'Sale in execution: The conveyancer and the sheriff' (2013) *De Rebus* available at http://www.derebus.org.za/sales-execution-conveyancer-sheriff/ last accessed 8 October 2019.

Appellate Division case of *Boland Bank v Pienaar and Another.*[76] The bank lent money to the second respondent and a mortgage bond was registered as security for the debt. The terms of the agreement were that the second respondent had to pay the money back in monthly instalments, and if he failed to do so, the full outstanding amount would be immediately due and payable, including interest. Furthermore, the bank could claim such an amount in court without notifying the second respondent.[77] Thereafter, the second respondent did default in payments and Pienaar, who was the first respondent that was not a part of the mortgage agreement, tendered payment of the arrears to the bank to avoid foreclosure. The bank refused such payment as it did not wish to 'jeopardise its right of foreclosure.'[78]

Pienaar therefore applied to the Orange Free State Provincial Division of the Supreme Court to compel the bank to accept the tendered payment.[79] Whilst the court a quo held in his favour,[80] the bank appealed the matter to the Appellate Division where the appeal was upheld.[81] Nestadt JA ultimately held that creditors are not obliged to accept late payments and they may instead elect to institute proceedings to foreclose the property.[82]

Although the judgment was not about a mortgaged property that was the home of consumers, the principle highlighted in the case says something about the approach that was adopted before the introduction of the Constitution. Domanksi critiqued the judgment in 1995, stating that the implications of the case were 'far reaching and potentially devastating.'[83] It is submitted that under the traditional approach, creditors had extensive rights under the mortgage bond and could even refuse a tender to pay the arrears. The financial circumstances of consumers were frequently disregarded and foreclosure could be pursued as a first resort simply because the mortgage bond agreement allowed it and the courts enforced the agreement.

On the other hand, if creditors did accept a tender of payment by consumers, it was argued that this practice caused severe problems if consumers continued to default in payments and the creditors decided to execute the property at a time in the future. This was because there was no mechanism in the court rules to officially record the amounts that were paid after judgment was granted but before the home was sold in execution. Furthermore,

[76] See note 42 above.
[77] Ibid para 1-2.
[78] Ibid para 3.
[79] Ibid.
[80] See *Pienaar v Boland Bank and Another* 1986(4) SA 102 (O) 109-111.
[81] *Boland Bank v Pienaar* (note 42 above).
[82] Ibid para 19.
[83] A Domanski 'Mortgage Bondage' *SALJ* (1995) 159.

sheriffs were not informed of the arrangements and the money paid in fulfilment of the judgment debt. Rather, sheriffs were notified that the sale was stayed and to therefore not proceed. If the judgment creditors did indeed decide to proceed with the sale at a later stage, the amount on the writ of execution did not reflect the full outstanding debt anymore.[84]

If consumers did not pay the judgment debt or at least arrange to settle the debt, creditors could have the judgment enforced through the execution process.[85] This process resulted in the property of consumers being sold and the proceeds being used to satisfy the judgment debt. Execution entailed giving effect to a judgment or carrying out a judgment in the way the law requires.[86]

There were three steps in the process that this thesis will discuss namely; obtaining a valid writ (or warrant), attaching the consumer's property and subsequently selling the attached property in a public auction.[87]

2.8.1 Obtaining a valid warrant or writ of execution

This was a document requested by creditors and the clerk or registrar of the court issued it. The writ or warrant of execution ordered sheriffs to possess the judgment debtors' property for it to be sold through a public sale, to realise the debt and costs incurred in the process.[88] Creditors could request a writ or warrant, after judgment was given, at any time.[89]

Where there were outstanding debts owed to creditors, the general rule was that the movable assets of consumers had to first be executed against before executing against their immovable property. If their movable assets could not satisfy the debt, the consumers' immovable asset, which in many cases was their home, could be executed against without obtaining a further order.[90]

However, if creditors had security for the debt in the form of a mortgage bond, they

[84] J Fourie 'Sale in execution: The conveyancer and the sheriff' (2013) *De Rebus* available at http://www.derebus.org.za/sales-execution-conveyancer-sheriff/ last accessed 8 October 2019. On the contrary, Magistrates' Court Rule 36(4)-(5) dealt with this dilemma in the Magistrates' Court.
[85] S Vengadajellum 'Short notes on: The execution process and the effect that a judgment may have on a debtor's movable and/or immoveable property' (2018) available at https://www.schoemanlaw.co.za/wp-content/uploads/2018/02/Website-Article-Feb-2018.pdf last accessed 8 October 2018.
[86] *Maharaj Brothers v Pieterse Bros Construction (Pty) Ltd & Another* 1961 (2) SA 232 (N) at 238C-D.
[87] *Mattoida Constructions (SA) (Pty) Ltd v E Carbonari Construction (Pty) Ltd* 1973 3 SA 327 (D) 332.
[88] Uniform Rule 45(1); Magistrates' Court Rule 36(1) and (2).
[89] There is no obligation on the judgment creditor to wait for a reasonable time before suing out the writ. See *Perelson v Druain* 1910 TS 458 at 462.
[90] See Section 66(1)(a) of the Magistrates' Court Act & Uniform Rule 45(1). This will be discussed in depth in Chapter 3 below.

did not need to first execute against the movable property. Instead, creditors could execute against the object of the mortgage bond which was the immovable property. Creditors had to get an order of the court declaring that the immovable property of the consumers was declared specially executable.[91] The courts declared the homes of the consumers specially executable if special circumstances existed. However, the fact that a mortgage bond existed was traditionally sufficient to equate to special circumstances.[92] The implications were devastating for consumers who would be left homeless at the end of the sale in execution.

2.8.2 Attaching the judgment debtor's movable or immovable property

Sheriffs (or deputy sheriffs) were crucial in the sale in execution because various matters were conducted by them. This included executing the warrant or writ of execution.[93] Regarding movable property, sheriffs had to demand satisfaction of the writ by going to the homes of consumers or their places of employment. This could be done by demanding that movable property, which could be sufficient to satisfy the writ, be pointed out. If there was a refusal to cooperate, sheriffs could search the property. The sheriffs would then make an inventory and could take possession of the property. Thereafter, a return of what was done was filed by the sheriffs with the registrar.[94] Sheriffs had to issue a *nulla bona* return if the movable property was insufficient to settle the debt. Thereafter, the clerk or registrar of the court had to issue a warrant or writ of execution against the immovable property as discussed above.

For immovable property, including a home; the owner, the registrar of deeds and non-owner occupiers of the property had to be notified about the attachment by sheriffs.[95] Once the property was attached, the custody, possession and control of the property passed from consumers to the sheriffs.[96] In reality however, consumers maintained control of the property until the auction. Thereafter, consumers or occupiers of the property could either

[91] See *Gerber v Stolze & Others* 1951 (2) SA 166 (T) 172F-G: To have property declared specially executable means that the creditor can immediately execute againt the immovable property. This dispenses with the circumlocution of having to first execute against movable and if it fails to realise the judgment debt, then to have recourse against the immovable property.
[92] Ibid.
[93] See Magistrates' Court Rule 36(1) and (7) as well as Uniform Rule 45 and 46 which detail the duties of the sheriff when carrying out the sale in execution.
[94] Uniform Rule 45(3)&(4).
[95] Uniform Rule 46(3).
[96] *Morrison NO v Rand NO* 1967 2 SA 208 (D) 210.

abandon their possession voluntarily, or they would have to be evicted.[97] It is therefore submitted that the law paid no consideration to where consumers and their dependants would go once their homes were sold in execution. Rather, the focus was on upholding the contract and the right of creditors to foreclose the homes of consumers once consumers defaulted in payments.

2.8.3 Public auction of the attached property

Sheriffs were responsible for selling homes through public auctions and they had to choose when and where the sale in execution will take place. Creditors had to consult the sheriffs and prepare a notice of the sale which included a description of the property and where it was located. This notice had to be published. Creditors also had to prepare the conditions of sale which had to be submitted to the sheriff involved in the process.[98] In theory, the purpose was to notify the public of what was being sold so that bidders were attracted to bid the highest possible price.[99] By bidding the highest possible price, it ensured that there was justice for creditors, who would receive the debt they were owed in full, and consumers who should end up with a reasonable surplus to start over.[100] The sale had to be conducted in the district that the attached property was situated, by a sheriff or deputy sheriff in that district.[101]

Sheriffs also had to handle the money gained through the sale and could only pay the amount to creditors when the property was transferred to the purchaser who then became the new owner.[102] A balance certificate detailing consumers' bond accounts had to be obtained by sheriffs from the creditors. These certificates would show the arrears when the sale in execution occurred which helped the sheriff determine the possible surplus or shortfall from the sale. Thereafter, the account would be finalised by sheriffs who would pay all the relevant parties.[103]

Consumers had to get the surplus if there was any money left over after the judgment

[97] The eviction process is not the focus of this thesis.
[98] Uniform Rule 46(7)(c) and 46(8)(a); Magistrates' Court Rule 43(6)(b)-(d).
[99] *Rossiter and Another v Rand Natal Trust Co Ltd and Others* 1984 1 SA 385 (N) 389 & *Pillay v Messenger Magistrates' Court, Durban and Others* 1951 1 SA 259 (N) 264.
[100] Ibid.
[101] Uniform Rule 46(4); Magistrates' Court Rule 43(10) and (11).
[102] Uniform Rule 46(14)(a). Also see J Fourie 'Sale in execution: The conveyancer and the sheriff' (2013) *De Rebus* available at http://www.derebus.org.za/sales-execution-conveyancer-sheriff/ last accessed 8 October 2019, which discussed the correct procedure to be followed in terms of this rule.
[103] J Fourie 'Sale in execution: The conveyancer and the sheriff' (2013) *De Rebus* available at http://www.derebus.org.za/sales-execution-conveyancer-sheriff/ last accessed 8 October 2019.

debt and the legal costs were paid. On the other hand, if there was a shortfall, consumers would be liable for it.[104] This usually occurred when the judgment debt was quite high due to large arrear amounts or when the value of the house was less than the outstanding bond amount or if there were multiple bonds registered against the home.[105]

In many cases, there was a shortfall because homes were often sold for significantly less than their market value. This was one of the areas that received a lot of criticism and it was alleged that collusion occurred to sell homes for prices way below the market value. In one instance it was reported that Mr Molokomme bought a home for R38 970 in 1989 with the assistance of a home loan from Nedbank.[106] Mr Molokomme subsequently died and his wife was unable to keep up with the bond repayments.[107] The bank instituted proceedings for the full outstanding balance and executed against the movables. One of the movable items that was attached was an asset that Mrs Molokomme used to run a small business; an industrial sewing machine. Mrs Molokomme's business suffered greatly as she was only able to make only half of her usual income. Her home was eventually sold in execution to BOE Bank Limited for R10.[108] After that, BOE Bank Limited resold the home for R35 000 and eventually, Mrs Molokomme was evicted whilst she was eight months pregnant.[109]

Another case involved Mr Nkwane whose home loan amounted to R380 000.[110] Standard bank had security for the loan in the form of a mortgage bond. Mr Nkwane defaulted in payments shortly after receiving the loan and could not continue meeting his obligations as specified in the loan agreement.[111] Although the home was valued at R492 470 when the sale occurred, it was sold in execution for R40 000.[112]

Both the cases and many others like them were possible because the court rules did not require the setting of a reserve price when selling the home in execution. In the end, consumers not only lost their family home, but they also still remained overindebted. Therefore, it is important to address issues such as those relating to a reserve price being set

---

[104] Author unknown 'Sale in execution: Know your rights' (2014) *Property24* available at https://www.property24.com/articles/sales-in-execution-know-your-rights/17401 last accessed 10 May 2019.
[105] Ibid.
[106] See A Arde 'Court Rules on Home Repossessions' (2018) *BusinessDay* available at https://www.pressreader.com/south-africa/business-day/20180914/281517932020686 last accessed 10 May 2019.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] *Nkwane v Nkwane and Others* Case no. 36700/2016 [2018] ZAGPPHC 153 (22 March 2018) para 6.
[111] Ibid.
[112] Ibid. The facts showed that the bank and Nkwane actively tried to avoid a sale in execution.

to sell the property and ensure that consumers are not exploited if it is inevitable for the homes to be sold in execution. The issue of reserve prices is discussed further in Chapter 5.

Another issue with public auctions was that in practice, some sheriffs did not make sure that the sale in execution procedure was meticulously followed which made them vulnerable to damages claims launched by consumers.[113] It is therefore important to ensure meticulous execution of the duties in facilitating a sale in execution by all role players. In particular, the interests of consumers need to be protected because they suffer the most negative consequences through the forced sale and they rely on the sheriffs to ensure that the sale was justly carried out.

2.9 The Right of Redemption

The above discussion shows the traditional approach that was followed if consumers failed to meet their obligations under the loan agreement. Creditors could call up the bond and claim the accelerated full outstanding balance on the loan by instituting proceedings to have the home sold in execution. The only way that consumers in this predicament could prevent their home from being sold in execution was to redeem their home. Under the common law, consumers were entitled to redeem their homes by paying creditors' the full outstanding balance they are owed and thereby freeing the property from the creditors' limited real right.[114] In other words, the mortgage bond was cancelled, and the consumer would receive the property, free of the mortgage bond agreement.

The right to redeem the property existed any time before there was a transfer of the property to the auction purchaser. In *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co,*[115] the court held that:

> Although the effect of a *pignus judiciale*[116] is that the control of the property arrested in execution passes from the judgment debtor… the dominium remains in the debtor, who can, up to the last moment before actual sale, redeem his attached property: that is to say, the property subject to the *pignus judiciale*, for while the pignus lasts he remains the owner of

[113] J Fourie 'Sale in execution: The conveyancer and the sheriff' (2013) *De Rebus* available at http://www.derebus.org.za/sales-execution-conveyancer-sheriff/ last accessed 8 October 2019.
[114] See PJ Badenhorst *Silberberg and Schoeman's the law of property* (note 19 above) 381. Also see TJ Scott & S Scott *Wille's law of mortgage and pledge in South Africa* (note 2 above) 191-195.
[115] 1922 AD 549.
[116] This refers to an attachment by an officer of the court.

the pledge…[117]

To put it differently, this means that at common law, consumers retained physical control of the property and had a right to redeem that property up to the time of the actual sale in execution. Whilst the right to redemption does protect consumers who are in danger of losing their homes, it is submitted that the protection under the common law was not enough. As discussed in Chapter 1, consumers entered into mortgage bond agreements because they could not afford to pay the full price of a home. If they could no longer pay their instalments under the mortgage agreement, it usually meant that they were facing a financial strain which left them overindebted. When consumers defaulted in their payments and creditors called up the bond, making the accelerated or entire debt due, most consumers would still be unable to pay that amount and were still at risk of losing their homes. Therefore, the right to redemption was not useful for most consumers.

The NCA has introduced a protection which can assist consumers that are unable to pay the full accelerated debt but can pay the full arrear amounts to catch up on their instalments.[118] It is submitted that this is a better way to prevent consumers' homes being sold in execution. This protection is discussed further in Chapter 4.

2.10 Concluding Remarks

The reality is that many consumers could lose their homes by missing a few payments. In many instances, creditors used the sale in execution of consumers' assets, including their home, as the first line of attack rather than a last resort.[119] In South Africa's pre-constitutional dispensation *pacta sunt servanda* was the overarching principle to enforce contracts which meant that creditors could easily sell consumers' homes in execution if there was a breach of the mortgage bond agreement. The law favoured property rights which could be vindicated without considering the consumers' circumstances.[120]

Creditors could even choose the court in which to institute proceedings and they

[117] *Liquidators Union v Brown & Co* (note 115 above) 558-9.
[118] See section 129(3)-(4) of the NCA.
[119] C Ryan 'New Court rules make it harder for repossessed homes to be sold for a pittance' (2017) available at http://www.acts.co.za/news/blog/2017/12/new-court-rules-make-it-harder-for-repossessed-homes-to-be-sold-for-a-pittance last accessed 10 May 2019.
[120] See *Boland Bank v Pienaar* (note 42 above).

often utilised the Supreme Court even when the Magistrates' Court had jurisdiction because it served their interests better.[121] If legal action was taken and the consumers did not enter an appearance to defend, creditors could easily proceed to the clerk or registrar of the court who would grant default judgment if the papers were in order.[122]

Thereafter, creditors would get a writ or warrant of execution and proceed to have the sheriff sell the home through a public auction. The procedures for the public auction have been very problematic because the home could be sold without a reserve price. This meant that potential buyers could buy property for trifling amounts.[123] In the end, consumers continued to face financial strain because if the proceeds from the sale did not cover the loan, the consumers remained indebted to the creditors.[124] On top of this, consumers and their dependants were left without a place to stay that they called home.

In addition, the right of redemption did not assist the vast majority of consumers who could not pay the full outstanding balance on the loan to discharge the debt. The loan was initially taken out because of the fact that consumers could not afford to buy a home without one. Redemption would therefore be useful in limited cases where perhaps the outstanding balance was not a large amount.

With these issues in mind, the next chapters will show how the procedure to sell homes in execution has evolved over the years and what prompted these developments. In particular the so-called traditional approach has been constantly challenged as unconstitutional and contrary to the NCA so the next two chapters will assess the impact of the Constitution and the NCA. It is also important to note that the majority of the procedures discussed above have been retained with amendments made to certain parts.

[121] *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) 820I. See Jurisdiction discussion above in Part 2.5.
[122] See the discussion of the procedure in *Jaftha* (note 17 above) para 15-16.
[123] See *Molokomme* and *Nkwane* examples above in Part 2.8.3.
[124] Ibid.

CHAPTER 3
THE IMPACT OF THE CONSTITUTION

3.1 Introduction

South Africa has a supreme Constitution which sets out the country's fundamental laws. The Constitution came into effect on 4 February 1997 and its preamble highlights South Africa's vision in the democratic dispensation to:

> Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights;
>
> Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law;
>
> Improve the quality of life of all citizens and free the potential of each person; and
>
> Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations.

In addition, some of the founding values of the Constitution include human dignity, equality, advancement of human rights and freedoms, non-sexism, non-racialism, the supremacy of the Constitution and the rule of law.[125] The Constitution contains 14 chapters which comprehensively deal the with the state, government and its people. It also contains a binding Bill of Rights that is justiciable.[126] This Bill of Rights gives people certain rights and if they are violated, judicial proceedings may be instituted to seek a remedy. If a law or conduct conflicts with the Constitution it will be declared illegal or invalid by the courts.[127]

In the landmark case of *S v Makwanyane and Another,*[128] Mohamed J said the following regarding Constitutions in general and South Africa's Constitution:

> All Constitutions seek to articulate, with differing degrees of intensity and detail, the shared aspirations of a nation; the values which bind its people, and which discipline its government

[125] Section 1 of the Constitution.
[126] Chapter 2 of the Constitution.
[127] Section 2 of Constitution.
[128] 1995 (3) SA 391 (CC).

> and its national institutions; the basic premises upon which judicial, legislative and executive power is to be wielded; the constitutional limits and the conditions upon which that power is to be exercised; the national ethos which defines and regulates that exercise; and the moral and ethical direction which that nation has identified for its future. In some countries the Constitution only formalises, in a legal instrument, a historical consensus of values and aspirations evolved incrementally from a stable and unbroken past to accommodate the needs of the future. The South African Constitution is different: it retains from the past only what is defensible and represents a decisive break from, and a ringing rejection of, that part of the past which is disgracefully racist, authoritarian, insular, and repressive, and a vigorous identification of and commitment to a democratic, universalistic, caring and aspirationally egalitarian ethos, expressly articulated in the Constitution. The contrast between the past which it repudiates and the future to which it seeks to commit the nation is stark and dramatic.[129]

In the previous chapter, this thesis discussed the procedures that were followed to sell a home when consumers defaulted on their loan instalments before the Constitution was introduced. There are certain constitutional rights that are affected through the sale in execution of consumers' homes. In particular, the housing clause in section 26 of the Constitution is affected. Since the procedures discussed in Chapter 2 were developed before the right in section 26 was introduced, it becomes important to analyse whether such procedures pass constitutional muster. However, creditors have rights too which must not be overlooked and the courts have had to grapple with how to balance the rights of both parties.[130]

This chapter will assess how the right to access adequate housing has impacted foreclosure proceedings by discussing the leading cases as well as amendments to the court rules. The chapter will also discuss other constitutional rights that may be infringed when homes are sold in execution. The following rights will thus be discussed under the following headings:

- the right to adequate housing
- the right to property
- the right to human dignity
- the rights of vulnerable people

[129] Ibid para 262.
[130] See *Jaftha* (note 17 above) para 42.

3.2 The Right to Adequate Housing

Section 26 of the Constitution provides that:

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

It has been argued that housing has, not only physical consequences but also psychological and social significance.[131] It is therefore an important socio-economic right. Section 26(1) of the Constitution speaks of a right to access adequate housing rather than a right to housing. This is relative depending on the circumstances of each person.[132] Adequacy therefore 'depends on context and may differ from province to province, from city to city and from rural to urban areas and from person to person.'[133]

The courts have also interpreted the right to access adequate housing as having both positive and negative aspects. On the one hand, section 26(2) places a duty on the state to progressively realise the right of access to adequate housing by taking certain measures. This is therefore a positive obligation. On the other hand, section 26(3) prohibits private persons and the state from unjustifiably depriving people of the access to adequate housing they already have. This is therefore a negative obligation.[134]

In the context of sales in execution, this right must be analysed because it can ultimately lead to people being deprived of their homes and such deprivation may not be arbitrary. However, creditors also have rights to foreclose the property and get their money back, as discussed in Chapter 2. These rights must be given sufficient attention. The first major decision to deal with the right to access adequate housing in the context of sales in execution of homes was *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others*[135]

[131] MH Cheadle et al *South African Constitutional Law: The Bill of Rights* (2002) 478.
[132] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) paras 36&37.
[133] Ibid para 36.
[134] See *Jaftha* (note 17 above) para 31-33.
[135] See note 17 above.

('*Jaftha* case'). This was followed by *Standard Bank of South Africa Ltd v Saunderson & Others,*[136] ('*Saunderson* case') and finally there was the case of *Gundwana v Steko Development and Others*[137] ('*Gundwana* case').

3.2.1 *Jaftha v Schoeman & Others; Van Rooyen v Stoltz & Others*[138]

The first Constitutional Court case to deal with the right to adequate housing and sales in execution was not a case which dealt with a home loan being issued and a mortgage bond securing the home in favour of a mortgagee. Rather, loans were advanced by creditors who instituted proceedings for money judgments. These orders were then used to execute against the consumers' movable assets and thereafter their homes, and the warrants of execution were granted by clerks of the Magistrates' Court. Nevertheless this case is still important because it dealt with the loss of homes through execution proceedings and it resulted in the amendment of the Magistrates' Court procedure to sell homes in execution.

3.2.1.1 Facts of the cases

Ms Jaftha suffered from high blood pressure and heart problems which prevented her from working. In addition to this, she had a standard two education. In 1997 she was granted a housing subsidy to buy a home and she did so. She lived there with her two children where they lived a humble life.[139] A creditor lent Ms Jaftha R250 in 1998 and monthly instalments were to be paid to satisfy the debt. Ms Jaftha was inconsistent in her payments which resulted in the creditor hiring attorneys to handle the matter. Judgment was granted for R632,45 against Ms Jaftha in the Magistrates' Court. Thereafter, Ms Jaftha attempted to make further payments but was hospitalised in 2000. When she was released, she found out that a sale in execution was scheduled against her home. In March 2001, the attorneys notified her that a sum of R5500 would stay the sale and she made payments that amounted to R500. Four months later, she was informed that the amount to stay the sale had increased to R7000. Ms Jaftha could not afford this amount, neither was she given a chance to pay it. The sale occurred the following month in August and Ms Jaftha was forced to leave her home. The

[136] See note 18 above.
[137] 2011 (3) SA 608 (CC).
[138] See *Jaftha* (note 17 above).
[139] Ibid para 3.

home was sold for R5000 to a third party who was the first respondent in the *Jaftha* case.[140]

Similarly, Ms Van Rooyen was also a woman who was unemployed and impoverished. She had never been to school and lived in the home in question with her three children. Her husband received R15 000 as a state subsidy to finance the purchase of a home in 1997 but he passed away shortly thereafter. As the surviving spouse, Ms Van Rooyen inherited the home. Ms Van Rooyen then purchased vegetables on credit and could not repay the amount of R190. The same attorneys from the *Jaftha* case were employed by the creditor. Eventually, the case was referred to the Magistrates' Court where judgment was granted against Ms Van Rooyen for R198,30. In 2001, on the same day as the sale of Ms Jaftha's home, Ms Van Rooyen's home was sold in execution. The purchase price was R1 000.[141]

Proceedings were then launched in the High Court seeking an order to set the sales in execution aside. Other relief sought was an interdict to stop the property being transferred to the buyers. A cost order was further sought against the firm that handled the two cases. Furthermore, Ms Van Rooyen sought orders which essentially dealt with preventing the eviction of previously disadvantaged people who acquired a state subsidy to buy a home in Prince Albert. If such eviction had already occurred, then the persons affected should be assisted to have such evictions set aside if their constitutionally protected rights had been violated.[142] The non-constitutional issues were first decided but that is not the purpose or focus of this discussion and therefore will not be discussed.[143]

3.2.1.2 Provisions in question

In the *Jaftha* case, the Constitutional Court assessed section 66(1)(a) of the Magistrates' Court Act.[144] That section prescribes the process that must be followed to sell homes in execution which starts when creditors are granted judgment to execute the property. This is discussed above in Part 2.8.2 but the crux is that if a sheriff does not find sufficient movables to satisfy the debt at the consumer's home, then he will file a *nulla bona* return. The clerk of the court, in light of the *nulla bona* return, will issue a warrant of execution to have the consumer's home sold to fulfil the debt. The section reads as follows:

[140] Ibid para 4.
[141] Ibid para 5.
[142] Ibid para 6.
[143] Ibid.
[144] Act 32 of 1944.

> (1)(a) Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given or such order has been made.

Section 67 of the Magistrates' Court Act was also challenged. The section lists several items which cannot be seized, attached or sold in the execution process. This includes property such as necessary beds, bedding and clothes, necessary furniture, a farmer's stock and tools, food and drink that will last a month, tools of trade, books, documents used by the consumer in his profession as well as arms and ammunition that the consumer has as required by law. Some of the items also had to not exceed a value that was determined by the Minister in the Government Gazette.[145]

3.2.1.3 Findings of the courts

The High Court essentially decided that section 66(1)(a) was consititutionally permissible. This was because under Rule 36 of the Magistrates' Court Rules, if the sheriff returned with a *nulla bona* return to show that the movables are insufficient to fulfil the judgment debt, the clerk was obliged to grant a warrant of execution.[146] If the judgment debtors had an issue with the warrant of execution, they could approach the court to set it aside by showing good cause.[147] In addition, the court a quo held that the right implicated is not one of ownership, but rather of access to adequate housing. Therefore, section 26 of the Constitution was not violated because the right does include the entitlement to a certain kind of house.[148]

It is submitted that this judgment failed to take into consideration the plight of the two women in the case, as well as the consequences of the sale in execution of their homes. Not only were they undereducated, but also unemployed, impoverished and had dependents. The decision also had an impact on other people in Prince Albert and South Africa at large

[145] See *Jaftha* (note 17 above) para 14.
[146] Ibid para 26 & 44.
[147] Ibid para 42.
[148] Ibid para 39 & 47. See Section 62 of the Magistrates' Court Act.

who fell into the debt trap and only had their state subsidised home as an asset.[149]

An alarming fact was that in Prince Albert at the time, there was an increase in the number of homes which were state subsidised and sold in execution. Some homes were also sold for substantially less than their market value.[150] Such sales in execution not only resulted in the loss of a home, but for the recipients of a state subsidy, it also meant that they would then be disqualified from getting another state subsidy. Finding alternative accommodation would thus be very hard to do.[151] What exacerbated the situation even more was that if there was a shortfall, a debt would remain.

The matter went on appeal, and was finally heard in the Constitutional Court. Before considering the right to access adequate housing Mokgoro J explained that:

> The underlying problem raised by the facts of this case is not greed, wickedness or carelessness, but poverty. What is really a welfare problem gets converted into a property one. People at the lower end of the market are quadruply vulnerable: they lack income and savings to pay for the necessities of life; they have poor prospects of raising loans, since their only asset is a state-subsidised house; the consequences of inability to pay, under the law as it stands, can be drastic because they live on the threshold of being cast back into the ranks of the homeless in informal settlements, with little chance of escape; and they can easily find themselves at the mercy of conscienceless persons ready to abuse the law for purely selfish gain.[152]

In other words, consumers get into debt and default on their payments because they have overextended themselves, faced a financial difficulty and have gotten into a bad financial position. Sometimes, the position they find themselves in is not their fault. The poor are the most vulnerable and the impact of losing a home for them is felt the most. However, creditors under the traditional approach, could still institute proceedings to recover the debt owed which would result in consumers' homes being sold in execution.[153]

The Constitutional Court then asked the question of whether a sale in execution of consumers' homes limits their right to adequate housing. If a limitation did exist, it had to

[149] *Jaftha* (note 17 above) para 12.
[150] Ibid.
[151] Ibid.
[152] Ibid para 30.
[153] Ibid, see Chapter 2 for the traditional approach.

pass the section 36 limitation clause analysis in order for it to be rendered constitutional.[154] That is to say, the limitation would be justified. Section 36 reads as follows:

> 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.

The respondents argued that the procedure to sell consumers' property in execution is reasonable and justifiable because an important government purpose is fulfilled through debt recovery. Without such a process or procedure, the administration of justice would be greatly affected.[155] Another argument advanced was that if creditors are hindered by the courts in their debt recovery process, there would be an indirect impact of creditors being very reluctant to advance loans to consumers, especially those that are poor.[156] Furthermore, it is impossible for a judge to oversee the granting of every execution order.[157]

It is submitted that debt recovery and the administration of justice are important in society. Not only do they foster legal certainty but they also encourage consumers to honour their agreements.[158] However, these are some the factors that should be weighed against the consumers' right to adequate housing. Common law, including the traditional approach, needed to be aligned to the values and rights in the Constitution which signified a need for a new approach to be adopted regarding selling homes in execution.

In the *Jaftha* case, Mokgoro J considered that Ms Jaftha and Ms Van Rooyen already had access to adequate housing which was being threatened:

---

[154] *Jaftha* (note 17 above) para 35&36.
[155] Ibid para 37.
[156] Ibid para 38.
[157] Ibid para 37.
[158] Ibid para 51. Also see D Hutchison & C Pretorius (eds) *The Law of Contract in South Africa* (note 23 above) 22.

> Relative to homelessness, to have a home one calls one's own, even under the most basic circumstances, can be a most empowering and dignifying human experience. The impugned provisions have the potential of undermining that experience. The provisions take indigent people who have already benefited from housing subsidies and, worse than placing them at the back of the queue to benefit again from such subsidies in the future, put them in a position where they might never again acquire such assistance, without which they may be rendered homeless and never able to restore the conditions for human dignity. Section 66(1)(a) is therefore a severe limitation of an important right.[159]

This point was amplified in a subsequent case where the court heard multiple foreclosure matters. The court held that if execution is ordered, the defendants may be unable to obtain other adequate housing.[160] This is even under circumstances where the defendants are able to get the residue that is left over from the difference between the purchase price minus the debt owed and costs incurred. In other words, the defendants would not only be rendered homeless, but also put 'at the back of the queue,'[161]in terms of obtaining other adequate housing.

For this reason, selling a home in execution may only be permitted in instances where it is justified. Whether it is justified will depend on the circumstances or facts of each case. This entails a balancing of the rights of creditors and consumers. Such a sale would not be justified if the advantage of the creditor by selling the home to recover the debt, is far less than the prejudice that the consumer will face.[162]

Under this background and the circumstances of the case, the Constitutional Court ruled that section 66(1)(a) of the Magistrates' Court Act was too broad and violated section 26(1) of the Constitution because indigent consumers lost their security of tenure through a clerk allowing a sale in execution of their homes.[163]As a result, words had to be read into section 66(1)(a) which require judicial oversight over the process.[164] The amended section read that:

[159] *Jaftha* (note 17 above) para 39.
[160] *Firstrand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ) para 12.
[161] Ibid.
[162] *Jaftha* (note 17 above) para 42-43.
[163] Ibid para 52.
[164] Ibid para 64.

> Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then *a court, after consideration of all relevant circumstances, may order execution* against the immovable property of the party against whom such judgment has been given or such order has been made. (emphasis in the original)

Therefore, judicial oversight is necessary to assess the circumstances and weigh up the rights of both parties.[165] This is so even if the home has been secured through a mortgage bond.[166] The Constitutional Court did not limit the situations where a sale in execution of consumers' homes would be prohibited. Rather, it declared that the approach must be flexible enough to take various circumstances into consideration regarding the consumers' plight whilst also being sensitive to the interest of creditors' that are entitled to have their loans repaid.[167]

The following guidelines can be deduced from the Constitutional Court decision:[168]

1. If the procedure to sell a home in execution is not complied with as required by the rules, the sale must not be allowed.
2. If another reasonable way to recover the debt exists, the sale must not be allowed.
3. If the procedure is complied with, and no other reasonable way to recoup the debt exists, the sale in execution may be allowed unless there is a gross disproportion in the circumstances of the parties. In other words, the creditors' interests are outweighed by the consumers' interests or the harm caused to consumers' outweighs the creditors' advantage.
4. In assessing proportionality, the amount or size of the debt must be considered. A trifling debt does not justify the home being sold.[169]
5. However, the circumstances in which the debt arose must also be taken into consideration. If the consumers have been reckless and overextended themselves,

[165] Ibid para 55.
[166] See later case of *Gundwana v Steko* (note 37 above) below in Part 3.2.3 of this thesis.
[167] *Jaftha* (note 17 above) para 44&53.
[168] Ibid para 56-60.
[169] See *Maleke* (note 162 above) where the court applied this principle to dismiss the applications.

knowing that they would not be able to pay the loan, the court may hold that a sale in execution is justified.[170]

6. The consumers' attempts to pay their debt.
7. The financial position of both parties. For example, are the consumers employed or do they have another source of income to repay the loan?
8. Any other relevant factor.

Whilst these guidelines are useful, they are not a closed list because each case is unique. There are a multitude of other factors which can be considered and such factors will be identified in this thesis especially in Chapter 6.[171]

Regarding the challenge to section 67 of the Magistrates' Court Act, the Constitutional Court disagreed with the argument advanced that the section is unconstitutional because it does not offer the same protection to consumers' homes as it does to the consumers' movable necessities.[172] The court held that the section fulfils the purpose of protecting the consumers' movable property that is necessary for survival if the value of the movable property does not exceed a certain amount. However, a similar blanket prohibition in relation to a home is inappropriate.[173] In essence, the court reasoned that a blanket prohibition would make it harder for impoverished consumers to access credit and it would disadvantage creditors who would be forbidden from selling the home in execution to get their money back.[174]

Whilst the Constitutional Court's reasoning makes sense, it would have been useful if this argument was further explored because prohibiting the sale of a home of a certain market value could serve to protect the home of indigent or vulnerable consumers. In those circumstances, creditors would have to pursue other means to recover the debt. This would be in line with the section 26 constitutional right to access adequate housing. Other countries do have such blanket prohibitions and this will be discussed further in Chapter 5 and 6.

[170] Also see *Jaftha* (note 17 above) para 41.
[171] See Chapter 6 of this thesis.
[172] *Jaftha* (note 17 above) para 12&50.
[173] Ibid para 51.
[174] Ibid.

3.2.2 *Standard Bank of South Africa Ltd v Saunderson & Others*[175]

This case was heard in the Supreme Court of Appeal and it was the first case to deal with the section 26 right to adequate housing in circumstances where creditors' had mortgage bonds over the consumers' property as security for a home loan.

3.2.2.1 Facts of the case

Following the approach in *Jaftha*, the *Saunderson* case, challenged the registrar's powers to issue an order for immovable property to be sold in execution. The facts of the case were that Standard Bank issued summons against nine consumers whose debts were secured by mortgage bonds and who had subsequently defaulted in their repayments. Standard Bank claimed judgment against the consumers for the respective amounts owed and ancillary orders to declare their immovable properties executable. Eight consumers did not file notices of intention to defend and Standard Bank applied for default judgments with the registrar. Standard Bank applied for summary judgment in the one case where the consumer did enter an appearance to defend. The case was set down to be heard along with the default judgment applications.[176]

The cases were first dealt with in the Cape Provincial Division where judgment was granted in each case for the full outstanding debt. However, the properties were not declared executable. Blignault J relied on the Constitutional Court case of *Jaftha* to conclude that the summonses did not contain enough allegations to permit the sales in execution. Standard Bank then appealed the matters to the Supreme Court of Appeal. [177]

Once again the court was tasked with determining whether the section 26 constitutional right to adequate housing was violated.

3.2.2.2 Provisions in question[178]

Section 27A of the Supreme Court Act**[179]** read together with Uniform Rule 31(5)(a) provide

[175] See note 18 above.
[176] Ibid para 4.
[177] Ibid para 5-6.
[178] See *Nedbank Ltd v Mortinson* (note 61 above) para 12-20 for discussion on the origin and reasons for the development of these provisions.

that the registrar may declare immovable property specially executable. Section 27A reads as follows:

> A judgment by default may be granted and entered by the registrar in the manner and in the circumstances prescribed in the Rules made in terms of the Rules Board for Courts of Law Act, 1985 (Act No. 107 of 1985), and a judgment so entered shall be deemed to be a judgment of the court.

Rule 31(5)(a) of the Uniform Rules states that:

> (a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment.
>
> (b) The registrar may –
>
> (i) grant judgment as requested;
>
> (ii) grant judgment for part of the claim only or on amended terms;
>
> (iii) refuse judgment wholly or in part;
>
> (iv) postpone the application for judgment on such terms as he may consider just;
>
> (v) request or receive oral or written submissions;
>
> (vi) require that the matter be set down for hearing in open court.
>
> (c) The registrar shall record any judgment granted or direction given by him.
>
> (d) Any party dissatisfied with a judgment granted or direction given by the registrar may, within 20 days after he has acquired knowledge of such judgment or direction, set the matter down for reconsideration by the court.

Furthermore, Rule 45(1) of the Uniform Rules of Court provides that:

> The party in whose favour any judgment of the court has been pronounced may, at his own

[179] Act 59 of 1959.

> risk, sue out of the office of the registrar one or more writs for execution thereof as near as may be in accordance with Form 18 of the First Schedule: Provided that, except where immovable property has been specially declared executable by the court or in the case of a judgment granted in terms of Rule 31(5) by the registrar, no such process shall issue against the immovable property of any person until a return shall have been made of any process which may have been issued against his movable property, and the registrar perceives therefrom that the said person has not sufficient movable property to satisfy the writ.

In *Standard Bank of SA Ltd v Ngobeni*,[180] the court held that the purpose of the rules delegating the power to grant or refuse default judgment to registrars was to relieve the burden that rests on judges. However, such power only exists in uncomplicated matters where the registrar checks that all formalities have been adhered to. Obscure or extraordinary points of fact or law may not be decided by a registrar. Instead, in Uniform Rule 31(5)(b)(vi) the registrar is given the duty to refer the matter for a hearing if there a genuine concern about whether judgment should be granted.

3.2.2.3 Findings of the court

The Supreme Court of Appeal disagreed with the arguments made by the respondents by distinguishing *Jaftha* from this case. It held that section 26(1) was not engaged in the *Saunderson* case because the section grants a right of access to adequate housing. What constitutes adequate housing is relative which will be determined by the facts of each case.[181] The court gave the example of a holiday home or luxury home and held that when such properties are sold in execution this will not trigger or affect the right to adequate housing at all.[182]

Furthermore, the *Saunderson* cases were 'radically different' from *Jaftha* because they involved consumers who 'willingly bonded their property to the bank to obtain capital.'[183] The Supreme Court of Appeal therefore held that the bank is a mortgagee that has rights over the home which are derived from the mortgage agreement and are fused into the

[180] 1995 (3) SA 234 (VSC) 235C-E.
[181] *Saunderson* (note 18 above) para 16.
[182] Ibid para 17.
[183] Ibid para 18.

title of the home.[184] The *Jaftha* case did not address section 26(1) in the context of the kind of cases being dealt with in the *Saunderson* case. Instead, the Supreme Court of Appeal pointed out that the Constitutional Court in the *Jaftha* case expressly stated that where the court procedure has not been abused, a sale in execution would ordinarily be allowed.[185] The Supreme Court of Appeal found that the defendants had not made an allegation that the court process had been abused and they also had not alleged that their right to access adequate housing would be infringed by the sales.[186]

Additionally, the Supreme Court of Appeal decided that the registrar's powers to grant default judgment was valid. The court reasoned that the registrar formally evaluates whether in the summons, a proper cause of action is disclosed; this does not involve a judicial function.[187] Registrars only perform this function if there is no appearance to defend entered by consumers and there is no allegation that the order will infringe a constitutional right. Where consumers do defend the matter and/or raise a constitutional right, the matter will be heard in open court. Further, if registrars genuinely believe the order would infringe a right, they can refer the matter to open court.[188]

Finally, the Supreme Court of Appeal issued a practice directive. This directive states that summons to institute legal proceedings for an order to declare immovable property executable must draw the consumers' attention to the possibility of a sale in execution infringing their section 26(1) right to adequate housing. If consumers decide to oppose the matter and raise the right to adequate housing, they must place information to support such an allegation before the court.[189]

Du Plessis and Penfold argue that the Supreme Court of Appeal's reasoning is not easy to follow because the real question should be 'whether the defendant is likely to be deprived of 'access' to adequate housing should he or she be deprived of the property in question – that is, whether he or she is likely to be left homeless as a result of the execution.' Furthermore, the Supreme Court of Appeal did not touch on the issue of security of tenure which was dealt with extensively in *Jaftha*.[190]

In fact, it seems that many principles in the *Jaftha case* were not applied by the

[184] Ibid para 18.
[185] Ibid para 19.
[186] Ibid para 19-21.
[187] Ibid para 24.
[188] Ibid para 23-24.
[189] Ibid para 27.
[190] Du Plessis M and Penfold G 'Bill of Rights Jurisprudence' *Annual Survey of South African Law* (2006) 45.

Supreme Court of Appeal. The main principle is that there needs to be judicial oversight where consumers are likely to lose their home by a sale in execution. It is submitted that the fact that a mortgage bond was secured over the property should not be a reason to deny consumers' right to adequate housing and it must be for the courts to weigh the rights and circumstances concerned, not the registrar.

It is also submitted that as much as creditors have the right to be repaid the loan and to institute foreclosure proceedings to recover the debt owed, this cannot be the overarching principle that the courts consider. A multitude of factors must be assessed to balance the rights of creditors and consumers.[191]

The effect of the *Jaftha* case and the *Saunderson* case in practice was that the Magistrates' Court procedure involving the clerks' competence to grant a warrant of execution was revoked, whilst the procedure in the High Court which involved registrars who had similar competence to grant writs of execution continued. This inconsistency created uncertainty in the law and courts had varied interpretations and procedures.[192]

What is noteworthy is that the respondents in the *Saunderson* case did not take the matter on appeal to the Constitutional Court. Instead, the Campus Law Clinic of the University of Kwa-Zulu Natal ('UKZN Law Clinic') applied for leave to appeal the decision and in the alternative, for direct access, to the Constitutional Court on the ground of public interest.[193] The Constitutional Court agreed that it was in the public interest to decide the procedure to allow applications to sell consumers' homes in execution. However, although this was an important constitutional issue, the Court did not grant leave to appeal or direct access.[194]

The Constitutional Court reasoned that UKZN Law Clinic was not a party to the proceedings in the lower courts and the issues it sought to be adjudicated were broader than those dealt with in the *Saunderson* case.[195] The Court thus held that it is undesirable to determine important constitutional issues as 'the court of first and last instance.'[196] Rather, the case should begin at the High Court where all interested parties such as the bank, bodies

[191] See *Jaftha* (note 17 above) para 56-60 for some of these factors.
[192] See *Nedbank Ltd v Mortinson* (note 61 above); *ABSA Bank Ltd v Ntsane and Another* 2007 (3) SA 554 (T); *Mkhize v Umvoti Municipality and Others* 2010 (4) SA 509 (KZP).
[193] *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another* 2006 (6) SA 103 (CC) para 18.
[194] Ibid.
[195] Ibid para 25.
[196] Ibid para 26.

representing consumers, and the Minister of Justice and Constitutional Development, can be joined.[197] However, there was no subsequent legal action taken by the clinic.

In essence, we do not have the benefit of seeing whether the Constitutional Court would have reached a different decision to the Supreme Court of Appeal. However the next case where registrars' powers were once again challenged, was decided in the Constitutional Court.

3.2.3 *Gundwana v Steko Development and Others*[198]

This was the next landmark case to deal with section 26 in the context of the selling of a family home and it was decided by the Constitutional Court.

3.2.3.1 Facts of the case

Ms Gundwana bought a home in 1995 and she obtained a loan of R25000 from Nedcor Bank which is the second respondent in this matter. A mortgage bond was therefore registered over the property. In 2003, Ms Gundwana fell into arrears and the bank instituted proceedings to sell the property in execution. The registrar granted default judgment for an amount of R33 543,06 and an order declaring the property executable.[199]

For about 4 years, the bank did not pursue the matter any further and Ms Gundwana made irregular payments to the bank.[200] In August 2007, Ms Gundwana discovered that a sale in execution was scheduled against her property. According to a bank official, she had defaulted in payments of R5 268,66 and the accelerated full outstanding balance on the loan was R23 779,13. In an attempt to avert the sale, Ms Gundwana paid R2000 to the bank, however the sale continued that same month. Steko Development bought the house, the transfer was registered and Steko Development launched eviction proceedings in April 2008. The order to evict Ms Gundwana was granted in June 2008 in the Magistrates' Court and her appeal to the High Court was dismissed. Leave to appeal to the Supreme Court of Appeal was

[197] Ibid para 26.
[198] See note 137 above.
[199] Ibid para 5.
[200] Ibid. See para 11 for details regarding the payments made.

also refused.[201]

Ms Gundwana then applied for the default judgment to be rescinded even though it was granted in 2003. That matter was pending in the High Court. She alleged that she did not know a default judgment had been granted against her. This is because after receiving summons she consulted a bank official and borrowed money to make further payments to the bank. She therefore assumed that the bank would not apply for default judgment and for four years, the bank did not take further action against her.[202]

At the Constitutional Court, Ms Gundwana was granted leave to appeal the order to evict her. She was also granted direct access on a constitutional issue which would dispose of her High Court application for rescission.

3.2.3.2 Provisions in question[203]

The *Gundwana* case, heard five years after the *Saunderson* case, also challenged the constitutionality of the power granted to registrars to declare immovable property specially executable.[204] An order declaring this was especially necessary since the *Jaftha* case had declared that it was for the court, not the clerk to, after considering all the relevant circumstances, issue a warrant of execution. Therefore, finality on this constitutional issue would benefit all those that are affected.[205]

3.2.3.3 Findings of the court

The prevailing argument made in various cases that deal with mortgage bond debts is that the consumers chose to enter into commercial transactions and they put their homes at risk by bonding their homes through mortgage bonds. For this reason, it has been a long-standing practice that if consumers fail to repay their debts, creditors are allowed to have the properties sold in order to recover the loan amount from the proceeds of the sales. This is why creditors that are armed with money judgments, are able to have the consumers' homes declared

[201] Ibid para 6-8.
[202] Ibid para 11.
[203] See Part 3.2.2.2 of this thesis.
[204] This power is granted by Uniform Rule 31(5)(b) and 45(1).
[205] *Gundwana* (note 137 above) para 32. Also see para 29-30 which discusses why direct access to decide on this issue five years before the *Gundwana case*, was refused in *Campus Law Clinic, University of KwaZulu-Natal* case (note 193 above) in the Constitutional Court.

specially executable and sold in execution.[206] The courts would therefore uphold the agreement as required by *pacta sunt servanda*.

Froneman J rejected that argument and the notion that the principles of *Jaftha* case should not apply because consumers willingly bonded their homes. This is because, he pointed out, the rule must be objectively valid or invalid; the test for validity is not subjective.[207] The Constitutional Court in this case held that the facts of numerous case have shown that there needs to be an enquiry to determine whether the right of the consumers to adequate housing can potentially be infringed. This cannot be determined through the registrar checking the summons. In fact, the Constitutional Court held, the facts of *Gundwana* show that there was nothing in the summons to indicate whether the property concerned was Ms Gundwana's home or whether she was an indigent debtor.[208] The Constitutional Court stressed that the factors mentioned in the *Jaftha* case must be considered in such instances. In other words, each case is unique and there needs to be an evaluation of all the facts to determine whether the order to declare the property specially executable should be granted.

The Constitutional Court also held that willingness of the consumer to bind their home as security does not necessarily mean that they have waived their right to access adequate housing or that the mortgage agreements must be enforced without proper court oversight.[209] Most consumers do not have the financial means to buy their homes for cash and therefore they must, out of necessity to have shelter and a place to call their own, obtain a loan from the bank.[210]

The effect of the pronouncement that the registrars' power to grant writs of execution was invalid was that the decision in the *Saunderson* case was overturned, along with the High Court decisions which agreed with *Saunderson*. In all cases where consumers' homes are to be sold in execution there needs to be proper initial judicial evaluation. However, the practice directions issued in the cases that agreed with *Saunderson* for the summons to alert a debtor of their section 26 constitutional right, still remain because they may assist the court in their evaluation.[211]

---

[206] See *Nedbank Limited v Mortinson* (note 61 above) para 25 & *Saunderson* (note 18 above) para 18.
[207] *Gundwana* (note 137 above) para 43.
[208] Ibid.
[209] Ibid para 44.
[210] *Absa Bank Ltd v Mokebe* (note 1 above) para 1.
[211] *Gundwana* (note 137 above) para 50&52. Also see para 57-60 of discussion of the retrospective effect of the judgment.

3.3 The Right to not be Arbitrarily Deprived of Property

The Constitutional Court intentionally did not address the section 25(1) right in the *Jaftha* case because of the conclusion the court reached in terms of section 26 of the Constitution. Nevertheless, the right to not be arbitrarily deprived of property can also be infringed through a forced sale. In *First National Bank of SA Ltd t/a Wesbank v Minister of Finance*,[212] the court held:

> In a certain sense any interference with the use, enjoyment or exploitation of private property rights involves some deprivation in respect of the person having title or right to or in the property concerned. If section 25 is applied to this wide genus of interference, "deprivation" would encompass all species thereof…[213]

It is therefore submitted that a deprivation of property can occur through the sale in execution of consumers' homes. Such an interference must not be arbitrary and this will depend on the facts of each case. It is further submitted that although consumers' property rights are encumbered by a mortgage bond, such rights are stronger when the consumer has built up equity in the home by paying a substantial amount of the loan over many years. If the consumer faces an unexpected financial hardship years into the agreement, they could lose this equity through a forced sale. This is especially because when there is a forced sale, the property is often sold for far less than its market value.

The case of *Firstrand Bank Ltd v Maleke and Three Similar Cases*,[214] ('*Maleke* case') dealt with this precise issue. The facts were that the defendants were historically disadvantaged consumers whose arrears on the bond were very low, except in one case where the arrear amounts were unknown. In addition, the defendants had been paying their instalments for periods ranging from 13 to 19 years. This meant that they had acquired equity in the properties, the market values of which had increased.[215] The court held that the prejudice that would be suffered by the defendants through a sale in execution would be grossly disproportionate to the prejudice suffered by the banks. The banks would only be denied immediate payment of the loan. The arrear amounts were trifling and could therefore

[212] 2002 (4) SA 768 (CC) para 57.
[213] Ibid para 57.
[214] See note 160 above.
[215] Ibid para 5.1-5.3.

be paid in a manner that was less invasive than execution.[216] In other words, under the circumstances, the consumers' right to property and to access adequate housing could not be limited under section 36 of the Constitution.

However, it must be noted that for the purposes of section 25 of the Constitution, a security right is also considered as property and foreclosure is the right that allows creditors to be repaid the home loan amount when consumers default. Nevertheless, it is submitted that when the courts refuse to grant an execution order, a delay in enforcing the agreement to be repaid the money owed does not amount to being deprived of property.[217] Creditors will still be repaid albeit under different terms and conditions. It may take longer but creditors can also benefit from giving consumers an opportunity to remedy their default or rearrange their obligations. This is because forced sales do not usually realise the market value of the property. If the amount does not even cover the debt or legal costs, then the creditors will still be owed by overindebted consumers who cannot pay the remaining debt.

It is further submitted that a sale in execution can render consumers homeless and they will be deprived of the equity that they built up in the home over the years. A balancing of factors must therefore occur to ensure that such a deprivation is not arbitrary. Nevertheless, the interests of creditors must also be considered because they also have a right to foreclose in order to be repaid the full outstanding balance on the home loan. In other words, the means must justify the ends when a home is sold in execution which was illustrated in the *Maleke* case discussed above.

3.4 Human Dignity

The right to human dignity is expressed in section 10 of the Constitution which states that 'everyone has inherent dignity and the right to have their dignity respected and protected.' However, the right to human dignity is also a value that is invoked to interpret other protected rights.[218] O'Regan J, expressed the value of human dignity as follows:

> The value of dignity in our Constitutional framework cannot… be doubted. The Constitution asserts dignity to contradict our past in which human dignity for black South Africans was

[216] Ibid para 5.4.
[217] Ibid.
[218] P De Vos & W Freedman (eds) *South African Constitutional Law in Context* (2014) 458. Also see section 1(a) and section 7(1) of the Constitution.

> routinely and cruelly denied. It asserts it too to inform the future, to invest in our democracy respect for the *intrinsic worth of all human beings*. Human dignity therefore informs constitutional adjudication an interpretation at a range of levels. It is a value that informs the interpretation of many, possibly all, other rights… human dignity is also a constitutional value that is of central significance in the limitations analysis.[219] (emphasis in the original)

In the context of this thesis, the central right that is infringed when consumers' homes are sold in execution is the fundamental right to access adequate housing. Human dignity, that is; a person's intrinsic worth, is affected when those people no longer have a place to stay.

The courts have acknowledged that this right is affected in *Government of the Republic of South Africa and Others v Grootboom and Others*,[220] where the court held that the foundational values of equality, human dignity and freedom are denied to people who have no shelter, food or clothing.[221] The court further held that a claim for a socio-economic right necessarily affects the right to dignity.[222]

Although *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others*,[223] dealt with the state evicting unlawful occupiers from its buildings, the court made a point which is very relevant to people's right to access adequate housing. The court held that when assessing reasonableness of the way the state acted when making evictions, the Constitution will be rendered meaningless if the value of human dignity is disregarded. Human beings must be treated as such and the state's conduct must be assessed against this context.[224] Similarly, it is submitted that when consumers' homes are sold in execution, they will be deprived of their homes therefore the courts must consider their human dignity as an underlying value to their right to access adequate housing which is affected.

Lastly, in the *Jaftha* case, Mogkoro J noted that to have a home can be a dignifying human experience even under the most basic circumstances. That experience should not be undermined especially when the consumers concerned are at risk of not obtaining other

[219] *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 para 35.
[220] See note 132 above.
[221] Ibid para 34.
[222] Ibid para 83. Also see *Jaftha* (note 17 above) para 21.
[223] *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC).
[224] Ibid para 10.

adequate housing and therefore unable to restore the conditions of their human dignity.[225]

3.5 Rights of Vulnerable People

The *Maleke* case discussed above in Part 3.3 also emphasised that people that fall into the category of 'historically disadvantaged persons' are more vulnerable in foreclosure cases. These persons are defined in section 2(6) of the NCA as 'a category of natural persons who, before the Constitution ... came into operation, were disadvantaged by unfair discrimination on the basis of race.' An important purpose of the Act is to promote an accessible credit market, especially to consumers who were historically excluded.[226] The Act therefore imposes a duty on the National Credit Regulator 'to promote and support the development… of… an accessible credit market and industry to serve the needs of historically disadvantaged persons.'[227] Claassen J, in the *Maleke* case held that the courts must pursue and reflect the same ideal and noted that the NCA is:

> Designed to render assistance and protection to the previously disadvantaged section of our population who may wish to enter the property market. The Act levels the playing field between a relatively indigent and unsophisticated consumer and a moneyed and well-advised credit provider, and to limit the financial harm that the consumer may suffer if he/she is unable to perform in terms of the credit agreement[228]

Although the Constitution does not explicitly refer to a right of vulnerable people, it does express certain values and aspirations which were discussed in the introduction of this chapter. South Africa has a repressive past that was categorised by inequality, indignity and violence. The Constitution aims to create a new era which heals the divisions of the country's past, there is equal protection of every citizen by the law and the quality of life of South Africans is improved.[229] It is therefore submitted that vulnerable, historically disadvantaged persons have to be especially protected by the courts to help them keep the existing access they have to housing.[230] The courts can do this by considering the circumstances of

[225] *Jaftha* (note 17 above) para 32.
[226] See section 3(a) of the NCA.
[227] Section 13(a) of the NCA.
[228] *Maleke* (note 160 above) para 3.
[229] See Preamble of the Constitution.
[230] Also see *Jaftha* (note 17 above) para 51.

consumers before coming to a decision to order a sale of their homes in execution. This also needs to be done to fulfil the provisions of the Act.

Additionally, Du Plessis and Penfold also argue that the creditors' interests to execute should be weighed against the prejudice or hardship of the consumers' dependants who may lose their home as a result of the foreclosure. Such dependants, which include children and the elderly, are innocent victims under the circumstances.[231] In particular, the Constitution grants children the right to shelter[232] and also states that in every matter concerning children, their best interests are of paramount importance.[233] The courts have held that housing and shelter are interrelated concepts.[234] If there are other means to recover the debt without rendering a family homeless, then the courts must refuse an order for executability.

3.6 Amendments to the Procedure

As a result of the court decisions which have been discussed above, Uniform Rule 46(1)(a) was amended and the amendment came into effect on 24 December 2010. The rule now reads:

> (a) 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 movable property of the judgment debtor from which it appears that the said person has not 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 issue unless the court, having considered all the relevant circumstances, orders execution against such property.

[231] Du Plessis M and Penfold G 'Bill of Rights Jurisprudence' *Annual Survey of SA Law* (2005) 27, 80.
[232] Section 28(1)(c) of the Constitution.
[233] Section 28(2) of the Constitution.
[234] *Grootboom* (note 132 above) para 73.

This amendment ensured that the High Court rule mirrored that of the Magistrates' Court when a creditor seeks a sale in execution of consumers' homes. It is now a settled rule that judges will consider the relevant circumstances in open court before coming to a decision.

This rule was interpreted in the case of *Standard Bank of SA Ltd v Bekker & Another and Four similar cases*.[235] The full bench of the Western Cape High Court Division first considered the *Jaftha* and *Gundwana* decisions and held that the phrase 'all the relevant circumstances' which was used in both cases, comes directly from section 26(3) of the Constitution.[236] This section provides that there can be no demolition or eviction of a person's home without an order issued by the courts after considering 'all the relevant circumstances'.

The full bench then noted that in both cases, the Constitutional Court declined to give a list of the facts which would be considered relevant. Therefore, it would be 'undesirable' and 'futile' for them to give such direction. This is because the circumstances which could be considered are endless and the facts of each case will shed light on what should be considered. The court is also restricted to making a decision based on the material placed before it.[237] As mentioned above, the *Jaftha* case did give some guidelines in terms of the factors to consider which is useful for the courts when they have to decide whether a home should be sold in execution.

In the case of *First Rand Bank Limited v Folscher,*[238] although the court agreed with the notion that is impossible to offer a complete list of factors because every potential circumstance cannot be anticipated, the court did provide a comprehensive list of factors to consider. These are as follows:

- Whether the mortgaged property is the debtor's primary residence;
- The circumstances under which the debt was incurred;
- The arrears outstanding under the bond when the latter was called up;
- The arrears on the date default judgment is sought;
- The total amount owing in respect of which execution is sought;
- The debtor's payment history;
- The relative financial strength of the creditor and the debtor;

[235] See note 28 above.
[236] Ibid para 8.
[237] Ibid para 10.
[238] *First Rand Bank Limited v Folscher* 2011 (4) SA 314 (GNP).

- 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;
- The proportionality of prejudice the creditor might suffer if execution were to be refused compared to the prejudice the debtor would suffer if execution went ahead and he lost his home;
- Whether any notice in terms of section 129 of the National Credit Act 34 of 2005 was sent to the debtor prior to the institution of action;
- The debtor's reaction to such notice, if any;
- The period of time that elapsed between delivery of such notice and the institution of action;
- Whether the property sought to have declared executable was acquired by means of or with the aid of, a State subsidy;
- Whether the property is occupied or not;
- Whether the property Is in fact occupied by the debtor;
- Whether the immovable property was acquired with monies advanced by the creditor or not;
- Whether the debtor will lose access to housing as a result of execution being levied against his home;
- Whether there is any indication that the creditor has instituted action with an ulterior motive or not;
- The position of the debtor's dependants and other occupants of the house, although in each case these facts will have to be established as being legally relevant.[239]

This list will be very useful in assisting the courts to reach a decision. It is submitted that this enhances the court's ability to assess all the relevant circumstances in foreclosure cases to safeguard the very important right to access adequate housing. Not all the factors must be

[239] Ibid para 41.

present but rather, the particular circumstances and facts of each case will determine what to scrutinise. The courts are required to decide on a case by case basis by balancing the rights of the creditor and consumer to determine whether the sale of consumers' homes would be justified.

On 17 November 2017, the Rules Board for South Africa's Courts of law substantially amended the Uniform Rules of Court and the Magistrates' Court Rules.[240] Both amendments deal with selling the primary residence of consumers in execution. Major amendments were made to Uniform Rule 46 and a new Uniform Rule 46A was added which is titled 'Execution against residential immovable property'. Similarly, Magistrates' Court Rule 43A deals with the same process in the Magistrates' Court. The rules therefore do not apply to property which is not the primary home of defaulting consumers.

In particular both Uniform Rule 46A(2) and Magistrates' Court Rule 43A(2) provides that a court has to consider an application to foreclose a primary home and must:

> (a)(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and
>
> (ii) consider alternative means by the judgment debtor of satisfying the judgment debt, other than execution against the judgment debtor's primary residence.
>
> (b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.
>
> (c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.

It is submitted that the amendments are aligned to the abovementioned judgments which have served to safeguard consumers' right to access adequate housing. The fact that the courts must consider alternative means to get the creditors' money back reinforces the idea that a home can only be sold in execution as a last resort. Each case will have its own merits, and the rules retain the principle that the court will consider all the relevant factors to decide the matter, not the registrar. However, the amendmenrs do impose extensive requirements on creditors and the courts are no longer quick to impose their right to foreclose to recover the

[240] Government Gazette No.41257 (17 November 2017) 18 & 68. These rules are discussed in detail in Chapter 5 of this thesis.

debt. However, the courts have said that South Africa cannot be a 'debtor's paradise' so creditors still need to be repaid the loan owed.[241] In Chapter 5, this thesis discusses the amendments in more depth, along with the practice directives issued to adhere to the rules.

3.7 Concluding Remarks

The courts have interpreted the right to access adequate housing as a fundamental socio-economic right. As much as the value of registering a mortgage bond lies in being able to sell the home in execution to obtain the full outstanding balance on the loan, this must be balanced against consumers' right to access adequate housing. The fact that the decision whether consumers' would lose their primary home was left to the registrars or clerks of the courts, without any judicial oversight, meant that consumers were left in very vulnerable positions. The abovementioned cases highlighted that factor.

The *Jaftha* case significantly improved the position of consumers because the Constitutional Court held that the court (judges) had to 'consider all the relevant circumstances' before ordering a sale in execution in the Magistrates' Court. However, the *Jaftha* case was interpreted differently in various courts.[242] In particular, the Supreme Court of Appeal distinguished the *Jaftha* case from the *Saunderson* case and said that the registrar's power to decide whether to execute was valid. The unintended result, as predicted by Du Plessis and Penfold was that creditors who could proceed using the Magistrates' Court chose instead to use the High Court.[243] The argument that consumers could approach the court to set the order aside, was rejected in the *Gundwana* case. In most cases, consumers are unaware of the protection and if consumers were aware, they did not have the wherewithal to use the mechanism. Instead, the Constitutional Court in the *Gundwana* case agreed with the *Jaftha* case and held that it is for the courts, and not the registrars, to decide whether a home should be sold in execution.

Amendments were made to the rules and this was an improvement which reconciled

[241] *Firstand Bank Limited t/a First National Bank v Seyffert and Another and Similar Cases* 2010 (6) SA 429 (GSJ) para 10.
[242] See *Nedbank Ltd v Mortinson* (note 61 above), *Standard Bank of South Africa v Adams* 2007 (1) SA 598 (C), *ABSA Bank Ltd v Ntsane* (note 192 above); *Mkhize v Umvoti Municipality and Others* 2010 (4) SA 509 (KZP).
[243] Du Plessis M and Penfold G, 'Bill of Rights Jurisprudence' *Annual Survey of South African Law* (2006) 45, 87-88. Also see *Gundwana* (note 137 above) para 18-19 where the Director of the Legal Resources Centre deposed to an affidavit that there was a problem where the Magistrates' Court had jurisdiction to declare a consumer's home specially executable, the matter would be instituted in the High Court.

court procedure with the obligation of the courts under section 7 and 8 of the Constitution.[244] That is, to 'respect, protect, promote…' and 'give effect' to the right to access adequate housing which is enshrined in section 26 of the Constitution.

Now the law is clear. In both the Magistrates' Courts and High Courts, the court must, after all the relevant circumstances are considered, decide whether a writ or warrant of execution should be granted to sell a home in execution. However, judicial oversight does not guarantee that the home will not be sold in execution. The courts have to look at the specific circumstances of each case.[245] What is certain is that if there are other measures to settle the matter, for instance, the payment of the arrears and reasonable costs incurred; the courts are very hesitant to grant the order for executability where the loss of a home is a possibility. The Constitution therefore restricts what a creditor could simply do under the common law and because of the principle of *pacta sunt servanda*. Nevertheless, creditors' are not stripped of their security rights. The courts have held that consumers' financial obligations remain and they must take responsibility by paying their debts.[246]

The next chapters will continue to discuss the progression of the court procedure over the years. In particular, the next chapter will assess the NCA and its impact on the procedure.

[244] *Standard Bank v Bekker* (note 28 above) para 3.
[245] L Steyn 'Protection against forced sale of a debtor's home in the Roman context' *Unisa Fundmina* (2015) 119, 120.
[246] See *Jaftha* (note 17 above) para 42&51.

CHAPTER 4
THE IMPACT OF THE NATIONAL CREDIT ACT

4.1 Introduction

In the previous chapter, the constitutional provisions which led to the amendment of certain procedures that needed to be followed before a family home could be sold to satisfy a debt were discussed. Now this thesis turns to analyse how the introduction of the NCA has impacted the procedures. The NCA was enacted in 2005 and came into full effect on 1 June 2007. It was enacted to regulate South Africa's credit industry thereby replacing various Acts, which did this before.[247] The previous legislation and the economy they operated under was

> …characterised by discrimination, a lack of transparency, limited competition, high costs of credit, and limited consumer protection. The mechanisms to prevent over-indebtedness that were in place at the time, could also not adequately promote the rehabilitation of consumers, and the available debt relief could also not assist already over-indebted consumers to deal with their debt.[248]

Therefore, there was a need for new legislation to be enacted which was targeted at not only creating an efficient credit market, but also with a focus on consumer protection issues such as relieving the over-indebtedness of consumers and preventing reckless credit lending.[249] The NCA was thus enacted 'to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.'[250] The Act does all of this by promoting an accessible credit market especially for consumers who were previously disadvantaged,[251] promoting responsibility and equity in the credit market,[252]

[247] The Credit Agreement Act 75 of 1980, The Usury Act 73 of 1968 and the Exemption Notices to the Usury Act, of 1992 and 1999.
[248] M Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' (2008) 20 *SA Merc LJ* 200 at 2045.
[249] See T Woker'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act. *Obiter* (2010) 217 & M Kelly-Louw 'The Prevention and Alleviation of Consumer Over-indebtedness' (2008) 20 *SA Merc LJ* 200.
[250] Section 3 of the NCA.
[251] Section 3(a) of the NCA.
[252] Section 3(c)-(d) of the NCA.

correcting negotiating power imbalances between creditors and consumers,[253] as well as preventing and alleviating the over-indebtedness of consumers.[254]

Moreover, in interpreting the provisions of the NCA, the courts have pronounced that the main purpose of the Act is to balance the rights of creditors and consumers so that there is an effective credit market.[255] The Act attempts to even out the playing field between 'a relatively indigent and unsophisticated consumer and a moneyed and well-advised credit provider, and to limit the financial harm that the consumer may suffer if he/she is unable to perform in terms of the credit agreement.'[256]

The NCA therefore restrains creditors' powers to enforce the credit agreement,[257] and gives the consumer certain rights.[258] It also prohibits reckless credit lending and assists over-indebted consumers by providing a number of debt relief measures. These include debt review, debt counselling and debt restructuring.[259] All of this is done to ensure that creditors are repaid what they are owed whilst still protecting the rights of consumers and ensuring that they are not taken advantage of.

However, Otto and Otto argue that the NCA introduced cumbersome procedures which curtail the creditors' right to seek relief for the amount they lent the consumer.[260] The Act is a comprehensive piece of legislation with over 173 sections.[261] It represents a complete shift from its predecessors and signifies a clean break from South Africa's past.[262] The rules regulating the enforcement of credit agreements have become stricter ever since the NCA came into full effect.[263] Mortgage bonds are also regulated under the NCA because they are included in the definition of credit agreements.[264] The NCA defines a mortgage agreement as

---

[253] Section 3(e) of the NCA.
[254] Section 3(g) of the NCA.
[255] *Rossouw v Firstrand Bank Ltd* (note 4 above) para 17 & *SA Taxi Securitisation (Pty) Ltd v Mbatha* (note 4 above) para 35.
[256] *Maleke* (note 160 above) para 3.
[257] Chapter 6 and 7 of the NCA. Also see JM Otto & R-L Otto *The National Credit Act explained* 2 ed (2010) 99.
[258] Chapter 4, Part A of the NCA.
[259] Chapter 4, Part D of the NCA.
[260] JM Otto & R-L Otto *The National Credit Act explained* 2 ed (2010) 99.
[261] Generally see M Kelly-Louw, *Consumer Credit Regulation in South Africa* 1 ed (2012), JM Otto *The National Credit Act Explained* 4 ed (2016), S Tennant *Consumer Law Compliance: The National Credit Act, the Consumer Protection Act and the Protection of Personal Information Act* 1 ed (2016).
[262] JM Otto & R-L Otto *The National Credit Act Explained* 2 ed (2010) para 2.3.
[263] R Brits 'Purging Mortgage Default: Comments on the Right to Reinstate Credit Agreements in terms of the National Credit Act' *STELL LR* 1 (2013) 165.
[264] Section 8(1)(b) read with section 8(4)(d): 'Subject to subsection (2), an agreement constitutes a credit agreement for the purposes of this Act if it is a credit transaction, as described in subsection 4. An agreement… constitutes a credit transaction if it is a mortgage bond or secured loan.' Also see *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 1.

'a credit agreement that is secured by a pledge of immovable property, the registration of a mortgage bond by the registrar of deeds over immovable property.'[265] Therefore, there are certain procedures that creditors must follow in terms of the NCA before enforcing a credit agreement which in this thesis is a mortgage bond.

The Act has been amended on a number of occasions to correct numerous ambiguities and inconsistencies which has resulted in a flood of litigation and commentaries by academics.[266] This chapter will discuss these additional procedures, the amendments and leading case law to the extent that this is relevant to this research. In addition, although not a main focus of this research, debt relief measures will be briefly discussed because they tackle the root cause of a sale in execution which is over-indebtedness.

4.2 Debt Collection Process

When consumers borrow money, they must repay that money. One of the most important rights that creditors have is the right to be repaid.[267] Nevertheless, creditors must follow the procedure to recover debt which is now set out in the NCA. First of all, creditors must send notices (commonly referred to as section 129 notices) to consumers to notify them that they have defaulted and to ask for that default to be remedied. If the default is not remedied, or consumers fail to respond to the notice; creditors may institute proceedings to claim the money they are owed and certain procedures must be followed in court. It is also important to note that even if the consumers are in default, they are entitled to reinstate the credit agreement under certain circumstances. So for the purposes of this research the following sections are important –

- Section 129(1)&(2) which deals with the notice;
- Section 129(3)&(4) which deals with reinstatement of the loan agreement; and
- Section 130 which deals with the procedures to be followed in court.

[265] Section 1(a) of the NCA as amended by the National Credit Amendment Act 19 of 2014 ('the Amendment Act or 'the NCAA').
[266] See R 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.
[267] See *Seyfrett* (note 241 above) para 10; *Jaftha* (note 17 above) para 42; and *Ntsane* (note 192 above) para 42.

4.2.1 The section 129 notice

4.2.1.1 Meaning of the provisions

This section sets out the procedures that must be followed before legal proceedings are instituted to recover the debt. In particular, section 129(1)&(2) provide that:

> (1) If the consumer is in default under a credit agreement, the credit provider—
>
> (a) may draw the default to the notice of the consumer in writing and propose that the consumer refer the credit agreement to a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction, with the intent that the parties resolve any dispute under the agreement or develop and agree on a plan to bring the payments under the agreement up to date; and
>
> (b) subject to section 130(2), may not commence any legal proceedings to enforce the agreement before—
>
> (i) first providing notice to the consumer, as contemplated in paragraph (a), or in section 86(10),51 as the case may be; and
>
> (ii) meeting any further requirements set out in section 130.
>
> (2) Subsection (1) does not apply to a credit agreement that is subject to a debt restructuring order, or to proceedings in a court that could result in such an order.

Although sub-section (1)(a) states that if consumers fail to meet their obligations under a credit agreement and are in default, creditors may give the consumers written notice of the default. The courts have interpreted this to mean that creditors are obliged or must give written notice of the default to consumers.[268] This is because sub-section (1)(b) provides that creditors may not commence legal proceedings under section 130(2) until such notice has been given to defaulting consumers.

Creditors must also propose that consumers refer their matters to a number of third

[268] *Absa Bank Ltd v De Villiers* 2009 (5) SA 40 (C) para 14; *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 (2) SA 512 (D) para 27& *Nedbank Limited and Others v The National Credit Regulator and Another* 2000 (6) SA 295 (GNP) para 8. In the recent case of *Amardien and Others v Registrar of Deeds and Others* 2019 (3) SA 341 (CC) the court also stated that the amount owed must be specified in the sectiion 129 notice.

parties so the problems can be resolved before further legal action is taken.[269] This includes a debt counsellor, alternative dispute resolution agent, consumer court or ombud with jurisdiction. A plan can therefore be formulated for consumers to pay the arrears, thereby getting the payments up to date. As stated above, creditors are forbidden from instituting legal proceedings without having first given notice and following the procedures that are in section 130 of the NCA. This is briefly dealt with in part 4.2.3 of this chapter.

In the context of a mortgage bond agreement, creditors (normally the banks) are required to give consumers a section 129 notice and make an attempt to make further arrangements with the them to get their payments up to date. Without having first done so, creditors cannot institute legal proceedings for the full outstanding balance on the mortgage bonds or sell the consumers' homes in execution.

Furthermore, in *FirstRand Bank Ltd v Folscher,*[270] the court issued a practice directive in the North Gauteng High Court. The directive requires that a section 129(1)(a) notice must also notify the consumer that if the court grants an order in favour of the creditor, the next step would be a sale in execution and thereafter eviction from the home.[271] Considering the fact that there are consumers who are under educated or inexperienced in dealing with such transactions and do not realise the grave consequences of defaulting, or not responding to legal notices; it is submitted that the practice directive is a good initiative.

4.2.1.2 Delivery of the section 129 notice

Before certain amendments regarding delivery were made to the NCA, the courts encountered numerous problems in interpreting section 129(1).[272] The main question was whether it was sufficient for creditors to show that the notice was delivered, or did the NCA require that consumers receive actual notice? Numerous cases attempted to answer this question.

[269] *Firstrand Bank Ltd v Olivier* 2009 (3) SA 353 (SE) para 18.
[270] See note 238 above.
[271] Ibid paras 47&53.
[272] See *Rossouw* (note 4 above); *Sebola v Standard Bank of South Africa Ltd* 2012 (5) SA 142 (CC); *ABSA Bank Ltd v Mkhize & Another & Two Similar Cases* 2012 (5) SA 574 (KZN); *Nedbank Ltd v Binneman & Twelve Similar Cases* 2012 (5) SA 569 (WCC) and *Balkind v ABSA Bank, In re ABSA Bank Ltd v Ilifu Trading 172 CC & Others* 2013 (2) SA 486 (ECG).

In *Rossouw and Another v First Rand Bank Ltd*,[273] ('*Rossouw* case') Mr and Mrs Rossouw were a married couple who concluded a mortgage bond agreement with First Rand Bank and the NCA applied to the agreement. The material terms of the agreement regarding notice stated that service would be at the Rossouws' *domicilium* or by registered post. Such notice would be deemed as received by them three days after posting. Also, a signed certificate stating that notice was delivered on behalf of the bank, would be sufficient proof to discharge the section 129(1) requirement of notice and the signature's validity did not need to be proved.[274] After two years, the Rossouws defaulted in payments and the bank sent them a section 129 notice. One of the arguments the Rossouws made was that they did not receive proper notice in terms of section 129(1) and section 130(1) of the NCA.[275] The matter was eventually dealt with by the Supreme Court of Appeal.

The court identified the issue as: in section 129(1) of the NCA, what manner of delivery is intended?[276] The Supreme Court of Appeal examined a number of sections in the NCA to hold that the consumer is granted a right to choose the method of delivery. This shows the legislature's intention was to also place the risk of not receiving the notice on the consumer.[277] In other words, if the creditor can show that there was delivery of the notice; that was sufficient to discharge the section 129 notice requirement before litigating, even if the consumer did not actually receive such notice.

Another case which dealt with the manner of delivery of the section 129(1) notice was *Sebola v Standard Bank of South Africa Ltd* ('*Sebola* case').[278] The *Sebola* case was decided by the Constitutional Court and the facts were similar to the *Rossouw* case. Mr and Mrs Sebola were a married couple that entered into a mortgage bond agreement with Standard Bank. The Sebolas chose the property that was mortgaged as the address to serve documents and notices. If the bank sent documents and notices by registered post to this address, the clause provided that the Sebolas would be regarded as having received notice within 14 days after posting.[279]

Thereafter, the Sebolas defaulted on their payments and the bank sent notice as required by section 129 and 130 of the NCA via registered mail. The Sebolas argued that the

[273] See note 4 above.
[274] Ibid para 2-3.
[275] Ibid para 6.
[276] See Part 4.2.1. of this chapter.
[277] *Rossouw v First Rand Bank Ltd* (note 4 above) para 31-32. See section 65(1)-(2) and section 96 of the NCA.
[278] See note 272 above.
[279] Ibid para 4.

notice was diverted to the wrong post office therefore, they never received it. A tracking and tracing record in the Sebolas' papers proved this.[280] Approximately two months later after sending notice in terms of the NCA, Standard Bank issued summons where it claimed the full outstanding amount under the mortgage bond, interest and costs. Furthermore, the Bank sought an order to declare home specially executable. The summons was served by affixing a copy at the Sebolas' chosen *domicilium* door. In the next months, default judgment was granted as well as a writ of execution. Once the Sebolas found out about the proceedings, they sought rescission of the writ of execution and default judgment. They argued that they did not receive the summons either. The matter ultimately ended up at the Constitutional Court. Cameron J, in a unanimous judgment held that:

> The requirement that a credit provider provide notice in terms of section 129(1)(a) to the consumer must be understood in conjunction with section 130, which requires delivery of the notice. The statute, though giving no clear meaning to "deliver", requires that the credit provider seeking to enforce a credit agreement aver and prove that the notice was delivered to the consumer. Where the credit provider posts the notice, proof of registered despatch to the address of the consumer, together with proof that the notice reached the appropriate post office for delivery to the consumer, will in the absence of contrary indication constitute sufficient proof of delivery. If in contested proceedings the consumer avers that the notice did not reach her, the court must establish the truth of the claim. If it finds that the credit provider has not complied with section 129(1), it must in terms of section 130(4)(b) adjourn the matter and set out the steps the credit provider must take before the matter may be resumed.[281]

It is submitted that the Constitutional Court's interpretation of the requirements for delivery to be effected strikes a balance between creditors and consumers. Since the consumers agreed to a certain manner of deliver, all the creditors had to prove is that they delivered the notice which is not a burdensome requirement. If consumers argue that they did not receive the notice, like the Rossouws, then they must prove this.

The cases discussed above are just two of the many cases where the issue of delivery was dealt with by the courts, leading to conflicting decisions. Even the Sebola judgment was

[280] Ibid para 5.
[281] *Sebola* (note 272 above) para 87.

interpreted differently in various jurisdictions.[282] Although the facts of the case of *Kubyana v Standard Bank of South Africa*[283] did not deal with mortgage agreement, the Constitutional Court once again had the task of determining what constituted proper service of a notice. In particular, the Constitutional Court asked what steps did creditors have to take to discharge the onus that they served the notice.[284]

In essence, Mr Kubyana had defaulted in payments of a motor vehicle loan, the bank notified him of his default and further sent a section 129 notice to Mr Kubyana's nominated registered post. The notice reached the correct post office and a notification was sent to Mr Kubyana's address. However, Mr Kubyana did not collect the notice and did not provide an explanation as to why he did not do so.[285] The Constitutional Court held that the NCA does not require that creditors personally serve notice to consumers or ensure that the notice is brought to the subjective attention of consumers.[286] Instead, the duty to send a notice is discharged when creditors make the document available to the consumer, as provided in section 65(2) of the NCA.[287] This is what the bank had done in this case. A track and trace record proved this and the onus shifted to Mr Kubyana to explain why he had not fetched the notice.[288] The Constitutional Court also revisited the *Sebola* judgment and distinguished it from the *Kubyana* case because notice was sent to the incorrect post office in the *Sebola* case, whilst it had reached the correct post office in the *Kubyana* case.[289]

The NCA has now been amended in order to provide much needed clarity. The NCA now provides that the notice must be delivered either to an adult at a place the consumer chose in the original contract that the consumer signed with the creditor or, the notice must be sent by registered mail to an address that the consumer chose.[290] The preferred manner of delivery must be indicated in writing by the consumer and once the notice is delivered there are two ways to indicate proof of delivery. The first is the postal service or its agent giving written confirmation. The second is a signature of the recipient, that is, the consumer or the

[282] *Nedbank Ltd v Binneman and Thirteen Similar Cases* 2012 (5) SA 569 (WCC); *ABSA Bank Ltd v Mkhize and Another and Two Similar Cases* 2012 (5) SA 574 (KZD); and *Balkind v ABSA Bank, In re ABSA Bank Ltd v Ilifu Trading 172 CC and Others* 2013 (2) SA 486 (ECG).
[283] 2014 (3) SA 56 (CC).
[284] Ibid para 1. See para 2-9 for factual matrix.
[285] Ibid para 7.
[286] Ibid para 31.
[287] Ibid. Also see para 39-40.
[288] Ibid para 53, 57&58.
[289] Ibid para 52-53.
[290] Section 129(5) as added by section 32 of the NCAA.

adult at the place the consumer chose.[291]

In practice most consumers choose to receive notices by registered mail or at their *domicilium* and they provide an address in their original contract. This has serious implications for the debt collection process because consumers often do not collect their registered letters from the Post Office. Notices delivered at a *domicilium* may also not come to the actual attention of consumers who may have been at work when the delivery occurred.[292]

This is particularly problematic when it seems that consumers are deliberately avoiding collecting their registered post or not responding.[293] The court has noted that some consumers do not understand or sufficiently appreciate the danger of receiving such letters of demand.[294] Many consumers who fall under the category of historically disadvantaged persons also do not have the funds to seek legal advice and are unaware of the free legal advice that is offered by institutions such as the Legal Resources Centre, Legal Aid Board or law clinics at universities.[295] It is therefore submitted that a greater effort must be made by all stakeholders to ensure that consumers are educated about the consequences of defaulting as well as their rights and options under the NCA. However, if consumers deliberately avoid notices, then the creditors have done enough to discharge their duty to send the notice.

It seems that the amendments by the NCAA are aligned to what case law decided so the principles in the abovementioned cases are still good law. However, an amendment was made to Uniform Rule 46A and Magistrates' Court Rule 43A which makes personal service mandatory to serve summons unless it cannot be effected in which case the court has a discretion to order another form of delivery. This places a higher burden on creditors who wish to institute proceedings after the section 129 notice is sent which means that subjective knowledge is required. Only time will tell if such a requirement of personal service can be extended to the section 129 notice which serves as a letter of demand.

4.2.2 Reinstatement of the credit agreement

The NCA creates a further right for consumers which provides them with extra protection

[291] Section 129(6)-(7) of the NCA as added by the NCAA.
[292] *Maleke* (note 160 above).
[293] Ibid para 6.1.
[294] Ibid para 5
[295] Ibid para 6.3

because they are, in terms of the Act and not just based on creditor discretion, permitted to reinstate their credit agreements.[296] Mortgage bond agreements can therefore be reinstated under the section 129(3) and (4). These sections initially provided as follows:

> (3) Subject to subsection (4), a consumer may
>
> > (a) at any time before the credit provider has cancelled the agreement, *reinstate* a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time of reinstatement, and
> >
> > (b) *after complying with paragraph (a) may resume possession of any property that had been repossessed by the credit provider pursuant to an attachment order.*
>
> (4) A *consumer* may not re-instate or revive a credit agreement after—
>
> > (a) the sale of any property pursuant to—
> >
> > > (i) an attachment order; or
> > >
> > > (ii) surrender of property in terms of section 127;
> >
> > (b) the execution of any other court order enforcing that agreement; or
> >
> > (c) the termination thereof in accordance with section 123. (my emphasis)

Regarding the above provisions, the general rule was that a defaulting consumer could, before the agreement was cancelled, pay the arrears, the default charges and 'reasonable costs of enforcing the agreement,'[297] to reinstate the credit agreement. The exceptions to the rule was in the case where the property has been sold, the execution of a court order to enforce the agreement or a termination of the agreement. Under those circumstances, reinstatement could not occur.

The effect of reinstatement was that the credit agreement would continue to operate as if the consumer had never been in default. Both parties would thus be restored to the position they were in before the default with the same duties and rights under the credit agreement. Therefore, foreclosure proceedings would come to an end and the consumer would be entitled to maintain or resume possession of their home. In principle, this

[296] R Brits 'Purging mortgage default: Comments on the right to reinstate credit agreements in terms of the National Credit Act' (2013) 24 Stellenbosch Law Review Vol 1, 165 at 165.
[297] Ibid see 183-185 for a discussion on the amounts to be paid.

mechanism is very beneficial to consumers who are faced with losing their home because reinstatement can not only prevent but also reverse debt enforcement up to a certain stage.[298]

However, the provisions in the Act contained certain terminological and conceptual contradictions which made it difficult for them to be interpreted. This is evidenced by the various judgments where the courts, including the Constitutional Court, have had conflicting views. In addition, academics have written journal articles and tried to provide clarity as to how to interpret the provisions.[299] For instance the fact that reinstatement had to occur before the cancellation of the agreement was a contradiction. If the agreement had not been cancelled, there would be no agreement to reinstate. Furthermore, the prohibitions mentioned in section 129(4) of the NCA could only occur if there had been a cancellation of the agreement.[300]

The landmark case of *Nkata v Firstrand Bank Limited and* Others,[301] attempted to clear up the principles of reinstatement by interpreting sections 129(3) and (4) in the NCA. The Constitutional Court asked the question whether the reinstatement of the mortgage agreement had occurred? The facts were that Ms Nkata was a single mother of two and business woman who bought a house in 2005. In order to finance the purchase, Ms Nkata registered two mortgage bonds with Firstrand Bank of R630 000 and R850 000. In 2007, the property became the family home.[302] Thereafter, Ms Nkata repeatedly fell into arrears which resulted in numerous letters and calls from the bank. This included two section 129(1) notices however, she denied ever receiving the notices. She raised an issue regarding the addresses to which the notices were delivered.[303]

The bank subsequently issued summons which were served by the Sheriff who affixed a copy on the door. Ms Nkata further denied receiving the summons which is why an appearance to defend was not entered into.[304] The bank then applied for and was granted default judgment for the accelerated full outstanding balance of R1 472 506.89 on the loan and interest. The Sheriff was authorised to carry out the execution process after the Registrar

[298] Ibid 165.
[299] R Brits et al 'Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: Quo vadis?' (2017) *THRHR* 177, 178.
[300] See R Brits…et al 'Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: Quo vadis?' (2017) *THRHR* 177, 188&189 for a discussion on how to interpret the 'before cancellation' requirement. Also see JM Otto & R-L Otto *The National Credit Act explained* 2 ed (2010) 117.
[301] See note 73 above.
[302] Ibid para 3.
[303] Ibid para 4.
[304] Ibid para 6.

issued a writ of execution.[305] In November 2010, Ms Nkata instituted an urgent application to rescind the default judgment. Before the matter was heard, a settlement agreement was entered into by Ms Nkata and the bank.[306] The terms were that the sale in execution would be cancelled, Ms Nkata would pay an instalment of R10 000 to the bank every month and if she defaulted again, the bank could proceed to sell the property in execution.[307]

Ms Nkata thereby settled her bond arrears of R87 500 in full, in March 2011. However, over the next two years, she still struggled to meet her monthly payments. Eventually, in February 2013, the bank sent her a notice of the pending sale to her registered mail address which she did not collect. The property was then sold in April 2013.[308] Ms Nkata brought another High Court application to cancel the sale of her home and she also sought a rescission of the default judgment. Transfer and registration to the new owner was temporarily cancelled pending litigation.[309] The High Court dismissed the rescission application. However, the High Court found that the credit agreement was reinstated in terms of section 129(3) of the NCA. As a result, the default judgment could not be enforced, and the sale was set aside.[310]

The Supreme Court of Appeal then heard the matter and upheld the appeal in favour of the bank stating that since the property had already been sold, it amounted to the execution of a court order to enforce the agreement. This therefore barred Ms Nkata from reinstating the agreement as stated in section 129(4)(b) of the NCA. Furthermore, the Supreme Court of Appeal held that reinstatement meant that the credit the agreement has been amended. This would demand a formality of the amendment being reduced to writing and signed.[311]

The matter was then heard by the Constitutional Court which set aside the decision of the Supreme Court of Appeal and found that the sale was invalid since it occurred two years after the mortgage agreement was lawfully reinstated.[312] Moseneke DCJ, who wrote the majority judgment first captured the essence of the purpose of the NCA. He pointed out that

[305] Ibid para 7. The registrar issued the writ in September 2010 which was before the *Gundwana* judgment that disallowed all registrar-issued default judgments and writs of execution which involved debtors' homes. The court held that the facts in each case must be judicially supervised and it declared rule 31(5) of the Uniform Rules of Court invalid. However, the declaration of invalidity was not made retrospective. Instead, the judgment required debtors who had default judgments granted against them to apply for rescission before 11 April 2011 and to explain the reason for lateness. Also see chapter 3 of this thesis which discussed the case in depth.
[306] The agreement was never made an order of the court.
[307] *Nkata* (note 73 above) para 8.
[308] Ibid para 13-14.
[309] Ibid para 17.
[310] Ibid par 18, 21-27.
[311] Ibid paras 28-29. Also see Section 116 of the NCA.
[312] *Nkata* (note 73 above) para 29.

when the courts decide the case the rights of the creditor must be balanced with those of the consumer. He stated that:

> The Act seeks to infuse values of fairness, good faith, reasonableness and equality in the manner actors in the credit market relate. Unlike in the past, the sheer raw financial power difference between the credit giver and its much needed but weaker counterpart, the credit consumer, will not always rule the roost. Courts are urged to strike a balance between their respective rights and responsibilities. Yes, debtors must diligently and honestly meet their undertakings towards their creditors. If they do not, the credit market will not be sustainable. But the human condition suggests that it is not always possible – particularly in credit arrangements that run over many years or decades, as mortgage bonds over homes do. Credit givers serve a beneficial and indispensable role in advancing the economy and sometimes social good. They too have not only rights but also responsibilities. They must act within the constraints of the statutory arrangements. That is particularly so when a credit consumer honestly runs into financial distress that precipitates repayment defaults. The resolution of the resultant dispute must bear the hallmarks of equity, good faith, reasonableness and equality. No doubt, credit givers ought to be astute to recognise the imbalance in negotiating power between themselves and consumers. They ought to realise that at play in the dispute is not only the profit motive, but also the civilised values of our Constitution.[313]

In interpreting section 129(3) of the Act, the Constitutional Court decided that reinstatement is something that happens by operation of law. This is unless reinstatement is prohibited by section 129(4) of the NCA. The majority reasoned that the wording of the sections show that the consumer is the 'protagonist' who is not required to seek the co-operation of the creditor or notify the creditor of their intention to reinstate the agreement. Such reinstatement may occur by paying the arrears, costs and permissible default charges to the creditor. A precondition of giving notice before reinstating the agreement would thus unduly limit the remedy.[314] The Constitutional Court further held that the full accelerated outstanding balance on the loan need not be paid for reinstatement to occur. What is required if for the arrears to be paid.[315]

The main (dissenting) judgment and majority judgment differed on whether in this case, the appellant had paid the respondent's 'permitted default charges and reasonable costs

[313] Ibid para 94.
[314] Ibid para 104-5.
[315] Ibid para 108.

of enforcing the agreement.'[316] The facts show that the respondent debited legal fees to Ms Nkata's bond account in October 2010 and February 2011. The bank did not give a separate notice of legal costs that it demanded for payment, nor did it regard Ms Nkata as being in arrears because of the costs.[317]

On the one hand, Cameron J, in the main dissenting judgment argued that the duty to determine the costs that must be paid as required by section 129(3) of the NCA, rests on the consumer. Therefore, if the consumer does not attempt to determine these costs and tender payment, then paying only the arrears will not reinstate the mortgage agreement.[318]

In addition, Nugent AJ also agreed with Cameron J but reasoned that nothing in the express words used in section 129(3) placed a duty on the creditor to claim costs in order for them to be due and payable. Furthermore, the provision did not mention that there would be a circumstance where such costs would not be required for reinstatement to occur.[319]

On the other hand Moseneke DCJ, in the majority judgment, held that when the appellant settled her bond arrears in full, the costs were not 'due and payable'. He reasoned that the respondent unilaterally debited the costs without giving notice to the appellant of their nature and extent.[320] The Constitutional Court therefore placed the duty on creditors to quantify the amounts that are payable to recover the legal costs from consumers. If this is not done, and consumers pays the arrears in full, the agreement is reinstated.

Moseneke DCJ also noted that if creditors are not required to give consumers due notice of the amount of the legal costs to be paid, the reinstatement mechanism will be frustrated. Creditors would argue that reinstatement cannot occur because the unilaterally debited legal costs to the mortgage account, had not been paid. This would be unfair not only because those legal costs would be relatively small, but also because they were never assessed or disclosed properly to the consumer.[321] In light of the abovementioned principles, the appeal was upheld in these terms:

> Ms Nkata is entitled to an order declaring that: the credit agreement was lawfully reinstated; from 8 March 2011, the default judgment entered against Ms Nkata and the subsequent

[316] Ibid see Cameron J and Moseneke DCJ judgments.
[317] Ibid para 112-113.
[318] Ibid 173 & 175. Also see *Nedbank Ltd v Barnard* Case number 1142/08 2009 ZAECPEHC 45 (1 September 2009) para 14-15, where the same argument was made by the bank but the court disagreed.
[319] *Nkata* (note 73 above) para 146-147.
[320] Ibid para 121.
[321] Ibid para 125.

> warrant of execution against her home had no legal force; the public auction of Ms Nkata's home on 24 April 2013 to the third respondent is set aside and the property may not be transferred to or registered in the name of the third respondent.[322]

The *Nkata judgment* was applauded for offering a lifeline to consumers who meet the requirements of section 129(3)&(4). For credit providers, it meant that reliance on the acceleration clause is insufficient to assist them when it comes to enforcing their right to foreclose.[323]

However, it has been argued that the dissenting judgments of Cameron J and Nugent AJ seem closer to the intention of the legislature in drafting the reinstatement mechanism as well as with practical reality.[324] It has also been argued that such an interpretation does not go against consumers who wish to use the reinstate the agreement. Any future amendments to the NCA should address the issue of who has the onus of determining the reasonable costs to pay, especially because the Constitutional Court judges were in such disagreement.[325]

It is submitted that the majority tried to interpret the provisions in a manner that would allow reinstatement even when consumers did not necessarily have reinstatement in mind but paid the arrears in full. This is also evidenced by court deciding that reinstatement happens *ex lege* without a need to inform the creditor, or even having an intention to reinstate the agreement.[326] Steyn argues that this creates uncertainty and the NCA should be amended so that clear procedural and substantive requirements which need to be met for reinstatement to occur, are created.[327] This argument is supported by Brits, Coetzee and van Heerden.[328]

Although the court stated that reinstatement was something that occurs unilaterally and *ex lege* which provides a lifeline for consumers who are not even aware of the mechanism, there is still a need to ensure that there is clear process for reinstatement to

---

[322] Ibid para 137.
[323] L Mnyandu & K Kern 'Reinstatement triumphs acceleration clauses in credit agreements subject to the National Credit Act' *SA Financial Markets Journal* (2017) available at http://financialmarketsjournal.co.za/reinstatement-triumphs-acceleration-clauses-in-credit-agreements-subject-to-the-national-credit-act/, accessed 20 May 2019. Also see A Truter 'A Case Law Discussion of the Implications of Reinstating a Credit Agreement' *Polity* (2018) available at https://www.polity.org.za/article/a-case-law-discussion-on-the-implications-of-reinstating-a-credit-agreement-2018-02-06, accessed 20 May 2019.
[324] R Brits…et al 'Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: Quo vadis?' (2017) *THRHR* 177, 186.
[325] Ibid.
[326] Ibid 188.
[327] L Steyn 'Reinstatement of a home mortgage bond by paying the arrears: The need for appropriate legislative reform' 2015 Stell LR 132 142–143.
[328] See R Brits et al 'Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: Quo vadis?' (2017) *THRHR* 177, 188.

occur.[329] Having a clear process to allow reinstatement would prevent cases like that of *Jaftha* where both the creditor and consumer were unaware that reinstatement had actually occurred.

In 2014, section 129(3) and (4) were amended by the National Credit Amendment Act 19 of 2014. It now reads as follows:

> (3) Subject to subsection (4), a consumer may at any time before the credit provider has cancelled the agreement, remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue, together with the credit provider's prescribed default administration charges and reasonable costs of enforcing the agreement up to the time the default was remedied.
> (4) A credit provider may not re-instate or revive a credit agreement after –
> (a) the sale of any property pursuant to –
> (i) an attachment order; or
> (ii) surrender of property in terms of section 127;
> (b) the execution of any other court order enforcing that agreement; or
> (c) the termination thereof in accordance with section 123.

The legislature therefore made material changes to the reinstatement mechanism. Unfortunately it has been argued that such amendments have exacerbated the problem of interpretation.[330] Before the amendment, under section 129(3), it was the consumer who had the power to reinstate the credit agreement by paying their arrears and other costs. However, the effect of the amendment is that when consumers pay all their arrears, they simply remedy a default. This therefore removes the issue of reinstating the agreement before cancellation which existed in the initial provision.[331] However, it has been argued that the fact that the words 'before the credit provider has cancelled the agreement' have remained, is still problematic because it is still not clear what cancellation entails or means in relation to reinstating a credit agreement.[332]

Another problematic amendment is that the power to reinstate the agreement has now shifted to the credit provider unless any one of instances in subsection (4) occur. The purpose of this amendment is not clear and it has been suggested that the legislature made an error

[329] L Steyn 'Reinstatement of a home mortgage bond by paying the arrears: The need for appropriate legislative reform' 2015 Stell LR 132 142–143.
[330] R Brits…et al 'Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: Quo vadis?' (2017) *THRHR* 177, 178.
[331] Ibid 193.
[332] Ibid.

and should have maintained the word 'consumer' in that provision. The words 'revive' have also been inserted and the meaning of this word is not explained.[333] Lastly, section 129(3)(b) has been completely repealed so the consumer no longer has the right to possess the property which is held pursuant to an attachment order. The reason for this amendment is also unclear.

Evidently, the *Nkata* judgment is not that useful when it comes to interpreting these new provisions. Academics suggest that instead of trying to reach a satisfactory interpretation of the current provisions on reinstatement, there is a need to 'go back to the drawing board' to reformulate and redraft sections 129(3) and (4) of the NCA.[334]

4.2.3 Procedures in court

Creditors may institute legal proceedings and claim relief only if consumers have defaulted under the agreement for a minimum of 20 business days. Moreover, a minimum of 10 business days must have passed since proper notice was delivered the consumers in terms of section 129(1) of the NCA. This would mean that they did not respond to the notice or they rejected the proposals of the creditors.[335]

In addition to the above, because creditors have security in the form of a mortgage bond, creditors may approach the court to enforce the consumers' remaining duties under the mortgage bond agreement at any time. This can be done only if the property was sold in accordance with an attachment order or it has been surrendered under section 127 of the NCA. The amount gained must have been insufficient to pay the full outstanding balance on the loan thereby discharging the consumers' obligations.[336]

The court can decide the matter only if the relevant procedures have been followed and if there is no pending case before the Tribunal which could affect the outcome of the current proceedings. In addition, the case must not be before a debt counsellor, consumer court or an agent for alternative dispute resolution or the ombud that has jurisdiction. Creditors also cannot approach the court if the consumers surrendered the home to the them before it is sold, agreed to the proposal and acted in good faith to fulfil it, complied with an agreed plan or brought the payments up to date.[337]

---

[333] Ibid.
[334] Ibid 178&179.
[335] Section 130(1) of the NCA.
[336] Section 130(2) of the NCA.
[337] Section 130(3)(a)-(c).

4.3 Over-indebtedness and Debt Review

Brits argues that over-indebtedness can be linked to consumers defaulting on their loan agreements.[338] Therefore, in instances where consumers go through financial difficulties which is beyond their control, the law should assist them and prevent a sale of their homes.[339] One of the purposes of the NCA is to prevent and relieve the over-indebtedness of consumers and in this context, the effect would be that less consumers would face a forced sale of their home.

The NCA deals with over-indebtedness in section 79. In particular, a consumer is regarded as overindebted if

> (1) the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's –
>
> (a) financial means, prospects and obligations;
>
> (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.

In order to be declared over-indebted, consumers can apply to a debt counsellor, who, if the application succeeds, can propose that the Magistrates' Court make an order to rearrange their obligations. The rearrangement measures include extending the duration that the agreement runs for, reducing the instalments to pay or postponing the period that payments are due.[340] If the decision reached by the debt counsellor is that the consumer is not over-indebted but is nevertheless going through a financial hardship, the debt counsellor may recommend that the creditor and consumer voluntarily enter into a rearrangement agreement.[341]

Another way that consumers can be declared over-indebted is through the courts. If the application to the debt counsellor fails, consumers may proceed to the Magistrates' Court to seek an order to be declared over-indebted.[342] Furthermore, where proceedings are

[338] R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (LLD thesis, University of Stellenbosch, 2012) 172.
[339] Ibid.
[340] Section 86(1) & 86(7)(c) of the Act.
[341] Section 86(7)(b) of the Act.
[342] Section 86(9) of the Act.

launched against consumers, they can allege to the court that they are over-indebted. The court may then either refer the consumers to a debt counsellor or declare the consumers over-indebted. A debt relief order may be made as contemplated in section 87 of the Act.[343]

A very recent amendment to section 85 of NCA states that even if the consumer does not allege they are over-indebted, but it appears to the court that the consumer is over-indebted, the court can still refer the matter or make an appropriate order.[344] This amendment is welcomed because there are consumers who do not know their rights or options under the Act. The court mus be able to protect such consumers in an effort to prevent their homes being sold in execution.

In the *Maleke* case, which was decided almost a decade before the amendment, the court held that based on the circumstances of the case, the creditor could be repaid the loan amount through debt review which would be more desirable than having the properties sold in execution. Therefore, the court has a duty to apply the principles of fairness and justice even when they were not prompted by the parties.[345]

What is noteworthy is the fact that an allegation of over-indebtedness does not invalidate creditors' claims to the money lent. Rather, it is used to refer the matter to a debt counsellor for a rearrangement of the obligations of consumers.[346] Debt review therefore restricts the creditors' ability to enforce the mortgage agreements.[347] In terms of section 88(3) of the NCA, creditors who receive notice of consumers being under debt review and debt rearrangement, are prohibited from enforcing any right or security that exists in the agreement. The prohibition exists until the consumers are in default under the credit or rearrangement agreement or incurred further charges or entered into another credit agreement.

As discussed in Chapter 3, consumers have a right to access adequate housing and foreclosure must be pursued as a last resort. It is submitted that if consumers are over-indebted and debt review can help prevent the sale of their family homes, then it is desirable to first pursue debt review before foreclosure is allowed by the courts. Brits supports this view and argues that 'debt restructuring is… the most significant and far reaching creative

[343] Section 85 of the Act.
[344] See Section 11 of the National Credit Amendment Act 7 of 2019.
[345] *Maleke* (note 160 above) para 5.4 and 6.7.
[346] *Standard Bank of South Africa Ltd v Hales and Another* 2009 3 SA 315 (D) para 6.
[347] See sections 130(4)(c) & 130(3)(c)(i) of the Act.

alternative to full-blown mortgage foreclosure.'[348] So although creditors will be restricted in their debt enforcement process, such restriction is justified if it means that consumers can meet their obligations through debt review and debt rearrangement.

However, the Act does not allow debt review to occur for an open-ended period of time if consumers still struggle to meet their obligations under the mortgage agreements. Where consumers continue to default whilst under debt review, creditors may, 60 business days after the application for debt review, give notice to terminate it.[349] I submit that this is a reasonable provision because consumers must not abuse the process. The purpose of the Act in general 'was not to shift the balance of power so much that all power in the credit relationship would amass into the hands of the consumer.'[350] Therefore, if consumers continue to not meet their obligations under the loan, creditors are entitled to recover the loan amount immediately.

Similarly, the creditor must also not abuse the process. In *SA Taxi Securitisation (Pty) Ltd v Ndobela*,[351] although not dealing with a mortgage bond agreement, the court held that a creditor had to engage in good faith with the consumer. If a debt counsellor sends a proposal on how the consumer's debts should be rearranged, the creditor cannot simply ignore the proposal and wait 60 business days to terminate the debt review and the loan agreement. Such termination is invalid because the creditor acted in bad faith and frustrated the process.[352]

4.4 Concluding Remarks

The NCA has granted consumers extensive rights to prevent them from being exploited by creditors. Additionally, the NCA provides consumers with mechanisms to manage their debt and prevent or alleviate their over-indebtedness.

Debt enforcement is justifiable if creditors have legitimate interests which outweigh the social and economic impact that consumers will face as a result. However, if debt enforcement can be prevented so the agreement can follow its normal course, it is preferable.[353] This is why the Act contains the section 129(1) notice provision which requires

[348] R Brits LLD thesis (note 338 above) 184-185.
[349] Section 86(10) of the Act.
[350] *SA Taxi Securitisation v Mbatha* (note 4 above) para 35.
[351] Case no 9162/2010 [2011] ZAGPJHC 14 (15 March 2011).
[352] Ibid para 9 &21. Also see *Collet v FirstRand Bank Ltd* 2011 4 SA 508 (SCA) para 15.
[353] R 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, 79.

creditors to notify consumers of their default and suggest dispute resolution to get consumers back on track with their payments. Additionally, section 130 of the NCA provides that the creditor does not have locus standi to sue nor does the court have jurisdiction, before a section 129 notice has been sent.

Although there was confusion regarding what constitutes delivery of the section 129 notice, various cases and the amendments to the NCA have made that clearer. However, the amendments to the Uniform Rules of Court and Magistrates' Court Rules on personal service being the requirement to effect delivery of summons, could possibly affect the section 129 notice.[354]

In terms of section 86 of the Act, consumers may be declared over-indebted which has the consequence of rearranging their obligations under their loan agreements. Although this limits the ability of creditors to enforce the agreement by having a forced sale of the home; it is desirable to pursue other means to repay the loan. Debt review is therefore a good measure that can be utilised by distressed consumers whose section 26 constitutional rights will be protected.

Additionally, the NCA introduced a reinstatement mechanism in section 129(3) and (4) which is similar to the right of redemption under the common law. However, there are major differences.[355] The common law right requires the full outstanding balance to be paid whereas, the NCA's section 129(3) only requires that the consumer to pays the arrears, charges and reasonable costs, thereby catching up on payments. This means that reinstatement under the Act is broader and provides a life line for consumers who can pay the arrears but cannot pay the full outstanding balance which is usually the case.[356] Another difference is that redemption ends the obligations between the parties so the mortgage bond agreement comes to an end whilst reinstatement continues the agreement as if there had never been any default.

Reinstatement is therefore an important mechanism since selling the family home in execution has detrimental consequences and it provides a way to reverse or even prevent execution up to a certain point.[357] Furthermore, reinstatement also enhances the constitutional

[354] See Chapter 5 of this thesis for a discussion of personal service.
[355] See Chapter 2 of this thesis for a discussion on the right to redemption.
[356] Such a right does not exist under the common law and the courts have upheld a creditor's right to claim the full outstanding balance even if the consumer was able to pay the arrears thereby catching up on their payments. See *Boland v Pienaar* (note 42 above) and *Nedbank Ltd v Fraser* 2011 (4) SA 363 (GSJ) para 36.
[357] R Brits 'Purging mortgage default: Comments on the right to reinstate credit agreements in terms of the National Credit Act' (2013) 24 Stellenbosch Law Review Vol 1, 165, 165.

right to housing because it provides a further remedy for consumers in financial distress to keep their home. In fact, Brits argues that to insist on selling a family home in execution in circumstances where consumers could purge their default by paying their arrears, would not pass constitutional scrutiny.[358] A creditor's right to foreclose in those circumstances would not outweigh the consumer's right to adequate housing.

The major issue regarding reinstatement is that the provisions in the NCA have ambiguities which resulted in the courts having to interpret the sections. The Act was then amended which has caused even more confusion because there have been major changes to the principles of reinstatement. These amendments to the reinstatement provisions in the Act have made it harder for consumers to be viewed as the protagonists in reinstatement, as the Constitutional Court had found in the *Nkata* case. Instead, it is up to the credit provider to facilitate the credit agreement being reinstated.[359] To conclude, the reinstatement mechanism in the NCA is an important one, but the provisions need to be clearer in communicating what reinstatement means for creditors and consumers.

[358] Ibid 168.
[359] A Duvanhage 'Changes in the NCA and the interpretation of the reinstatement mechanism' (2017) De Rebus 26, 28.

CHAPTER 5
ABSA BANK LIMITED v MOKEBE AND RELATED CASES

5.1 Introduction

The previous chapters have critically discussed the procedure to sell homes in execution and the impact of the Constitution as well as the NCA on such procedure. It is evident that the procedure had many flaws which led to various amendments, with the most recent amendment being Uniform Rule 46A which came into operation on 22 December 2017.[360] In particular, this rule aimed to deal with how courts should resolve divergent issues in relation to selling the homes of consumers in execution.[361] It is also important to note that a Practice Manual to regulate foreclosure matters had also been issued in the Gauteng Local Division of the High Court.[362] Nevertheless, problems still remaine and different courts followed different procedures regarding foreclosure and the granting of money judgments.[363]

In April 2018, numerous applications for foreclosure were heard by Van der Linde J in motion court in the Gauteng Local Division.[364] Van der Linde J used the power granted in section 14(1)(b) of the Superior Courts Act which allows a single judge of any Division to, in consultation with the Judge President, discontinue the hearing of a civil matter before him or her and to refer such matter to the full bench of that Division. Van der Linde J observed that the judges in the Division were not following a harmonious approach regarding foreclosure matters.[365] The full bench had to hear submissions of various parties including the banks, consumers and various *amicus curaie.*

This chapter will therefore discuss the *Mokebe* case in depth because it is a recent case on foreclosure laws which has had a significant impact on how courts must deal with the sale in execution of homes. This chapter will briefly discuss the facts of the case, the provisions in question, the issues identified, the arguments of the parties and the findings of

[360] The Magistrates' Court Rules were also amended with a similar Rule 43A to deal with forclosure of homes in that court.
[361] See the brief discussion in Chapter 3 of this thesis.
[362] Chapter 10.17 of the Practice Manual of the Gauteng Local Division of the High Court of South Africa.
[363] *Absa Bank Ltd v Lekuku* [2014] ZAGPJHC 244 (14 October 2014); *FirstRand Bank Ltd t/a First National Bank v Zwane*; *FirstRand Bank Ltd t/a First National Bank v Hyslop and Another*, *Nedbank v Nkuna and Another* 2016 (6) SA 400 (GJ); *ABSA Bank Ltd v Njolomba, RC and Another* Case no. 20321/2017 (5 March 2018).
[364] See *Absa Bank Limited v Mokebe*; *Absa Bank Ltd v Kobe*; *Absa Bank v Vokwani*; *Standard Bank of South Africa Ltd v Colombick and Another* (GJ) (unreported case no 2018/00612; 2017/48091; 2018/1459; 2017/35579, 13-4-18).
[365] Ibid para 15.

the court. This chapter will also discuss other important issues regarding the procedure to sell homes in execution which were not explicitly asked in the case namely the service of court notices and jurisdiction.

5.2 Facts of the Case

Four applications were brought by Absa Bank and Standard Bank in unopposed motion court in the Gauteng Local Division of the High Court. The banks sought to foreclose on properties that were possibly the homes of the consumers. It is important to note that the banks did not seek orders to declare the property immediately executable. Rather, at that time, they applied for money judgments of the accelerated full outstanding balance on the home loans. This was because these consumers had defaulted on their monthly bond instalments.[366]

For the first application, the respondent (Kobe) was just over 11 months in arrears on a home loan for R237 256 repayable at R2450 over 20 years. The arrear amount was R35 042 and the accelerated outstanding balance was R267 527. The bank could not confirm whether the property was Kobe's home, but suspected that it was not.[367] In the summons it also said that although the Kobe was employed, she would not be in a position to satisfy the judgment debt. The summons was served by affixing a copy at the door or gate of the chosen *domicilium*.[368]

Similarly, in the second application, the respondent (Mokebe) had a home loan of R275 000 for 20 years at monthly instalments of R3018. Mokebe was 6 months in arrears and the accelerated full outstanding balance was R295 697. The bank suspected that the house was Mokebe's home.[369] The summons and application for default judgment were served by affixing at the door or gate of the chosen *domicilium.* The relief sought in the application was only judgment for R295 697, interest and costs.[370]

Furthermore, in the next application, the respondent (Vokwana), had a home loan of R115 000 which was repayable in monthly instalments of R1 479 for a period of 20 years.[371] Vokwana was in arrears of 10 months and the bank suspected that the property was

[366] *Absa Bank Limited v Mokebe*; *Absa Bank Ltd v Kobe*; *Absa Bank v Vokwani*; *Standard Bank of South Africa Ltd v Colombick and Another* (GJ) (unreported case no 2018/00612; 2017/48091; 2018/1459; 2017/35579, 13-4-18) para 1.
[367] Ibid para 2.
[368] Ibid para 3&4.
[369] Ibid para 5.
[370] Ibid para 6.
[371] Ibid para 9.

Vokwana's home. Relief sought was a money judgment for the accelerated full outstanding balance, interest, executability, a writ and costs.[372] The summons was served on an occupant at the Vokwana's residence, and the application for default judgment was served on Vokwana's son's girlfriend at the *domicilium*.[373]

In the last application, the respondents (Colombrick and Kimberg) had two home loans of R836 000. The amount was repayable in 20 years and the respondents fell into arrears for 4 months. The full outstanding balance that was triggered amounted to R771 494.[374] Relief sought was judgment for the accelerated full outstanding balance, interest, executability, a writ, costs and confirmation that the bank was entitled to retain all amounts paid to it under the home loan.[375]

Van der Linde J noted that the facts of each case will always differ even though they may be certain similarities. One such fact that varies is the extent of the arrears because periods as short as two months can be involved or the loan amount could be small which also makes the monthly instalment small.[376]

5.3 Provisions in Question

The relevant laws to be interpreted were the courts function under section 26(3) of the Constitution; the meaning of section 129(3) and (4) of the NCA; the meaning and effect of, and the courts function under the new Uniform Rule 46A; and the provisions of the latest Practice Manual regarding applications of this nature.[377]

5.4 Questions to Answer

The banks involved in the matters, namely Absa Bank and Standard Bank, along with a number of amicus curiae,[378] were called to assist the court in how to interpret the

[372] Ibid para 9.
[373] Ibid para 10.
[374] Ibid para 11.
[375] Ibid para 11.
[376] Ibid para 13.
[377] *Absa Bank Ltd v Mokebe* (note 1 above) para 24-25.
[378] Investec Bank Limited, National Credit Regulator, Socio-economic Rights Institute of South Africa, Legal Aid South Africa, Law Society of South Africa and Lungelo Lethu Human Rights Foundation.

abovementioned laws. Van der Linde J asked for the following questions to be answered:[379]

1. Where a bank requests an immediate order for the accelerated full outstanding balance on the loan, does a court have a discretion when postponing an application, to decline that request and give the debtor an opportunity to remedy a default by paying the overdue amounts? In other words, can the courts postpone the request too so that it is ultimately dealt with at the same time and in the same enquiry when the executability application is dealt with?
2. If the court does, should the practice manual request uniformity of treatment by the judges in the Gauteng Local Division?
3. If so, what should that uniformity of treatment be? In particular, is the suggested manner to deal with the issue as stated in the practice manual objectionable or desirable?
4. Does an immediate money judgment (and its subsequent execution by the sale of an attached movable) for the accelerated full outstanding balance qualify as 'any other court order enforcing that agreement' for purposes of s129(4)(b) of the NCA?
5. If it does, does it prohibit the reinstatement or revival of the credit agreement - despite the arrears having been paid up - once the applicant bank, on the strength of such a judgment, will have attached and sold in execution the movable property of the debtor?
6. If such a judgment could be given on the basis that it would be capable of being set aside or declared null and void later if the debtor 'remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue …', is it desirable that the court make such an order given its potential for movables to be attached and sold (potentially to purge the arrears) in the meantime or that it may be undesirable to make an order, which is not final in that it may potentially be set aside/declared null and void later?

The parties deposed to affidavits detailing their position, and this, along with the judgment will be discussed in this chapter to establish what the new approach to foreclosure is.

[379] See *Absa Bank Limited v Mokebe*; *Absa Bank Ltd v Kobe*; *Absa Bank v Vokwani*; *Standard Bank of South Africa Ltd v Colombick and Another* (GJ) (unreported case no 2018/00612; 2017/48091; 2018/1459; 2017/35579, 13-4-18) para 24 & 25.

5.5 Foreclosure is Pursued as a Last Resort

Before dealing with the questions set out by the court, this thesis will first discuss how the banks argue that foreclosure is pursued as a last resort. For instance, in the *Mokebe case*, Standard bank explained the steps it takes as follows: 'a possibility to rehabilitate the borrower; payment holidays; rescheduling of instalment; debt review; debt consolidation; surrender of collateral and private sales prior to the legal process being commenced.'[380]

Similarly, Absa Bank first explained its debt recovery process to show that a sale in execution is the last step that is pursued by the bank. In fact, a great deal of time and money is spent to ensure that the process is fair and that other reasonable means are used to get consumers up to date with their payments.[381] From the time consumers sign the home loan agreement, Absa stated that a conveyancer will advise them on their rights, duties, the NCA and their section 26 rights in the Constitution.

Furthermore, consumers are encouraged to speak to the bank when facing financial difficulties so that a solution can be devised.[382] However, if the bank detects that consumers are at risk of defaulting or when they do default, the bank will engage with them to find a solution. The solutions include reducing payments, extending the loan agreement, creating a catch-up plan, referring the consumer to debt counselling or the bank facilitating debt management itself.[383]

If consumers are not able to get back on track, there are six stages of engagement before foreclosure is pursued.[384]

1. If consumers are in arrears of an amount worth 6 months of instalments, their file goes to the bank's legal department. The file can remain here for years if sporadic payments are made.
2. If consumers devise a solution to catch up on payments and they do, their file will return to the legal department if they default again and the arrear amounts to 3 months' worth of instalments.

[380] *Absa Bank Ltd v Mokebe* (note 1 above) para 55.
[381] Absa's supplementary affidavit para 9.1 &10 in *Absa Bank Ltd v Mokebe* (note 1 above).
[382] Ibid para 12.
[383] Ibid para 14
[384] Ibid 9-11 contains a full discussion of the stages or alternatively see *Absa Bank Ltd v Mokebe* (note 1 above) para 55.

3. Consumers will be advised to sell their homes privately if they continue to default on their obligations under the home loan agreement.
4. Absa also has a 'Help U Sell' programme to assist consumers in selling their homes where an estate agent is used to market the property.
5. If all the above does not work, the consumers' files are referred to the Release Price Forum. [385]
6. If the default continues, a Risk Mitigation Officer will go to the consumers' property to engage with them and determine their circumstances. This occurs before or after judgment is granted in favour of the bank.

Absa Bank further stated that the whole process takes them an average of 33 months and consumers are allowed to settle their arrears right up until the sale in execution has occurred.[386] This is in line with section 129(3) of the NCA which enables the agreement to be reinstated.

Several factors are considered before foreclosure is pursued by the Release Price Forum. This includes; whether a life changing event occurred which affected the ability of consumers to pay the instalments, engagements with the bank and solutions explored to remedy the default, social justice factors, history of defaults and not honouring the subsequent agreements to pay. The forum also considers the age of consumers, whether there is a short term left of the loan and whether there is a low outstanding balance on the loan. Another important factor is whether consumers rejected a good private offer to purchase.[387]

From this discussion it appears that, the process followed by the bank is very comprehensive and it sounds good on paper. It gives consumers numerous opportunities to remedy their default and get back on track with payments to keep their homes. The process is consumer centric and the fact that foreclosure is pursued as a last resort ensures that consumers do not lose their homes for frivolous reasons. In addition, the factors that the banks consider are very relevant and the courts should also analyse such factors to decide whether it is necessary to have the sale in execution.

If such an approach was followed, it is submitted, there would be far less sales in execution of primary homes. However, a consideration of the previous matters shows that in

[385] This is a committee that assesses the consumers' portfolios to determine whether Absa Bank would proceed with foreclosure proceedings.
[386] Absa's supplementary affidavit para 30 in *Absa Bank Ltd v Mokebe* (note 1 above).
[387] Ibid para 21.

fact this is not the case.[388] Homes have been sold regardless of the fact that there was a low outstanding balance owed on the loan, vulnerable consumers were involved or the financial position of consumers had changed. This is why it is so important to reassess and strengthen South Africa's foreclosure laws to ensure that such injustices do not occur in the future.

Although there were amendments to the court procedure to sell the homes of consumers in execution, Shaw argues that the principle which comes from the *Jaftha* case should have been included. This principle is that a sale in execution must be pursued a last resort for creditors to recover the debt owed.[389] By including this principle in the rules it would reduce the rate of sales in execution especially when there are other options available.

However, case law is also binding and this principle has appeared in other cases. For instance in *Standard Bank of South Africa Ltd v Hales*,[390] the court held that '(e)very effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort.'[391] This is regardless of the fact that the consumer willingly bonded the property.

There are various alternative means to have the debt repaid and Shaw argues that South Africa can include the mechanisms that exists in other countries to better protect the right to access adequate housing. In England for example, if consumers temporarily lose their jobs but are able to get long term employment thereafter; the courts will require the arrears to be added to the capital and consumers will be entitled to continue paying the bond but pay higher premiums.[392] This is a much more desirable situation than in South Africa where a sale in execution is allowed. It is submitted that redemption or reinstatement under those circumstances would not be useful for the consumer. In other words, the only way to prevent the home from being sold in execution under the common law is to pay the full outstanding balance to redeem the home, and the contract comes to an end. This does not assist consumers who temporarily lose their jobs and find other jobs to get back on track with their obligations under the home loan agreement. Similarly, reinstating the agreement by paying

[388] See *Absa Bank v Ntsane and Another* (note 192 above) where the arrears amounted to only R18.46 on the day application for default judgment was made.
[389] DJ Shaw 'Too quick to execute – how does SA's new rules on sale in execution compare internationally?' (2016) *De Rebus*, available at http://www.derebus.org.za/quick-execute-sas-new-rules-sale-execution-compare-internationally/ last accessed 8 October 2019.
[390] See note 346.
[391] Ibid para 59.
[392] DJ Shaw 'Too quick to execute – how does SA's new rules on sale in execution compare internationally?' (2016) *De Rebus*, available at http://www.derebus.org.za/quick-execute-sas-new-rules-sale-execution-compare-internationally/ last accessed 10 October 2019.

the overdue amounts and costs under the NCA is also not a useful mechanism for consumers who find new employment. Therefore, the situation in England is much more desirable in preventing homes being sold in execution.

Another suggestion made by Shaw is that the home should not be sold in execution if the loan amounts to less than 80% of the value of the home. This is because the risk that creditors carry is quite low and at the end, they will get their interest when the property is sold, hopefully at market value.[393] It is submitted that under those circumstances, consumers who have spent years paying for their home and have therefore built its equity over the years, stand to lose all of that equity as a result of a sale in execution. This is especially reprehensible because in the past, homes could be sold for substantially less than their market value. So, consumers would lose their home along with the equity they built up in their home whilst still remaining indebted to creditors because of a shortfall in the proceeds. Foreclosure therefore did not benefit creditors and consumers.

5.6 Findings of the Court

5.6.1 Granting of monetary judgment separately from application for execution

Regarding the first issue, the banks argued that a monetary judgment cannot be postponed so that it is heard with the application to execute against immovable property because the courts do not have the discretion to do that. However, the banks submitted that it would be preferable for both applications to be heard and decided together because they form part of the same process.[394] All of this is done to ensure that consumers get back on track when their circumstances improve.

Without first obtaining the monetary judgment, creditors cannot get an order which declares the immovable property specially executable. The Law Society supported the applications being heard together to reduce collusion which occurs in the auction process to sell houses for amounts significantly lower than the market value. The NCR and Legal Aid further submitted that since both applications are part of the same process, they are inextricably linked.[395]

The court noted that it is important for creditors to disclose the nature of security

[393] Ibid.
[394] *Absa Bank Ltd v Mokebe* (note 1 above) para 9.
[395] Ibid para 10.

they hold in matters pursuant to a home loan where they intend to foreclose the property so that a court can exercise proper judicial oversight. A failure to do so results in a risk of the executionary relief being denied if it is sought separately from the money judgment.[396]

Furthermore, Uniform Rule 46A requires that creditors fully disclose, to the court when applying for a money judgment, all the facts which would affect the court's discretion when execution is sought.[397] Therefore, to grant the money judgment but postpone the order for executability gives rise to a piecemeal handling of the case and undue protraction of the proceedings. This should be discouraged.[398] Applications should only be dealt with in a piecemeal manner as an exception to the rule.[399]

The court thus decided that the 'money judgment is an *intrinsic part* of the cause of action and *inextricably linked* to the in rem claim for an order of execution, the latter which is non-existent without the money judgment'[400] (emphasis in the original). This makes the execution claim accessory in nature and it is dependent on the main obligation that it secures, to exist. The real right cannot be divorced from the debt it secures.[401]

The court further held that it is obligatory for creditors to allege and prove that their cause of action is based on execution which shows their claim to the money judgment. This is a necessary averment to obtain an order for execution.[402] This is because when creditors institute legal action to foreclose, in reality, both actions to recover the debt and to use the property to pay the debt back, are instituted. The Practice Manual of the High Court, Gauteng Local Division also supported both applications being heard together.

The issue which arises when a money judgment is sought on its own and is granted by the court is that creditors will use the order to attach and sell the movable assets of consumers. This is done in partial satisfaction of the judgment debt.[403] Another prospect is a garnishee order being granted against the income of consumers. This would adversely affect their situation in that it would be difficult to arrange to pay the judgment debt and to prevent

[396] Ibid para 11. Also see *Nedbank Ltd v Mortinson* (note 61 above) para 33.1.5.
[397] *FirstRand Bank t/a First National Bank v Zwane* (note 363 above) para 20.
[398] *Dawood v Mohamed* 1979 (2) SA 361 (D) at 365H.
[399] *Atterbury Property Holdings (Pty) Ltd v Municipal Manager: City of Tshwane* 2017 JDR 1844 (GP) para 17.
[400] *Absa Bank Ltd v Mokebe* (note 1 above) para 14.
[401] See *Klerck N.O. v Van Zyl and Maritz* 1989 (4) SA 263 (SE) 275.
[402] *Absa Bank Ltd v Mokebe* (note 1 above) para 17.
[403] *Absa Bank Limited v Mokebe*; *Absa Bank Ltd v Kobe*; *Absa Bank v Vokwani*; *Standard Bank of South Africa Ltd v Colombick and Another* (GJ) (unreported case no 2018/00612; 2017/48091; 2018/1459; 2017/35579, 13-4-18 para 21.

the looming sale in execution of their homes.[404] Consumers would also struggle to find further financial assistance from another source since they would have a judgment recorded against them.[405] Furthermore, there is a possibility that if consumers can catch up on the arrears, the money judgment can end up being rendered nugatory.

It is submitted that it is not only desirable, but also necessary for both claims to be heard simultaneously. The courts can therefore postpone the money judgment so that it is dealt with when the order for executability is sought. Section 173 of the Constitution states that courts must take the interests of justice into account when they regulate their own process. This further justifies the postponement.[406]

The court also noted that all the banks alleged that foreclosure is sought as a last resort. This means that they should be able to place all the relevant facts before the court at one time so that the court is able to consider both matters properly. Therefore, there would be no need for a postponement. Additionally, there is no prejudice that creditors would face if the money judgment is postponed because they are still secured by the mortgage bond.[407] Their right to be repaid the debt does not fall away.

It is submitted that by having both orders decided in one hearing, there would be added benefits of reduced costs and time saved. However, the court distinguished the issue of postponement in relation to unsecured creditors. It held that unsecured creditors can have both matters heard separately. Nevertheless, the court noted that such creditors are still bound by Uniform Rule 46A in the way they seek executability and they have a more onerous procedure to follow.[408]

In conclusion, creditors have a duty to institute proceedings for the money judgment and order for executability simultaneously. If the matter requires postponement, the entire matter must be postponed avoiding piecemeal adjudication.

5.6.2 Section 129(3) and (4) of the NCA

Reinstatement was extensively dealt with in Chapter 4; the essence of the mechanism is that

[404] See *FirstRand Bank t/a First National Bank v Zwane* (note 363 above) para 17.
[405] *Absa Bank Ltd v Mokebe* (note 1 above) para 22.
[406] See *FirstRand Bank t/a First National Bank v Zwane* (note 363 above) paras 23-24. Also see *Nedbank Ltd v Fraser and Another and Four Other Cases* (note 356 above) para 42.
[407] *Absa Bank Ltd v Mokebe* (note 1 above) para 25-26.
[408] Ibid para 28.

it will be allowed when the consumer pays the arrears, reasonable costs and default charges. However, reinstatement will not be allowed under certain circumstances mentioned in section 129(4) of the NCA.

More specifically, the *Mokebe* case asked the question of whether granting an order for the accelerated full outstanding balance and the order to declare the home specially executable, amounted to a court order which prevents the reinstatement of the bond agreement which is a specified ground in section 129(4) of the NCA?[409] In other words, if a creditor has instituted foreclosure proceedings and is granted a money judgment as well as the order for executability, does this bar the consumer from having the mortgage bond agreement reinstated?

In the *Nkata* case, the court decided that reinstatement amounts to a 'statutory remedy for rendering a default judgment and attachment order ineffectual.'[410] Ms Nkata paid her arrears after judgment was granted but before the sale in execution occurred. The majority therefore decided that she was entitled to revive the mortgage bond agreement at that time. Therefore, it is accepted in law that reinstatement will be prevented under section 129(4)(b) of the NCA when the proceeds of the sale are realised after the public auction of the home.[411] This is because at that point, if the court procedures were duly followed, the agreement would have come to an end and there would thus be nothing to reinstate.

In addition, the court in the *Mokebe* case relied on section 39(2) of the Constitution. The section requires the courts to, when interpreting legislation, 'promote the spirit, purport and objects of the Bill of Rights.' Under the circumstances, the NCA must be interpreted to promote the section 26(1) right to access adequate housing. By doing so, the granting of a money judgment and execution order should not be a bar to the reinstatement of a mortgage agreement because the mechanism can help consumers keep their home.[412] In other words, the right to access adequate housing of consumers outweighs the right of creditors to have the order enfocred so the debt repaid timeously. However, once the home has been publicly auctioned and the money from the sale realised, the agreement ends and the consequence is that it cannot be reinstated or revived.

Therefore, to answer the initial question, the full bench in the *Mokebe* case held that the granting of a money judgment and the order to declare property specially executable is

[409] *Absa Bank Ltd v Mokebe* (note 1 above) para 40.
[410] *Nkata* (note 73 above) para 131.
[411] *Absa Bank Ltd v Mokebe* (note 1 above) para 43.
[412] Ibid para 46.

not a bar to reinstating the mortgage agreement. The court also stated that to ensure that consumers understand their rights, a statement needs to be included in a document which initiates foreclosure proceedings, in the following way:

> The defendant's (or respondent's) attention is drawn to section 129(3) of the National Credit Act No. 34 of 2005 that he / she may pay to the credit grantor all amounts that are overdue together with the credit provider's permitted default charges and reasonable agreed or taxed costs of enforcing the agreement prior to the sale and transfer of the property and so revive the credit agreement.

5.6.3 Reserve price

As mentioned previously in this thesis, the court rules allowed a public auction of properties without setting a reserve price.[413] This practice led to collusion in the system whereby syndicates would engage in bid rigging to buy houses for a pittance at public auctions and then sell them for a huge profit.[414]

In *Nkwane v Nkwane and Others*,[415] a case considered just before the amendments were made to the procedure, Mr Nkwane, who was the applicant in the matter, argued that the original Uniform Rule 46(12) was inconsistent with the constitutional rights to access adequate housing and to not be arbitrarily deprived of property.[416] The bank argued that the low prices that immovable properties are purchased for, reflects the fact that a sale in execution amounts to a forced sale. The sale continues regardless of the financial circumstances of consumers or the property market. Furthermore, there is uncertainty because forced sales can be cancelled at the last minute and if they do go through, buyers would have to institute eviction proceedings of the occupiers. Eviction proceedings can be very drawn out and expensive.[417] The bank also argued that:

[413] The original rule 46(12) of the Uniform Rules explicitly stated that the sale shall be 'without reserve' and the immovable property will be sold to the highest bidder.
[414] *Absa Bank Ltd v Mokebe* (note 1 above) para 53. Also see C Ryan 'New Court rules make it harder for repossessed homes to be sold for a pittance' (2017) available at http://www.acts.co.za/news/blog/2017/12/new-court-rules-make-it-harder-for-repossessed-homes-to-be-sold-for-a-pittance last accessed 10 May 2019.
[415] See note 110 above, para 6 for facts.
[416] *Nkwane v Nkwane* (note 110 above) para 5.
[417] Ibid para 13.

> Where sales of property at an auction are subject to a reserve price …, the effect of this is to diminish interest in the sale and reduce the likelihood of the property being sold at the auction at all. Where the property is sought to be sold in execution but no sale results, this causes prejudice to both the execution creditor and the execution debtor… An additional challenge is that the property often deteriorates further because the sale date is often months apart. This will reduce the price that the buyers are willing to pay at subsequent sales.

It is submitted that there is an even bigger prejudice caused to creditors and consumers when a home is sold for a price that is significantly lower than the market value. The *Nkwane* case is a good example where the home was sold for an amount that was less than 10 per cent of its market value. It is further submitted that this is highly irrational because the purpose of the sale in execution, that is; to sell the property to realise the debt owed by the consumer, is not fulfilled. Instead, the opposite effect occurs where creditors are still owed a large sum of money and consumers are not only rendered homeless, but are still distressed and overindebted. Another submission is that the person who buys the property is unjustifiably enriched by the misfortune of consumers. However, such enrichment was allowed by the rules where the highest bidder could buy the home without a minimum price being set. It has been argued that this situation where the buyer buys and then on-sells property for a huge profit should be prohibited.[418]

A further argument was made by Brits who stated that it is necessary for the best possible price to be obtained in a sale in execution of a home so that consumers can leave the situation with as much dignity as possible.[419] Moreover, where the legal system allows consumers to lose their home at a value that is unconscionably less than the market value, it is contrary to South Africa's constitutional order, which attempts to create a society based the values such as human dignity, equality and the advancement to human rights.[420] It is also contrary to section 9(1) of the of the Constitution which guarantees that 'everyone is equal before the law and has the right to equal protection and benefit of the law.' It is submitted that the practice of selling consumers' homes way below the market value left them unprotected and this was unjust.

The amendment to the rules in relation to reserve prices was therefore very necessary and only time will tell if it will be enough to fix the issue of homes being sold for an amount

[418] See Legal Aid's Affidavit para 35 in the case of *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ).
[419] Ibid para 33.
[420] Ibid.

significantly below than their market value. In Uniform Rule 46(12), the prohibition on setting a reserve price is removed. Instead, the new rules enable the courts to set a reserve price.[421] In addition, the rules set out the factors that the courts can consider when deciding whether a reserve price should be set and what that reserve price should be. Uniform Rule 46A(9)(b) sets out the factors which include:

> (i) the market value of the immovable property;
>
> (ii) the amounts owing as rates or levies;
>
> (iii) the amounts owing on registered mortgage bonds;
>
> (iv) any equity which may be realised between the reserve price and the market value of the property;
>
> (v) reduction of the judgment debtor's indebtedness on the judgment debt and as contemplated in subrule (5)(a) to (e), whether or not equity may be found in the immovable property, as referred to in subparagraph (iv);
>
> (vi) whether the immovable property is occupied, the persons occupying the property and the circumstances of such occupation;
>
> (vii) the likelihood of the reserve price not being realised and the likelihood of the immovable property not being sold;
>
> (viii) any prejudice which any party may suffer if the reserve price is not achieved; and
>
> (ix) any other factor which in the opinion of the court is necessary for the protection of the interests of the execution creditor and the judgment debtor.

As much as these amended rules provide a major shift from the previous procedure which required no reserve price to be set, it has been argued that they do not go far enough.[422] In particular, although Uniform Rule 46A(9)(a) states that a court must consider whether a reserve price should be set, the Rule merely provides that the courts may set a reserve price as empowered by Uniform Rule 46A(8)(e).

The courts must therefore exercise their discretion and a reading of these provisions shows that setting a reserve price has not been made something that is compulsory. Thus

[421] Uniform Rule 46A(8)(e) & 46A(9).
[422] DJ Shaw 'Too quick to execute – how does SA's new rules on sale in execution compare internationally?' (2016) *De Rebus*, available at http://www.derebus.org.za/quick-execute-sas-new-rules-sale-execution-compare-internationally/ last accessed 10 October 2019.

there is still a possibility for consumers' homes to be sold with no reserve price.[423] This is problematic because in practice, the amendment to the rules could be ignored, and homes would continue to be sold way below their actual value. However, in the *Mokebe* case, the full bench stated that:

> It would, in our view, be expedient and appropriate to generally order a reserve price in all matters depending on the facts of each case. That will serve to curb the inequities of the matters such as those in *Jaftha,*[424] *Ntsane,*[425] *Maleke,*[426] *Gundwana,*[427] *Nxazonke*[428] and *Nkwane*[429]. The facts of a particular case may, however, convince a court to depart from the general practice of setting reserve prices. It may well be that the debtor's obligations regarding the property can be so great that the equity in the property is close to zero or even has a negative value. This fact too, should be taken into account in order to decide whether to impose the reserve price in a particular matter. It will always be
>
> > '. . . in the interests of both the Banks and the judgment debtor to realise as much value in the property as reasonably possible.'[430]

It is submitted that it will be in rare circumstances that the market value of the property is below zero. If the amendments do not require every sale in execution of a home to have a reserve price, the amendments should have at least expressly outlawed properties being sold for a pittance due to collusion in public auctions.[431] Such sales are illegitimate as they defeat not only the purpose of a sale in execution, but also go against the constitutional rights of consumers.

When the homes of consumers are sold, the sale will disadvantage them if it is sold at a pittance. Consumers lose their homes and still owe creditors for the shortfall which can be a substantial amount.[432] Another reason which makes a reserve price necessary is that many

---

[423] Uniform Rule 46A(9).
[424] *Jaftha* (note 17 above) See Part 3.2.1 of this thesis.
[425] *Absa Bank v Ntsane* (note 192 above).
[426] *Maleke* (note 160 above).
[427] *Gundwana* (note 137 above) See Part 3.2.3 above.
[428] *Nxazonke and Another v Absa Bank Ltd and Others* [2012] ZAWCHC 184 (4 October 2012).
[429] *Nkwane* (note 110 above).
[430] Per Keightley J in *Mouton v Absa Bank Ltd* Case no. 17922/2014; *Haylock v Absa Bank Ltd* 24820/2015 (14 July 2017).
[431] DJ Shaw 'Too quick to execute – how does SA's new rules on sale in execution compare internationally?' (2016) *De Rebus*, available at http://www.derebus.org.za/quick-execute-sas-new-rules-sale-execution-compare-internationally/ last accessed 8 October 2019.
[432] *Absa Bank Ltd v Mokebe* (note 1 above) para 53.

consumers spend years, sometimes decades, paying their instalments and over those years, the market value of their homes increase.[433] An unforeseen financial difficulty can result in those consumers defaulting in payments. If the courts decide that a sale in execution is justified, and the property is sold for significantly less than the market value, then those consumers will lose the equity they contributed towards for years and are left without a home.

What the amended rules do mention is that the sale in execution as well as the conditions of the sale must comply with any law that regulates auctions, especially the Consumer Protection Act,[434] and its regulations.[435] Furthermore, the amendments also require that creditors include the property's market value and local authority valuation, in the application for execution among other things.[436] Since properties have been sold for ridiculous amounts that are way below market price, this is an improvement in the procedure because it makes the amount that the property should be sold for very clear.[437] In addition, the courts play an imperative role in foreclosure proceedings and they have a duty under the Constitution to prevent unjust outcomes.[438] This has been reiterated in many cases, including the *Mokebe* case.

The *Mokebe* case boldly addressed the issue of reserve prices. Although the banks argued that setting a reserve price would reduce the number of potential buyers of the immovable property, the court disagreed. It held that there is no foundation for such an allegation.[439] Even if it is true, the court is empowered by the rules to decide whether to set a reserve price and what that price should be. The court in the *Mokebe* case also held that the court's power to set such a price stems from section 26(3) of the Constitution.[440] Such a power exists so the court can make a decision that is just and equitable. This decision will be based on certain facts that need to be deposed to in an affidavit by the banks. Since the banks argue that a sale in execution is pursued as a last resort, they should be able to put forward all the information that will assist the court. In addition, the court in the *Mokebe* case also placed a duty on consumers to also give their input in the matter. If consumers choose not to do so,

[433] See *Maleke* (note 160 above) para 5 which discusses the equity a consumer has in their property.
[434] Act 66 of 2008.
[435]Uniform Rule 46(8)(a)(i)(v).
[436] Uniform Rule 46A(5)(A).
[437] DJ Shaw 'Too quick to execute – how does SA's new rules on sale in execution compare internationally?' (2016) *De Rebus*, available at http://www.derebus.org.za/quick-execute-sas-new-rules-sale-execution-compare-internationally/ last accessed 8 October 2019.
[438] *Absa Bank Ltd v Mokebe* (note 1 above) para 51.
[439] Ibid para 54.
[440] Ibid para 57.

the court will be bound by whatever information is placed before it by creditors.[441]

The court in the *Mokebe* case further held that if there is difficulty in finding a buyer because the reserve price is too high, creditors can seek a variation of the existing order from the court.[442] Although the courts cannot ensure that consumers will be left with a shortfall to pay after the property is sold, the courts can 'ensure the sale is at a just and equitable price by taking the factors of each specific matter into account.'[443] The court therefore oversees the sale in execution and their role is to balance the rights of both creditors and consumers.

Shaw argues that the rules should allow potential buyers to view the property which could also result in a higher purchase price. Another amendment to the rules could be reducing the required deposit which is currently 10%. Not many buyers are able to provide this without first securing a bond.[444] It has also been proposed that the minimum price to begin bidding should be 85% of the market value of the property.[445] Additionally, an amendment could be made to give consumers three to six months to privately sell their homes through an estate agent which could also influence the property being sold at the highest possible price.[446]

A look at the laws of other countries such as the United Kingdom (UK), Malaysia, Korea and Ghana, among others, shows that foreclosure laws in relation to the sale of homes can be quite stringent.[447] These countries take into consideration that mortgage bonds last for an average of 20 to 30 years and there is a high possibility that in that time, a debtor will face financial strain. Instead of selling the home, UK laws require creditors to rearrange the debt to allow the consumer to get back on track with their payments. Other countries require the homes to be sold at fair market value.[448]

---

[441] Ibid para 59.
[442] Ibid para 54.
[443] Ibid para 56.
[444] Sub-rule 7A of Form 21.
[445] This is a rule which is applied in Ghana and Germany. See DJ Shaw 'Too quick to execute – how does SA's new rules on sale in execution compare internationally?' (2016) *De Rebus,* available at http://www.derebus.org.za/quick-execute-sas-new-rules-sale-execution-compare-internationally/ last accessed 10 October 2019.
[446] Ibid.
[447] DJ Shaw 'Too quick to execute – how does SA's new rules on sale in execution compare internationally?' (2016) *De Rebus,* available at http://www.derebus.org.za/quick-execute-sas-new-rules-sale-execution-compare-internationally/ last accessed 10 October 2019.
[448] C Ryan 'New Court rules make it harder for repossessed homes to be sold for a pittance' (2017) available at http://www.acts.co.za/news/blog/2017/12/new-court-rules-make-it-harder-for-repossessed-homes-to-be-sold-for-a-pittance last accessed 10 May 2019.

5.7 Other Issues not Explicitly Asked in the Case

5.7.1 Jurisdiction

As discussed above in Chapter 2 of this thesis, since the High Court has concurrent jurisdiction to hear matters that fall under the Magistrates' Court jurisdiction, an issue arose in foreclosure matters. Creditors would forego the Magistrates' Court jurisdiction which led to various problems for consumers and the courts. This is an issue that the court did not address in the *Mokebe* case although the facts show that the Magistrates' Court had jurisdiction in three of the matters that were before Van Der Linde J. It is however important to address these problems and the new approach that courts must take will be discussed below.

In particular, the recent cases of *Nedbank Limited v Thobejane and Related Matters*[449] ('*Thobejane* case') and *Nedbank Limited v Gqirana NO and Related Matters*[450] ('*Gqirana* case') will be briefly analysed to find out what the law currently says regarding jurisdiction of the courts.

5.7.1.1 *Nedbank Limited v Thobejane and Related Matters*[451]

The case was decided in the Gauteng Division of the High Court in Pretoria. The main issue was that creditors had a tendency to institute proceedings which had amounts within the Magistrates' Court jurisdiction, in the High Court.[452] In this case, all of the matters concerned claimed the accelerated full outstanding balance on home loans that were below R400 000 and therefore within the Magistrates' Court jurisdiction.[453]

A longstanding principle in law exists that courts must not refuse to hear a matter where they have jurisdiction if the matter is properly brought before them because the plaintiff or applicant has a right to choose a court when there is concurrent jurisdiction.[454]

---

[449] *Nedbank Limited v Thobejane and Related Matters* (unreported case no 84041/15; 93088/15; 99562/15; 36/16; 736/16; 1114/16; 1429/16; 3429/16; 6996/16; 16228/16; 29736/1; 30302/16, 26-9-2018) (GP).
[450] 2019 (6) SA 139 (EGC).
[451] *Nedbank Limited v Thobejane* (note 449 above).
[452] Ibid para 1.
[453] Ibid para 7.
[454] *Standard Credit Corporation Ltd v Bester and Others* 1987 (1) SA 812 (W) 820I; *Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others* 2013 (5) SA 484 (SCA) 493E-F; *Moosa NO v Moosa* (A146/13) [2014] ZAGPPHC 796 (18 September 2014) para 19.

However, the full bench in the *Thobejane* case noted that the tendency of foregoing Magistrates' Courts when they have jurisdiction to hear certain matters posed two threats. The first is to the right of access to justice[455] and the second is the sustainability of burdening the High Courts with matters that could have been instituted in the other courts.[456]

The full bench also noted that the courts have to regulate their processes in a manner that promotes the interests of justice[457] and access to justice.[458] This is why the court called for a new approach to determine the jurisdiction of High Courts where matters fall within the jurisdiction of the Magistrates' Courts.[459] The full bench held that where the appropriate court is avoided simply because another court has concurrent jurisdiction, this amounts to an abuse of process:[460]

> Access to justice as envisaged by the Constitution is not served, where alternative Courts are created and equipped to deal with matters and litigants bypass those institutions, because they claim that they have a right to do so. What section 34 envisages is a meaningful opportunity to institute and defend legal action in a Court of law and places an obligation on the State to take steps to remove any regulatory, social or economic obstacles, which may prevent or hinder the possibility of access to justice. The position that a plaintiff is *dominus litus* and can choose any forum that suits him/her is at best outdated. It loses sight of the deep seated inequalities in our society and the constitutional imperative of access to justice.[461]

The full bench further held that matters which fall within the jurisdiction of the Magistrates' Court should be instituted there.[462] The exception is if the matter concerns difficult principles of law or fact which would be better considered by the High Court.[463] Under those circumstances, an application must be made setting out the reasons why the matter must be heard in the High Court.[464] In addition, the Courts have a *mero motu* discretion to transfer a matter to another court if they do so in the interests of justice.[465] This judgment only

[455] Section 34 of the Constitution states that 'Everyone has the right t have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
[456] *Nedbank Limited v Thobejane* (note 449 above) para 29.
[457] Section 173 of the Constitution.
[458] Section 34 of the Constitution. Also see *Nedbank Limited v Thobejane* (note 449 above) para 45.
[459] Ibid para 46-47.
[460] *Nedbank Limited v Thobejane* (note 449 above) para 76.
[461] Ibid para 79.
[462] Ibid para 91.
[463] Ibid para 75.
[464] Ibid para 91.
[465] Ibid para 96. Also see *Veto v Ibhayi City Council* 1990 (4) SA 93 (SE).

impacted litigants in Gauteng, however, it represents a shift in the law. In the past, creditors could choose to institute matters in the High Court even if the Magistrates' Court had jurisdiction because it was in their interests to do so. Now the Courts take into consideration the impact that this has on consumers, which is brought about by the right to access justice. The next case delves deeper into this impact and the rights that consumers have.

5.7.1.2 *Nedbank Limited v Gqirana NO and Related Matters*[466]

This case was heard in the Eastern Cape and it dealt with the same issue of the concurrent jurisdiction of the High Court.[467] There were initially seven matters in the *Gqirana* case which sought money judgments for amounts within the Magistrates' Court jurisdiction.[468] In essence, Lowe J with Hartle J concurring, used the NCA to come to the a similar conclusion as the *Thobejane* case.

Lowe J first set out the context under which creditors and consumers interact. Many consumers fall under the category of historically disadvantaged individuals and low income persons.[469] The debt they owe is often an insignificant amount to creditors, but not to consumers who would face substantial prejudice if they defaulted in their payments.[470] The NCA therefore exists to protect consumers and to balance the bargaining power between creditors and consumers.[471] One such way that the NCA does this is by stating that Magistrates' Court have jurisdiction over all matters where the NCA applies, whatever the amount.[472] What is also noteworthy is that the NCA states that if a credit agreement contains a provision that the consumer consents to the High Court's jurisdiction, such a provision is unlawful if the matter falls within the jurisdiction of the Magistrates' Court.[473] The NCA therefore supports the contention that matters need to be heard in the Magistrates' Court when

---

[466] See note 450 above.
[467] Ibid para 2&3.
[468] Ibid para 9
[469] Ibid para 37.1 & 37.4.
[470] Ibid para 37.3.
[471] See para 4.1 of this thesis which discusses the why the NCA was enacted and its purpose.
[472] Section 29(1)(e(of the Magistrates' Court Act read with Section 172(2) of the NCA:
'(1) Subject to the provisions of this Act and the National Credit Act, 2005 (Act 34 of 2005), a court, in respect of causes of action, shall have jurisdiction in ─ ... (e) actions on or arising out of any credit agreement, as defined in section 1 of the National Credit Act, 2005 (Act 34 of 2005); ... (g) actions other than those already mentioned in this section where the claim or the value of the matter in dispute does not exceed the amount determined by the Minister from time to time by notice in the Gazette.
In respect of matters falling under the National Credit Act 34 of 2005, magistrates' courts have unlimited monetary jurisdiction by virtue of the provisions of this subsection and s 172 (2) of the National Credit Act 34 of 2005.'
[473] Section 90(2)(vi) of the NCA.

it has jurisdiction. It is submitted that this is in line with the right to access justice.

In dealing with this right, Lowe J in the *Gqirana* case, agreed with decision in the *Thobejane* case,[474] and linked access to justice with the right to equality under section 9 of the Constitution.[475] However, Lowe J also argued that the *Thobejane* case 'was too widely cast' in the relief it gave.

Whilst the banks argued that High Courts are quicker and more efficient, and that defendants or respondents usually do not defend the matter, Lowe J stated that the right to access justice still applies.[476] It is not fair for defendants or respondents to have their matters heard in the High Courts as they are usually difficult to access geographically and financially. There are greater costs involved in the High Courts and it is more difficult to represent oneself. [477]

A proper reading of the NCA and Magistrates' Courts Act recognised these difficulties, and the Acts therefore attempted to provide consumers with better access to justice, by allowing the Magistrates' Court to have jurisdiction no matter the amounts involved. However, if exceptional circumstances exist such as the court having to decide complex legal or factual issues, then the High Courts may be utilised.[478]

It is submitted that the prejudice that is caused to consumers who have to defend their matters in the High Court, is greater than the prejudice suffered by creditors, usually the banks, who seek to sell the homes of consumers in execution. As much as creditors argue that the High Court is quicker, this must be balanced against the right to access justice of consumers.[479] The right to access justice of creditors will still be fulfilled in the Magistrates' Court and the prejudice that creditors suffer as a result, is less than that of consumers. Whilst debt enforcement fulfils an important function in society, there must be no abuse of process.

5.7.2 Personal service of notices

As explained in Chapter 2 and Chapter 4 of this thesis, consumers usually choose the address where notices should be sent in all kinds of cases, including applications to sell a home in

[474] *Nedbank Limited v Thobejane* (note 449 above) para 51.
[475] Ibid para 53.
[476] Ibid para 59.
[477] Ibid para 64.
[478] Ibid para 74.
[479] Ibid para 68. Also see para 75 for a summary of the case principles.

execution. Many standard form contracts have the *domiciluim* of consumers listed as the address to send notices to. Whilst sitting in on various foreclosure cases Meyer J observed the following:

> [Motion Court] deals with hundreds of this type of applications on a weekly basis in which the sales in execution of people's homes are sought. Service in most instances was effected at the chosen *domicilium citandi et executandi* by affixing a copy to the 'outer' door, the 'principal' door, the gate, the 'main' gate, and the like, or by leaving a copy somewhere on the premises, such as under a stone. Instances of service on a human being, qualified to receive service, are rare. The ineluctable inference, in my view, is that debtors are invariably at work during weekdays when service of process and of documents are mostly effected by sheriffs, unless they have moved away from, or vacated, the premises where service was effected.[480]

Bearing in mind the constitutional right to adequate housing, Meyer J was not satisfied that proper service was effected in the process to sell the homes of consumers in execution. Therefore, Meyer J ordered that the defendant furnish reasons as to why the application should not be granted. A copy of the order and the application was to be served where the defendant is employed or at the defendant's residential address on a Saturday.

Considering many cases like the *Powell* case,[481] the Rules Board amended the Uniform Rules to require that notices should be served personally on the debtor where the creditor seeks to execute a primary residence. However, the court can order service in another manner. Uniform Rule 46A states that:

> Every notice of application to declare residential immovable property executable shall be—
> (a) substantially in accordance with Form 2A of Schedule 1;
> (b) on notice to the judgment debtor and to any other party who may be affected by the sale in execution, including the entities referred to in rule 46(5)(a): Provided that the court may order service on any other party it considers necessary;
> (c) supported by affidavit which shall set out the reasons for the application and the grounds on which it is based; and
> (d) served by the sheriff on the judgment debtor personally: Provided that the court may order service in any other manner.

[480] See *Powell* (note 67 abve) para 5.
[481] Also *Maleke* (note 160 above).

As a result of the amendment, the Practice Manual of the Gauteng Local Division of the High Court of South Africa created a directive which reads as follows:[482]

> An order declaring property specially executable shall only be granted by the Court if the application has been served on the respondent PERSONALLY, alternatively in a manner as authorised by the Court. If efforts to serve personally proves impossible, the Court may authorise service at the place of employment of the respondent, or on a Saturday, or on a person over the age of 16 at the *domicilium citandi*, or in any other way which may bring the matter to the attention of the respondent; Furthermore, all email and/or other correspondence which may be relevant to the respondent being aware of the date of hearing should also be attached. If the property is not the primary residence (for example of served on a tenant, and the respondent no longer resides there) personal service is not required. (Emphasis in the original)

The amendments were thereafter interpreted in various cases.[483] In *Standard Bank of South Africa Limited v Hendricks and Related Matters,*[484] Savage J heard seven foreclosure matters where executionary relief was sought in the Western Cape High Court Division. Savage J invoked the provisions of section 14(1)(b) of the Superior Courts Act[485] and the matters were postponed to be heard by the full bench as directed by the Judge President of the division, as was done in the *Mokebe* case. The abovementioned issues regarding the granting of the money judgment and execution order at the same time, as well as uniformity of treatment by the division was discussed. The full bench essentially agreed with the *Mokebe* judgment.[486] The issue of personal service was also dealt with in depth in the *Hendricks* case.

In many cases, default judgment is granted to creditors when consumers fail to enter their appearance to defend the case. The prevailing argument made by consumers is that they did not receive service of the summons.[487] This is why personal service is essential. The courts have agreed that a 'party's recourse on getting to know of a default judgment – once

[482] Practice Manual of the Gauteng Local Division of the High Court of South Africa (2018) Chapter 10.17 item 1.
[483] This was not an identified issue in *Mokebe* case (note 1 above), although personal service was mentioned in para 52.
[484] 2019 (2) SA 620 (WCC).
[485] Act 10 of 2013.
[486] *Standard Bank of South Africa v Hendricks* (note 484 above) para 40 & 48.
[487] See *De Paul Albert and Another v Standard Bank of South Africa Limited* Case no. 21841/14 [2015] ZAGPPHC 727 (11 September 2015).

the horse has bolted – is a poor substitute for the initial judicial evaluation.'[488]

In fact, in certain serious matters the courts have used their discretionary power to require, as a rule, that personal service be mandatory. An example is divorce matters which has numerous consequences for the spouses, their families and third parties.[489] Similarly, it is submitted that since the right to access adequate housing is an important socio-economic right, the courts must require the higher standard of personal service where it is possible.

Both the creditors and consumers will benefit from personal service because if consumers have actual knowledge of the pending proceedings, they can contact the creditors to resolve the matter.[490] For instance, Absa Bank argued in the *Mokebe* case that most foreclosure matters do not result in the home being sold because after legal proceedings are instituted, consumers do make an active attempt to find a solution with the bank that results in them keeping their home.[491] Simply affixing a copy at the door of the homes of consumers cannot be acceptable service especially because they are at risk of losing their home. They therefore need to be personally served the documents.

It has been suggested that personal service could be effected on the weekend when consumers are at home, or even at their workplace.[492] The principle of *audi alteram partem* also supports personal service on consumers who will be given a chance to defend the matter and be heard in court. It is inadequate for the courts to only hear the side of creditors which has been the prevailing practice in applications to sell the homes of consumers in execution.

It is submitted that this new practice of making personal service a mandatory step in foreclosure is a good practice because it acts to safeguard the constitutional rights of the consumers who may potentially lose their homes.[493] However, the amendment is not rigid and does provides that 'the court may order service in any other manner.' This too is a welcomed rule because there will be cases where personal service is impossible or difficult. A simple example is allowing service via email when consumers are out of town or the country. The Practice Manual above also suggests various ways to effect service if authorised by the court.

[488] *Gundwana* (note 137 above) para 50 and *Jaftha* (note 17 above) para 49.
[489] *Canale v Canale* 1995 (4) SA 426 (E).
[490] *Standard Bank of South Africa v Hendricks* (note 484 above) para 31.
[491] Absa's supplementary affidavit in the *Mokebe* case (note 1 above).
[492] *Standard Bank of South Africa v Hendricks* (note 484 above) para 32.
[493] *Absa Bank Limited v Lekuku* Case no. 32700/2013 [2014] ZAGPJHC 244 (14 October 2014).

5.8 Concluding Remarks

The order in the *Mokebe* case stated that:

1. In all matters where execution is sought against a primary residence, the entire claim, including the monetary judgment, must be adjudicated at the same time.
2. Execution against moveable and immovable property is not a bar to the revival of the agreement until the proceeds of the execution have been realised.
3. Any document initiating proceedings where a mortgaged property may be declared executable must contain the following statement in a reasonably prominent manner:
   'The defendant's (or respondent's) 'attention is drawn to section 129(3) of the National Credit Act No. 34 of 2005 that he / she may pay to the credit grantor all amounts that are overdue together with the credit provider's permitted default charges and reasonable taxed or agreed costs of enforcing the agreement prior to the sale and transfer of the property and so revive the credit agreement.'
4. Save in exceptional circumstances, a reserve price should be set by a court in all matters where execution is granted against immovable property, which is the primary residence of a debtor, where the facts disclosed justify such an order.

The order therefore articulates the major findings of the case. Now, in the High Court Division of the Gauteng Provincial Division, the money judgment and execution order must be heard simultaneously. Furthermore, the mortgage agreement may be reinstated under section 129(3) of the NCA right up until the home is sold in execution. This is a similar provision to the common law right to redemption which can also be utilised till the home is sold. Since consumers are usually unaware of their rights, the court also held that a notice must be added to summons to notify consumers of their right to redemption. Finally, the court held that reserve prices should be set by a court in all matters where creditors seek to sell the homes of consumers in execution. A reserve price will be disallowed only under certain circumstances.

This judgment has been welcomed by academics and the courts in other jurisdictions who have adopted the same uniform approach.[494] It is submitted that the *Mokebe* case adequately addressed most of the issues that still existed despite the court rules being amended and the issuing of the Practice Manual in the Gauteng Local Division of the High Court.

[494] *Standard Bank of South Africa v Hendricks* (note 484 above) in the Western Cape adopted the Mokebe principles. However, in the jurisdictions like the Free State and KwaZulu-Natal, such changes have not been effected through their Practice Manuals or case law. See C Singh 'To foreclose or not to foreclsoe: Revealing the 'cracks' within the residential foreclosure process in South Africa' (2019) *SA Merc LJ* 145, 155.

Nevertheless, other important issues were tackled in depth by other cases where the full bench dealt with foreclsure cases. In terms of jurisdiction, creditors must institute proceedings in the relevant Magistrates' Court which has jurisdiction to hear the matter. Regarding notices, personal service of notices must be effected unless the court decides another manner to effect service.

In conclusion, the amendments and the court's interpretation of them have attempted to enhance the procedure to sell the homes of consumers in execution. The courts have therefore moved from the traditional approach where creditors could easily have the homes sold in execution. The procedure has been strengthened so that any loss of access to adequate hosuing through the execution process is not arbitrary. However, creditors still retain their mortgage security interest and they have a higher burden to prove that a sale in execution would be justified.

CHAPTER 6
RECOMMENDATIONS AND CONCLUSION

6.1 Introduction

The purpose of this thesis has been to analyse the procedures which must be followed before homes are sold in execution as a result of consumers defaulting in their home loan instalments. Initially, the law held property rights at a high standard which made it easier for creditors to foreclose properties. The Magistrates' Court Rules and Uniform Rules of Court contained many loopholes which made a sale in execution an easy process.[495]

However, whilst a sale in execution is a normal occurrence which is not in itself reprehensible,[496] the Constitution enshrined the right to access adequate housing which also includes the right to not be arbitrarily evicted. These rights made it necessary for the court procedures to be developed when allowing consumers' homes to be sold in execution. Such changes were also brought about by numerous landmark cases which interpreted the rights affected through the forced sale of a home.[497]

Furthermore, this thesis discussed the NCA and how the Act has also impacted foreclosure procedures. In particular, the Act restrains creditors from enforcing mortgage bond agreements by providing for reinstatement and debt review. The Act also sets preconditions as well as further steps to follow when creditors do institute legal action to foreclose property and recover the amount owed from the proceeds.[498]

Finally, the *Mokebe* case was discussed which dealt with various issues that have arisen as a result of different judges interpreting the amendments to the court rules and practice notes differently. This includes issues related to whether the applications for the money judgment and execution order should be heard together, reinstatement under the NCA, the jurisdiction of the courts, service of notices and reserve price.[499]

The purpose of this final chapter is to propose the way forward. It will outline what consumers can do to prevent foreclosure when they are unable to meet their financial

[495] See Chapter 2 above.
[496] *Gundwana* (note 137 above) para 53-54.
[497] See Chapter 3 above.
[498] See Chapter 4 above.
[499] See Chapter 5 above.

obligations in terms of a mortgage agreement. It also consolidates the factors that the courts must consider to balance the rights of creditors and consumers in foreclosure matters. Finally, recommendations are proposed on how the court procedures can be further amended so that they better protect consumers' rights whilst also taking creditors' rights into consideration.

6.2 The Role of Consumers

What has been consistently stressed in this thesis is that when consumers borrow money, they need to pay it back. The most important right which creditors have, is their right to be repaid. Even in landmark cases where the right to housing was discussed, the Constitutional Court pointed out that the interests of creditors must not be disregarded.[500] Those courts that interpreted the NCA were consistent in their view that the intention of the NCA was not to create a debtor's paradise in South Africa.[501] This is an indication that there is a need to focus on consumers to make them aware not only of their rights, but also of their responsibilities. In this regard consumers should take the following steps:

- Be educated about their finances and mortgage laws
- Be proactive when facing financial strain
- If the sale in execution is inevitable, accept this and try to minimise their loses

6.2.1 Education

In 2008, the South African Human Rights Commission (SAHRC) initiated a Public Hearing where various stakeholders including community members, the banks, the Banking Association of South Africa and the South African Board of Sheriffs made submissions regarding the content of the right to access adequate housing and the process to evict and repossess homes. A report was then written to synthesise the findings as well as make recommendations to assist role players in the process.[502]

One of the key findings was that people regularly enter into mortgage agreements without fully understanding the fine print. The documents are also written in a language that

[500] *Jaftha* (note 17 above) para 42.
[501] *Seyfrett* (note 241 above) para 10.
[502] Report on Public Hearing on Housing, Evictions and Repossessions (2008) 4.

consumers do not understand. Additionally, there is a lack of documentation which serves as proof when disagreements emerge. If consumers have insurance, they do not always understand the terms of this insurance. This is especially in cases where the homeowner dies. The homeowner's dependants may simply assume that the property will be paid off and later discover that it has not been paid off. [503]

Consumers also lack an understanding of the legal processes involved which are often complicated. Furthermore, they do not know their rights or what alternatives are available. There is also a tendency on the part of consumers to ignore court processes.[504] This is evidenced by the fact that in so many cases, consumers fail to file a notice of intention to defend the matter.[505] Moreover, consumers are frequently unaware of the consequences of not paying their mortgage bond instalments and they do not seek proper advice when they face financial hardship. The reasons for this lack of knowledge is inexperience, limited or no education and inadequate information provided by creditors.[506]

It is submitted that there must be a responsibility on all stakeholders to ensure that consumers are adequately informed about mortgage laws and the consequences of non-payment. The banks have argued that before the mortgage agreement is entered into, a conveyancer will explain the consumer's rights and obligations under section 26 of the Constitution and the NCA.[507] This practice should continue and it is also important for consumers to be informed in a language that they understand. In fact, the NCA provides that the consumer has a right to receive information in plain and understandable language.[508]

In addition, one of the purposes of the NCA is 'addressing and correcting imbalances in negotiating power between consumers and credit providers by providing consumers with education about consumer rights.' This is done through the National Credit Regulator which is tasked with disseminating and promoting information about the NCA to the public.[509] It is submitted that knowledge is power and if a consumer knows about certain rights that have been introduced by the NCA to protect them, this would reduce sales in execution of homes. In particular, the reinstatement mechanism and the debt review process are significant

[503] Ibid 29.
[504] Ibid 30. Also see L Marais et al 'The non-payment of mortgage bonds in South Africa: the voice of defaulters' *Acta Structilia* (2005) 11 & *Maleke* (note 160 above) para 5.
[505] See facts of *Mokebe* (note 1 above).
[506] L Marais et al 'The non-payment of mortgage bonds in South Africa: the voice of defaulters' *Acta Structilia* (2005) 11.
[507] See Absa's Supplementary Affidavit para 12 in *Absa Bank Ltd v Mokebe* (note 1 above).
[508] Section 63& 64 of the Act.
[509] Section 16(1)(a) of the Act.

lifelines that are granted to consumers who struggle to fulfil their financial obligations.[510]

Another suggestion is for consumers, before even getting the home loan, to research and get as much information as they can before binding themselves to a 20-30 year loan. They should shop around to try and get the best possible deal.[511] After the affordibility assessments are done and the bank makes the loan offer, consumers should not take the maximum home loan amount they can afford.[512] Instead, they should buy a home that costs less so that they can pay an instalment that is higher than the one required by the bank. Paying more than the required instalment results in paying up the loan earlier than expected which also means that less interest will be paid overall.[513] Furthermore, if consumers face a financial hardship and subsequently default in payments, they will already be ahead in their payments. For example, if the bank offers a home loan of R1 000 000, the consumer can take up a home loan of R800 000 and buy a home for this amount. If the monthly imstalments are R8000, the consumer can pay R10000 which is in excess of R2000 every month and would drastically reduce the loan period and interest paid on the loan.

Lastly, consumers should live within their means because overindetedness is a major reason for homes being foreclosed. The debts that consumers have should be as low as possible especially when they are also owing under a home loan.[514] There are numerous books on budgeting and finances in general which will enlighten them on how to spend responsibly.[515] In essence, prevention is key when it comes to foreclosure. When consumers are knowledgeable about their finances, options and rights; they make better decisions.

6.2.2 Be proactive

Numerous cases, especially those dealt with in the *Mokebe* case have also shown that consumers will avoid the banks when they face financial difficulties.[516] This happens even if the banks make substantial attempts to make arrangements to help consumers catch up on

[510] See Chapter 4 above.
[511] Banks such as FNB, Absa, Standard Bank and Nedbank have bond repayment calculators which are useful in determining if consumers can afford the loan.
[512] P Ndumo *From Debt to Riches: Steps to Financial Success* (2011) 155.
[513] Ibid 142.
[514] Ibid 154.
[515] The classics are GS Clason *The Richest Man in Babylon* (1926), R Kiyosaki & S Lechter *Rich Dad Poor Dad* 1997. Also see a South African book on finances – P Ndumo *From Debt to Riches: Steps to Financial Success* (2011).
[516] Also see Author unknown 'Sale in execution: Know your rights' (2013) *Property24* available at https://www.property24.com/articles/sales-in-execution-know-your-rights/17401 last accessed 10 May 2019.

their arrears. When this happens, banks usually institute proceedings to have a consumer's home sold in execution as a last resort.[517] It is submitted that consumers need to be proactive when they face a financial strain. In many cases, they seek assistance when creditors have already obtained a court order. Instead, they should contact the creditor when they experience financial difficulties and they should not ignore any notices that may be sent by the creditor.[518] A sale in execution can therefore be prevented. This is especially because it is not beneficial for either party.

The banks have argued that they pursue foreclosure as a last resort. It is therefore submitted that consumers have multiple opportunities to rearrange their obligations with the bank. However, they must not make unrealistic commitments or act under pressure when they decide on the correct course to take.[519]

Some suggestions that have been made are that consumers should consult an expert such as a debt counsellor to assist with drawing up a budget which will help them catch up on the arrears. This can be used to negotiate with creditors.[520] Consumers can get such assistance by applying for debt review when they cannot keep up with their financial obligations so they can be declared overindebted.[521]

Consumers can also contact an alternative dispute resolution agent such as the National Debt Mediation Association to assist them to reach a resolution with creditors, that benefits both parties.[522] The section 129(1) notice includes a provision that consumers take such action to reach an agreement with the creditors so that debt enforcement proceedings are not institutted. Consumers must thus respond immediately to a section 129(1) notice because ignoring it could have dire consequences.[523] Similarly, when consumers receive summons, they must file a notice of intention to defend the matter if they have a good defence. They must place facts that the courts must consider in the foreclosure application so that the court can hear their side and make a decision based on all the relevant circumstances. In the end,

[517] See Absa's Supplementary Affidavit 21-30 in *Absa Bank Ltd v Mokebe* (note 1 above).
[518]Author unknown 'Sale in execution: Know your rights' (2013) *Property24* available at https://www.property24.com/articles/sales-in-execution-know-your-rights/17401 last accessed 10 May 2019. Also see the banks' affidavits in *Mokebe* (note 1 above).
[519]Ibid.
[520] Ibid.
[521] See Chapter 4 for debt review proceedings.
[522] Author unknown 'Sale in execution: Know your rights' (2013) *Property24* available at https://www.property24.com/articles/sales-in-execution-know-your-rights/17401 last accessed 10 May 2019.
[523] Ibid.

consumers who are proactive can take control of the situation and they will be better off for doing so.[524]

6.2.3 Minimise loss

If the sale of the home is inevitable, consumers should try and sell the home through an estate agent or privately find a buyer who will approach the bank with an offer. In this way, the property will yield the best possible price.[525] It is submitted that this will prevent the home from being sold for significantly less than the market value through a public auction or reduce a shortfall. In addition, banks have programmes specifically created to help consumers who are struggling to pay their mortgage bond.[526] For instance, Absa Bank's Help U Sell programme utilises estate agents who market the property in the relevant area and who are experts in selling distressed property.[527] If the market value is still not realised or the home is sold in execution, consumers are entilted to have the shortfall explained as well the charges and fees associated with the sale.[528]

6.3 The Role of Creditors

Creditors, especially the banks, play a vital role in society. As stated in Chapter 1 of this thesis, most consumers do not have the financial capacity to pay the full price of a home and they borrow money from the bank in order to do so. Home loans are therefore a major mechanism that allows consumers to gain access to adequate housing, which is an important socio-economic right.[529] The mortgage bond grants creditors the right to sell homes in execution where consumers default in their payments. However, as discussed in Chapters 3 to 5, such right is restricted by the Constitution, NCA, court rules and practice notes.

---

[524] Author unknown 'Sale in execution: Know your rights' (2013) *Property24* available at https://www.property24.com/articles/sales-in-execution-know-your-rights/17401 last accessed 10 May 2019. Absa stated in an affidavit that in a private sale, the home could be sold for about 80% of its market value whilst in a public auction, it is usually 50-55% of the market value. See Absa's Supplementary Affidavit para 23 in *Absa Bank Ltd v Mokebe* (note 1 above).

[525] Author unknown 'Sale in execution: Know your rights' (2013) *Property24* available at https://www.property24.com/articles/sales-in-execution-know-your-rights/17401 last accessed 10 May 2019.

[526] See P Ndumo *From Debt to Riches: Steps to Financial Success* (2011) 159-161. Absa Bank has a 'Help U Sell' programme whislt Standard Bank has an 'EasySell' Programme. First National Bank has a 'Quick Sell' programme and Nedbank has assisted sales.

[527] See Absa's Supplementary Affidavit para 19 in *Absa Bank Ltd v Mokebe* (note 1 above).

[528] Author unknown 'Sale in execution: Know your rights' (2013) *Property24* available at https://www.property24.com/articles/sales-in-execution-know-your-rights/17401 last accessed 10 May 2019.

[529] Also see Absa's Supplementary Affidavit para 52&53 in *Absa Bank Ltd v Mokebe* (note 1 above).

In particular, a reading of the legislative authority shows that a higher burden has been placed on creditors who seek to foreclose consumers homes. The role of creditors who provide home loans will be discussed under the following headings:

- Be transparent
- Be flexible
- Pursue the sale in execution as a last resort
- Do not abuse court procedure

6.3.1 Be transparent

From the outset, banks must be transparent with consumers. They must do this by communicating to the consumer their various rights, duties and options under the mortgage bond agreement.[530] For example, creditors must explain that consumers must let them know if they face financial strain so that the terms of the agreement can be altered to help the consumers keep up with payments.[531] This creates a relationship of trust and when consumers are knowlegeable about the transaction, both parties benefit.

Another suggestion is for creditors to offer life insurance and retrenchment cover that is affordable for consumers who are more vulnerable to their financial situation changing drastically in a manner that would deem them unable to pay the instalment.[532]

Furthermore, creditors must engage with consumers throughout the loan period. The consumers' bond accounts should be sent to them and must be communicated in such a way that consumers understand what it says. When consumers default, banks must react promptly to find out why.[533] In essence, a hands-on approach is necssary because when both parties are aware of the loan repayments, it is easier to identify when there is a struggle to repay and arrangements can be made to alter the agreement.

6.3.2 Be flexible

Home loans can last for up to 30 years and in that time consumers can face financial strain.

[530] Ibid, para 12.
[531] Report on Public Hearing on Housing, Evictions and Repossessions (2008) 46.
[532] Ibid 44.
[533] See L Marais et al 'The non-payment of mortgage bonds in South Africa: the voice of defaulters' *Acta Structilia* (2005) 17 for a discussion of the results of consumers who participated in a survey about their mortgage bonds and their suggestions.

Research has shown that the reasons for defaulting in payments are linked to a direct change in the financial situation of consumers and their families, such as unemployment or an illness.[534] Some of these things cannot be prevented which is why creditors need to be flexible and accommodating in allowing the agreement to be restructured to fit the needs of consumers. Banks have said that a sale in execution is not in their interest and that they are in the business of financing homes, not foreclosure.[535] By giving consumers an opportunity to catch up on payments or reduce the instalments, amoung other things, this can ensure that consumers keep their homes and creditors are eventually paid the outstanding balance on the loan.

6.3.3 Use the sale in execution as a last resort

Creditors must have sufficient reason for the sale in execution. The facts and circumstances of each case will vary and the courts will be tasked with determining whether the sale in execution was pursued as a last resort. Brits argues that there must be a sufficient link between the reason for the sale in execution versus the effect that this will have on consumers.[536] In particular, if the arrear amounts are trifling, a sale in execution should not be permitted because the debt could be fulfilled by other means and the prejudice cause to consumers who will lose their home is much higher that the prejudice that would be caused to creditors.[537]

6.3.4 Do not abuse court procedure

The Constitutional Court in the *Jaftha* case held that where there has not been an abuse of court procedure, a sale in execution should ordinarily be granted by the courts.[538] It is therefore submitted that this is an important requirement when instituting legal proceedings to foreclose consumers' homes. Creditors must follow the correct procedures in their entirety

[534] See L Marais et al 'The non-payment of mortgage bonds in South Africa: the voice of defaulters' (2005) *Acta Structilia* 14.
[535] See C Ryan 'SA banks sued for R60bn in home repossession case' (2017) *GroundUp* available at https://www.fin24.com/Companies/Financial-Services/r60bn-home-repossession-suit-against-banks-20170816 last accessed 10 May 2019. Also see G Salter 'Repossession of homes: Nedbank responds to criticism' (2017) available at https://www.groundup.org.za/article/repossession-homes-nedbank-responds-criticism/ last accessed 10 May 2019.
[536] R Brits 'Sale in Execution of mortgaged property of homes may not result in arbitrary deprivation of property' (2013) *SAJHR* 536 at 543.
[537] *Jaftha* (note 17 above) find para & *Maleke* (note 160 above) para 5.4.
[538] *Jaftha* (note 17 above) para 58.

especially because the sale could result in consumers losing their homes and this should not be taken lightly. For instance, if the mortgage agreement is not attached to the summons or the matter has been instituted in the High Court when the Magistrates' Court has jurisdiction,[539] or personal service of summons has not occurred;[540] a sale in execution of a home should not be permitted. As much as these new procedures have placed a higher burden on creditors who wish to institute proceedings for debt recovery, they are necessary to protect consumers' constitutional right to access adequate housing.

Generally, banks have argued that they already practice the abovementioned suggestions.[541] Therefore, it is submitted that they continue or improve upon engaging with consumers, accommodating consumers' needs and selling homes in execution as a last resort by following the correct court procedures.

6.4 The Role of the Courts

The main function of South African courts is to adjudicate disputes impartially 'without fear, favour or prejudice.'[542] In addition to that function, the NCA implores the courts to balance the rights of creditors and consumers.[543] A sale in execution is an important mechanism to uphold a mortgage bond agreement especially because this type of security allows so many people to buy a home. Therefore, foreclosure must not be undermined by consumers as a debt enforcement mechanism. Similarly, the foreclosure process must not be abused by creditors at the expense of the consumers.[544]

The Constitution prohibits arbitrary deprivation of property and arbitrary eviction.[545] The Constitution also gives people the right to access adequate housing.[546] The courts must therefore be careful and engage in a balancing of the rights of creditors, that is, to be repaid the home loan, versus the property rights of consumers in sections 25(1) and section 26 of the

[539] See Part 5.7.1 of this thesis.
[540] See Part 5.7.2 of this thesis.
[541] See G Salter 'Repossession of homes: Nedbank responds to criticism' (2017) available at https://www.groundup.org.za/article/repossession-homes-nedbank-responds-criticism/ last accessed 10 May 2019. Also see Absa's Supplementary Affidavit in *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ).
[542] Section 165(1) & (2) of the Constitution.
[543] See section 3 of the NCA discussed in Chapter 3 of this thesis; *Rossouw v Firstrand Bank Ltd* (note 4 above) para 17 & *SA Taxi Securitisation (Pty) Ltd v Mbatha* (note 4 above) para 35.
[544] Also see R Brits 'Sale in Execution of mortgaged property of homes may not result in arbitrary deprivation of property' (2013) *SAJHR* 536 at 544-545.
[545] Section 25(1) of the Constitution.
[546] Section 26(1) of the Constitution.

Constitution.

Each case is unique and there is a potential for abuse by both creditors and consumers.[547] The courts have however developed guidelines on the factors to consider, although they do not amount to an extensive list of factors. This thesis has consolidated the factors mentioned in numerous cases:[548]

The home:

- Is the property the primary residence of the consumer and will the consumer be rendered homeless if it is sold in execution? If it not, then the rights in section 26 of the Constitution are not engaged. The creditor would be justified in selling such property because the defendant will not suffer undue hardship or prejudice of losing a home.
- Was a state subsidy used to buy the home?[549]
- What is the market value of the home?

The loan agreement:[550]

- Is the loan secured by a mortgage bond?
- What was the amount loaned?
- What is the amount of arrears and the oustanding balance on the loan? How does this compare to the market value of the home?[551]

The consumer:

- What circumstances was the debt incurred under?[552]
- How old is the consumer?
- Is the consumer a historically disadvantaged and vulnerable or indignant person?[553]

[547] See Brits Supporting Affidavit para 11 in record of *Absa Bank Ltd v Mokebe* (note 1 above).
[548] See *Mokebe* (note 1 above), *Jaftha* (note 17 above), *Maleke* (note 160 above), *Nstane* (note 192 above) *Hendricks* (note 484 above) & *Standard Bank of South Africa Ltd v Panayiotts* 2009 (3) SA 363 (W) para 78-80.
[549] *Mortinson* (note 61 above) para 33.1-33.2.
[550] See *Jaftha* (note 17 above) para 60.
[551] If the amount of the arrears is trifling, other alternatives can be used to recover the debt such as reinstatement. See *Jaftha* (note 17 above) para 40 & *Maleke* (note 160 above) para 5.2-5.3.
[552] See *Jaftha* (note 17 above) para 60 & Ntsane (note 192 above) para 58.
[553] *Maleke* (note 160 above) para 3.

- What does the payment history of the consumer look like?
- What was the financial position of the consumer which led to the arrears? Has there been an unexpected change which has affected his ability to pay the instalments?
- What is the current financial position of the consumer? Are there other sources of income available to pay the arrears?[554]
- Has the consumer made attempts to engage with the creditor to make other arrangements to pay the debt?[555]
- Does the consumer have dependants such as minor children or elderly parents who live in the home and would therefore be impacted by a sale in execution?
- Does the family have access to alternative adequate housing?
- Has the consumer refused to privately sell the home or rejected favourable offers to purchase by private persons?

The creditor:

- Did the creditor comply with all the procedures or has there been an abuse of court process?[556] This includes procedures set out in the NCA, the court rules and practice directions.
- Did the creditor inform the consumer of the section 26(1) right to access adequate housing and the need for the consumer to set out their circumstances before the court?[557]
- Is the creditor pursing foreclosure as a last resort?[558]
- What attempts has the creditor made to make arrangements with the consumer?
- Would the creditor be prejudiced by a delay of the repayment of the loan?

Alternative measures to repay the loan

- Are there any other less invasive measures to repay the loan that can be explored?[559]

[554] For instance the consumer can sell some movable property or get a loan from friends and family.
[555] See *Jaftha* (note 17 above) para 60.
[556] *Jaftha* (note 17 above) para 58.
[557] *Saunderson* (note 18 above) para 27.
[558] See *Jaftha* (note 17 above) para 59.

- Can the term of the loan increase so as to allow lower instalments?
- Is the consumer over-indebted and has gone through debt review?[560]
- Can the agreement be reinstated under section 129(3) of the NCA?
- Is redemption under the common law a viable option?
- Should the matter be postponed to allow a private sale?[561]

Other factors may be taken into consideration depending on the facts of each case.[562] It is submitted that the courts must analyse the factors to determine who would suffer the most prejudice. In other words, does the interest of creditors to receive payment outweigh the interest of consumers to keep the current access they have to adequate housing?[563] That is the overarching question that the courts must consider to make a just and equitable decision for both parties.

For example, it may be just to allow execution where the consumer lives alone, the outstanding balance on the loan is high, the arrears are also high, the consumer defaulted for years and ignored all attempts by the creditor to rearrange the obligations under the home loan. On the contrary, if the consumer is a historically disadvantaged person who consistently paid their instalments for many years, has dependants and was retrenched which lead to arrears; this is a different situation. The consumer has built up considerable equity in the home so a less invasive way to pay the outstanding loan can be ordered by the courts.

The courts should also consider the economic interests of the community in general and the impact on the economy in relation to access to credit.[564] If the procedures to foreclose a home become too strict, this will have a negative impact on the economy as a whole.

---

[559] Ibid.
[560] *Maleke* (note 160 above) para 17.
[561] *Gundwana* (note 137 above) para 53.
[562] In numerous cases, the courts have explained that this is not an extensive list and the unique set of facts for each case will determine the factos to take into considerations. See See *Jaftha* (note 17 above) para 53 & *Standard Bank v Bekker* (note 28 above) para 30.
[563] *Ntsane* (note 192 above) para 42.
[564] L Steyn *Statutory Regulation of Forced Sale of a Home in South Africa* (LLD thesis, University of Pretoria, 2012) 328.

6.5 Recommendations to Improve Foreclosure Proceedings

The amendments to the rules are welcomed and they have changed drastically over the years, but they can be improved. South African laws should further protect the constitutionally protected right of consumers to access adequate housing.

Firstly, it is submitted that the rules should make mediation or arbitration compulsory for creditors and consumers. A tribunal should be created to specifically deal with sales in exeution of homes.[565] This is especially because the right to adequate housing is an important socio-economic right and execution has to be pursued as a last resort. Moreover, such a manner of resolving the issues between parties would be a quick and inexpensive remedy. Mediation or arbitration should be compulsory especially if the amounts are trifling, the default is for a short period of time and the consumer's financial situation has changed.

Additionally, although the rules have given the courts a discretion to set the reserve prices of homes and the *Mokebe* case further held that setting a reserve price is the general rule; it is submitted that the rules should have made the setting of a reserve price compulsory. If not, then they should have at least expressly prohibited bid rigging. The main argument raised against the setting of reserve prices is that it reduces the amount of people interested in the property and it is submitted that this argument cannot be given much weight.[566] This is because the purpose of the sale in execution is to fulfil the full outstanding balance on the loan. If the home is sold for a price that is significantly less than its market value, this purpose is not fulfilled. Instead consumers are left homeless and still overindebted whilst creditors are still owed the shortfall. On the other hand, the buyer becomes enriched and the law previously allowed this.[567]

In order to combat the issue of not having enough interested buyers, it is submitted that the rules should provide for better advertising of the sale in execution. For instance, the rules should provide for an auctioneer who has a wide range of advertising methods, network of buyers, and expertise in handling auctions, to be hired to handle the sales. Similarly, sheriffs could be trained on how to better advertise and conduct the auctions.

Another submission is that the mortgage shortfall should not be claimed if it is the result of an abuse of the sale in execution procedure by the creditor. This is because the

[565] See *Ntsane* (note para 192) 97&98.
[566] See Part 5.6.3 of this thesis. Also see *Hendricks* (note 484 above) para 58.
[567] J Smit 'Outrageous in this day and age' *Without Prejudice* (2010) 36. Also see *Hendricks* (note 484 above) para 59.

overindebted consumers who have already lost their homes are put in a worse off position by still being indebted to creditors. If an abuse of the procedure occurred, holding consumers liable for the shortfall is unjust.

Furthermore, although the Constitutional Court decided that a blanket prohibition of the sale of homes that are under a certain amount was not appropriate,[568] the legislature could explore that option for low income housing. This is especially if the housing was acquired with a state subsidy.[569] It is also submitted that a prohibition of sales in execution of homes where the consumers have paid a certain percentage of the loan should also be introduced. Shaw suggested 80% of the market value. This is because the home owner has built up equity in the home and it would be undesirable to sell it and lose all that equity.

Lastly, the NCA should be amended to clarify what reinstatement entails because the latest amendment has caused even further confusion.[570] Although the majority in *Nkata* interpreted the provisions of the Act to offer a lifeline to consumers; the amendments seem to contradict those findings. It is therefore imperative for the legislature to refine and rework the reinstatement mechanism especially because it is a viable remedy for consumers to keep their homes.

6.6 Conclusion

The abovementioned discussion shows that the issue of foreclosure of primary homes is a very sensitive topic. On the one hand, creditors must be repaid the money they lent to consumers and the strength of a mortgage bond lies in being able to enforce it.[571] On the other hand, consumers have the right to access adequate housing as well as to not be arbitrarily deprived of property.

Over the years, the procedure to sell homes in execution has changed drastically from the traditional approach of enforcing contracts because the parties bound themselves; to the approach of balancing the right of creditors and consumers. This balancing act has not been an easy task and the courts play an important role in attempting to create just outcomes for both creditors and consumers.

---

[568] See *Jaftha* (note 17 above) para 51.
[569] L Steyn LLD thesis (note 564 above) 335.
[570] Ibid 322. Also see Part 4.2.2 of this thesis.
[571] *Saunderson* (note 18 above) para 3.

Whilst the amendments to the rules have made it difficult to foreclose primary homes, the courts have also said that they are not trying to create a debtor's paradise.[572] There will be very little incentive for consumers to pay their mortgage debt if there is no legal consequence to defaulting.[573] In fact, if the value of a mortgage bond diminishes, there will be an adverse impact on the home loan system as a whole because there will be a much greater risk of banks not being able to recover the debt. This would lead to stricter requirements to access a mortgage loan such as a greater deposit.[574] Reduced access to credit impacts the most on poorer consumers who will not be able to afford to buy a home which is one of the most essential assets consumers can have. This not only goes against the constitutional right to adequate housing, but also an important purpose of the NCA which is to create an accessible credit market.

However, the amendments were necessary because homes were being sold in execution under circumstances where the arrear amounts were too small, proper service of summons was not effected or for prices way below the market value, among other things. Such practices were unjust especially because the Constitution and the NCA aim to create a society based on human dignity, equality and the advancement of human rights. Foreclosure laws must also reflect that vision and only time will tell if the amendments will make a great impact to better protect the rights of consumers whilst balancing them with the rights of creditors. Whilst there is uncertainty regarding the practices in various jurisdictions, it is hoped that over time, clarity can be further provided by the rules board and the courts.

[572] *Seyfrett* (note 241 above) para 10.
[573] See Absa's Supplementary Affidavit 20, para 51-52 in *Absa Bank Ltd v Mokebe* (note 1 above).
[574] Ibid.

BIBLIOGRAPHY

Legislation

Constitution of the Republic of South Africa, 1996.
Credit Agreement Act 75 of 1980.
Deeds Registries Act 47 of 1937.
Insolvency Act 24 of 1936.
Magistrates' Court Act 32 of 1944.
National Credit Act 34 of 2005.
National Credit Amendment Act 19 of 2014.
National Credit Amendment Act 7 of 2019.
Superior Courts Act 10 of 2013.
Supreme Court Act 59 of 1959.
Usury Act 73 of 1968.

Court Rules

Magistrates' Court Rules

Uniform Rules of Court

Practice Manuals

Practice Manual of the Gauteng Local Division of the High Court of South Africa (2018), Government Gazette No.41257 (17 November 2017) 18.

Cases

A

Absa Bank Limited v Mokebe; *Absa Bank Ltd v Kobe*; *Absa Bank v Vokwani*; *Standard Bank of South Africa Ltd v Colombick and Another* (GJ) (unreported case no 2018/00612; 2017/48091; 2018/1459; 2017/35579, 13-4-18.
Absa Bank Limited v Njolomba and Related Cases 2018 (5) SA 548 (GJ).
Absa Bank Ltd v De Villiers 2009 (5) SA 40 (C).

Absa Bank Ltd v Lekuku Case no. 32700/2013 [2014] ZAGPJHC 244 (14 October 2014).

Absa Bank Ltd v Mokebe and Related Cases 2018 (6) SA 492 (GJ).

ABSA Bank Ltd v Ntsane and Another 2007 (3) SA 554 (T).

Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors 2009 (2) SA 512 (D).

A*bsa Bank Ltd v The Sheriff of the High Court, Simon's Town In re Absa Bank Ltd and Expidor 124 CC* (WCC) (unreported case numbers 26018/2010; 3045/2010, 9-5-2011).

Agri Wire (Pty) Ltd and Another v Commissioner of the Competition Commission and Others 2013 (5) SA 484 (SCA).

Amardien and Others v Registrar of Deeds and Others 2019 (3) SA 341 (CC).

Atterbury Property Holdings (Pty) Ltd v Municipal Manager: City of Tshwane 2017 JDR 1844

B

Bader and Another v Weston and Another 1967 (1) SA 134 (C).

Balkind v ABSA Bank, In re ABSA Bank Ltd v Ilifu Trading 172 CC & Others 2013 (2) SA 486 (ECG).

Barkhuizen v Napier 2007 (5) SA 323 (CC).

Boland Bank Ltd v Pienaar and Another 1988 (3) SA 618 (A).

Bondev Midrand (Pty) Ltd v Madzhie and Others 2017 (4) SA 166 (GP).

C

Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd and Another 2006 (6) SA 103 (CC).

Canale v Canale 1995 (4) SA 426 (E).

Collett v FirstRand Bank Ltd 2011 (4) SA 508 (SCA).

D

Dawood and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC).

Dawood v Mohamed 1979 (2) SA 361 (D).

De Paul Albert and Another v Standard Bank of South Africa Limited Case no. 21841/14 [2015] ZAGPPHC 727 (11 September 2015).

E

Ewing McDonald & Co Ltd v M & M Products Co 1991 (1) SA 252 (A).

F

Firstand Bank Limited t/a First National Bank v Seyffert and Another and Similar Cases 2010 (6) SA 429 (GSJ).

First National Bank of SA Ltd t/a Wesbank v Minister of Finance 2002 (4) SA 768 (CC).

First Rand Bank Limited v Folscher 2011 (4) SA 314 (GNP).

Firstrand Bank Limited v Nkata 2015 (4) SA 417 (SCA).

Firstrand Bank Ltd v Maleke and Three Similar Cases 2010 (1) SA 143 (GSJ).

Firstrand Bank Ltd v Olivier 2009 (3) SA 353 (SE).

FirstRand Bank t/a First National Bank v Zwane and Two Other Cases 2016 (6) SA 400 (GJ).

Firstrand Bank Ltd v Powell, Firstrand Bank Ltd v Nsele & Another, Firstrand Bank Ltd v Herbst & Another (2011/9130, 2011/20765, 2011/31969) [2012] ZAGPJHC.

G

Gerber v Stolze & Others 1951 (2) SA 166 (T) 172F-G.

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC).

Graaff-Reinet Municipality v Van Ryneveld's Pass Irrigation Board 1950 (2) SA 420 (A).

Guardian National Insurance Co Ltd v Searle 1999 (3) SA 296 (SCA).

Gundwana v Steko Development CC and Others 2011 (8) BCLR 792 (CC).

I

Iscor Housing Utility Co and Another v Chief Registrar of Deeds 1971 (1) SA 614 (T).

J

Jaftha v Schoeman and Others; Van Rooyen v Stoltz 2005 (2) SA 140 (CC).

K

Klerck N.O. v Van Zyl and Maritz 1989 (4) SA 263 (SE).

L

Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co 1922 AD 549.

M

Maharaj Brothers v Pieterse Bros Construction (Pty) Ltd & Another 1961 (2) SA 232 (N).

Malherbe v Britstown Municipality 1949 (1) SA 281 (C).

Mardin Agency (Pty) Ltd v Rand Townships Registrar 1978 (3) SA 947 (W).

Mars Inc v Candy World (Pty) Ltd 1991 (1) SA 567 (A).

Mattoida Constructions (SA) (Pty) Ltd v E Carbonari Construction (Pty) Ltd 1973 3 SA 327 (D).

Mkhize v Umvoti Municipality and Others 2012 (1) SA 1 (SCA).

Moosa NO v Moosa (A146/13) [2014] ZAGPPHC 796 (18 September 2014).

Morrison NO v Rand NO 1967 (2) SA 208 (D).

Mortinson v Nedbank 2005 (6) SA 462 (W).

Mouton v Absa Bank Ltd Case no. 17922/2014; *Haylock v Absa Bank Ltd* 24820/2015 (14 July 2017).

N

Nedbank Limited and Others v The National Credit Regulator and Another 2000 (6) SA 295

(GNP).

Nedbank Limited v Gqirana NO and Related Matters 2019 (6) SA 139 (EGC).

Nedbank Limited v Thobejane and Related Matters (unreported case no 84041/15; 93088/15; 99562/15; 36/16; 736/16; 1114/16; 1429/16; 3429/16; 6996/16; 16228/16; 29736/1; 30302/16, 26-9-2018) (GP).

Nedbank Ltd and Others v National Credit Regulator and Another 2011 (3) SA 581 (SCA).

Nedbank Ltd v Binneman & Twelve Similar Cases 2012 (5) SA 569 (WCC).

Nedbank Ltd v Barnard Case number 1142/08 2009 ZAECPEHC 45 (1 September 2009).

Nedbank Ltd v Fraser and Another and Four Other Cases 2011 4 SA 363 (GSJ).

Nedbank Ltd v Mortinson 2005 (6) SA 462 (W).

Nedcor Bank Ltd v Kindo 2002 (3) SA 185 (C).

Nkata v FirstRand Bank Ltd 2016 (4) SA 257 (CC).

Nkwane v Nkwane and Others Case no. 36700/2016 [2018] ZAGPPHC 153 (22 March 2018).

Nxazonke and Another v Absa Bank Ltd and Others [2012] ZAWCHC 184 (4 October 2012).

O

O'Donoghue v Human 1969 (4) SA 35 (E).

Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others 2008 (3) SA 208 (CC).

P

Perelson v Druain 1910 TS 458 (E).

Pillay v Messenger Magistrates' Court, Durban and Others 1951 (1) SA 259 (N).

R

Rossiter and Another v Rand Natal Trust Co Ltd and Others 1984 (1) SA 385 (N).

Rossouw v Firstrand Bank Ltd 2010 (1) SA 439 (SCA).

S

Sasfin v Beukes 1989 (1) SA 1 (A).

SA Taxi Securitisation (Pty) Ltd v Mbatha 2011 (1) SA 310 (GSJ).

SA Taxi Securitisation (Pty) Ltd v Ndobela Case no 9162/2010 [2011] ZAGPJHC 14 (15 March 2011).

Sebola v Standard Bank of South Africa Ltd 2012 (5) SA 142 (CC).

Simpson v Klein NO & Others 1987 (1) SA 405 (W).

Standard Bank of SA Ltd v Bekker & Another and Four similar cases 2011 (6) SA 111 (WCC).

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

Standard Bank of South Africa Limited v Hendricks and Related Matters 2019 (2) SA 620 (WCC).

Standard Bank of South Africa Ltd v Hales and Another 2009 3 SA 315 (D).

Standard Bank of South Africa Ltd v Panayiotts 2009 3 SA 363 (W).

Standard Bank of South Africa Ltd v Saunderson and Others 2006 (2) SA 264 (SCA).

Standard Bank of South Africa v Shiba 1984(1) SA 153 (W).

Standard Bank of South Africa v Adams 2007 (1) SA 598 (C).

Standard Credit Corporation Ltd v Bester and Others 1987 (1) SA 812 (W).

V

Vasco Dry Cleaners v Twycross 1979 1 SA 603 (A).

Veto v Ibhayi City Council 1990 (4) SA 93 (SE).

Textbooks

Badenhorst PJ et al *Silberberg and Schoeman's the law of property* 5 ed (2006) LexisNexis Butterworths: Durban.

Cheadle MH et al *South African Constitutional Law: The Bill of Rights* (2002). Butterworths: Durban.

De Vos P & Freedman W (eds) *South African Constitutional Law in Context* (2014) Oxford University Press: Cape Town.

Hutchison D & Pretorius C (eds) *The Law of Contract in South Africa* 2 ed (2012) Oxford University Press: Cape Town.

Kelly-Louw M *Consumer Credit Regulation in South Africa* 1 ed (2012) Juta: Cape Town.

Otto JM & Otto R-L *The National Credit Act explained* 2 ed (2010) LexisNexis Butterworths: Durban.

Otto JM *The National Credit Act Explained* 3 ed (2013) LexisNexis Butterworths: Durban.

Otto JM *The National Credit Act Explained* 4 ed (2016) LexisNexis Butterworths: Durban.

Pete S et al *Civil Procedure: A Practical Guide 2 ed* (2015) Oxford University Press: Cape Town.

Scott TJ & Scott S *Willes' Mortgage and Pledge in South Africa* 3 ed (1987) Juta & Co Ltd: Cape Town.

Sharrock R *Business Transaction Law* 8 ed (2011) Juta: Cape Town.

Tennant S *Consumer Law Compliance: The National Credit Act, the Consumer Protection Act and the Protection of Personal Information Act* 1 ed (2016) Juta: Cape Town.

Van Loggerenberd DE *Jones and Buckle The Civil Practice of the Magistrates' Courts in South Africa Vol II: The Rules* 10 ed (2011) Juta & Company Ltd: Cape Town.

Books

Clason GS *The Richest Man in Babylon* (1926) Signet: New York.

Kiyosaki R & Lechter S *Rich Dad Poor Dad* (1997) Plata Publishing LLC: Scottsdale.

Ndumo P *From Debt to Riches: Steps to Financial Success* (2011) Jacana Media (Pty) Ltd: Johannesburg.

Theses

Brits R *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* (LLD thesis, University of Stellenbosch, 2012).

Sham N *Executed in Execution: Discussion and Suggestions Regarding the Immovable Property Foreclosure Process in South Africa* (LLM thesis, University of KwaZulu-Natal, 2017).

Shaw DJ *The Constitutionality of Sale in Execution for less than market value or where alternatives are available* (Unpublished), LLD thesis, University of Witwatersrand (2019).

Steyn L *Statutory Regulation of Forced Sale of a Home in South Africa* (LLD thesis, University of Pretoria, 2012).

Journal Articles

Brand FDJ 'The Role of Good Faith, Equity and Fairness in South African Law of Contract – the Influence of the Common Law and Constitution' (2009) *SALJ* 71.

Brits R, Coetzee H & van Heerden C 'Re-instatement of credit agreements in terms of the National Credit Act 34 of 2005: Quo vadis?' (2017) *THRHR* 177.

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 'Sale in Execution of mortgaged property of homes may not result in arbitrary deprivation of property' (2013) *SAJHR* 536.

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.

Domanski A 'Mortgage Bondage' (1995) *SALJ* 159.
Du Plessis M and Penfold G, 'Bill of Rights Jurisprudence' (2005) *Annual Survey of South African Law* 80.

Du Plessis M & Penfold G, 'Bill of Rights Jurisprudence' (2006) *Annual Survey of South African Law* 45.

Duvenhage A 'Changes in the NCA and the interpretation of the reinstatement mechanism' (2017) *De Rebus* 26.

Kelly-Louw M 'The prevention and alleviation of consumer over-indebtedness' (2008) *SA Merc LJ* 200.

Maasdorp AFS ‘The law of Mortgage’ (1901) 18 *SALJ* 233.

Marais L et al ‘The non-payment of mortgage bonds in South Africa: the voice of defaulters’ *Acta Structilia* (2005) 11.

Maswazi B ‘The doctrine of precedent and the value of s39(2) of the Constitution’ (2017) *De Rebus* 28.

Otto JM ‘National Credit Act. Vanwaar Gehasi? Quo vadit lex? And some reflections on the National Credit Amendment Act 2014 (1)’ (2015) *TSAR* 583.

Singh C ‘To foreclose or not to foreclsoe: Revealing the ‘cracks’ within the residential foreclosure process in South Africa’ (2019) *SA Merc LJ* 145.

Smit ‘Outrageous in this day and age’ (2010) *Without Prejudice* 36.

Steyn L ‘Protection against forced sale of a debtor’s home in the Roman context’ (2015) *Unisa Fundmina* 119.

Steyn L ‘Reinstatement of a home mortgage bond by paying the arrears: The need for approporiate legislative reform’ (2015) *Stell LR* 132.

Woker T ‘Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act.’ (2010) *Obiter* 217.

Reports

Report on Public Hearing on Housing, Evictions and Repossessions (2008) 4.

Online Sources

Arde A ‘Court Rules on Home Repossessions’ (2018) *BusinessDay* available at https://www.pressreader.com/south-africa/business-day/20180914/281517932020686 last accessed 10 May 2019.

Author unknown ‘Sale in execution: Know your rights’ (2014) *Property24* available at https://www.property24.com/articles/sales-in-execution-know-your-rights/17401last accessed 10 May 2019.

Fourie J ‘Sale in execution: The conveyancer and the sheriff’ (2013) *De Rebus* available at http://www.derebus.org.za/sales-execution-conveyancer-sheriff/ last accessed 8 October 2019.

Mnyandu L & Kern K ‘Reinstatement triumphs acceleration clauses in credit agreements subject to the National Credit Act’ *SA Financial Markets Journal* (2017) available at http://financialmarketsjournal.co.za/reinstatement-triumphs-acceleration-clauses-in-credit-agreements-subject-to-the-national-credit-act/ last accessed 20 May 2019.

Ryan C ‘New Court rules make it harder for repossessed homes to be sold for a pittance’ (2017) available at http://www.acts.co.za/news/blog/2017/12/new-court-rules-make-it-harder-for-repossessed-homes-to-be-sold-for-a-pittance last accessed 10 May 2019.

Ryan C ‘SA banks sued for R60bn in home repossession case’ (2017) https://www.fin24.com/Companies/Financial-Services/r60bn-home-repossession-suit-against-banks-20170816 last accessed 8 October 2019.

Salter G ‘Repossession of homes: Nedbank responds to criticism’ (2017) available at https://www.groundup.org.za/article/repossession-homes-nedbank-responds-criticism/ last accessed 10 May 2019.

Shaw DJ ‘Too quick to execute – how does SA’s new rules on sale in execution compare internationally?’ (2016) *De Rebus*, available at http://www.derebus.org.za/quick-execute-sas-new-rules-sale-execution-compare-internationally/ last accessed 10 October 2019.

Truter A ‘A Case Law Discussion of the Implications of Reinstating a Credit Agreement’ *Polity* (2018) available at https://www.polity.org.za/article/a-case-law-discussion-on-the-implications-of-reinstating-a-credit-agreement-2018-02-06 last accessed 20 May 2019.

Vengadajellum S ‘Short notes on: The execution process and the effect that a judgment may have on a debtor’s movable and/or immoveable property’ (2018) available at https://www.schoemanlaw.co.za/wp-content/uploads/2018/02/Website-Article-Feb-2018.pdf last accessed 8 October 2018.