SALE IN EXECUTION OF MORTGAGED HOMES MAY NOT RESULT IN ARBITRARY DEPRIVATION OF PROPERTY

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ABSTRACT

The sale in execution of immovable residential property amounts to a deprivation of property in terms of s 25(1) of the Constitution. Since no law may permit arbitrary deprivation of property, it is necessary to ensure that the law of mortgage foreclosure also avoids this unconstitutional result. The principle is that a deprivation of property will be arbitrary if there is ‘no sufficient reason’ for such an interference with a debtor’s property. If residential property is sold in execution despite the fact that there are alternative ways to achieve the mortgagee’s purpose (namely, debt enforcement), the resultant deprivation will be arbitrary, since there is no sufficient nexus between the purpose of the deprivation and the effect that it has on the individual debtor. The need to scrutinise mortgage foreclosures on a case-by-case basis is especially important in the poverty and justice context, since the forced sale of and eventual eviction from the home will often cause or exacerbate the debtor’s socio-economic hardship. Based on the subsidiarity principles, it is argued that the requirements of s 25(1) can be fulfilled through the correct interpretation and application of the National Credit Act’s debt relief mechanisms – especially debt rearrangement – to the degree that they serve as viable alternatives to sales in execution.

Key words: property, Constitution of the Republic of South Africa, 1996, National Credit Act, judicial sale, housing

I INTRODUCTION

The dilemma with people losing their homes as a result of debt enforcement is not only that primary residences are at risk, but more that homelessness will exacerbate (or bring about) their poverty. Indeed, ‘[w]hat is really a welfare problem gets converted into a property one’. Debt is a practical reality for most people, and some are especially vulnerable when they become unable to fulfil their obligations. The effects can be particularly devastating for the poor (or those facing poverty), since their dignity often hangs in the balance when creditors seek to have their homes sold in execution. Debt enforcement litigation will place many of these home-owning debtors in a position from which few will recover. It is important therefore to consider that the fight against poverty is not only aimed at alleviating existing poverty, but includes

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1 Jaftha v Schoeman, Van Rooyen v Stolz 2005 (2) SA 140 (CC) para 30.
the ideal to ensure that those who are on the brink of financial disaster do not step into the so-called ‘poverty trap’.2

People who own immovable property should ideally not lose such assets, which may represent the only wealth they possess. However, the sale in execution of property to enforce debt is a well-known, necessary part of South African law. Although the forced sale of primary residences clearly implicates the housing clause (s 26) of the Constitution of the Republic of South Africa, 1996, this article only considers the procedure and its effects from a constitutional property law point of view.3 Therefore, I argue that a sale in execution of property results in a deprivation of property for purposes of s 25(1) of the Constitution and as such must satisfy the non-arbitrariness test. The Constitutional Court has mentioned that a s 25 scrutiny of the sale-in-execution procedure – as an alternative to a s 26 analysis – could add a ‘new dimension’ to these cases,4 which is what this article explores.

Section 25(1) arguably applies in the broader context of having any property (whether movable or immovable) sold in execution to enforce any debt (whether secured or unsecured). Yet, for present purposes I only consider the following scenario: a debt created by contract, namely a typical home loan, such debt being secured by a mortgage over the immovable property in question, which security was expressly granted by way of agreement and registration.

Credit law and property law interact quite often and a clear example is when debt enforcement is accompanied by sale in execution of mortgaged property. A s 25(1) analysis of the sale-in-execution remedy must necessarily take account of the impact that consumer credit law has on the interests of the debtor and creditor. Therefore, the National Credit Act 34 of 2005 (NCA) is relevant in this context, since mortgage agreements fall within the scope of

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2 This phrase originates from Jaftha (ibid) para 51.
4 Jaftha (note 1 above) para 22.
the Act.5 Partly inspired by socio-economic considerations,6 the NCA was enacted to regulate consumer credit matters (including the enforcement of debt) and therefore it also contains socio-economic objectives.7 Significantly, the fact that the NCA envisions, amongst others, "to promote and advance social and economic welfare"8 ensures that poverty relief is a relevant factor when interpreting and applying the Act.9

Based on the subsidiarity principles,10 the contention of this article is that the NCA’s debt-review process – and specifically the debt rearrangement possibility – can (and must) be utilised to give effect to the requirement of s 25(1), namely that sales in execution may not result in arbitrary deprivation of property. Accordingly, debt rearrangement is presented as an alternative to full debt enforcement (and its effects, such as sale in execution), the conclusion being that if debt rearrangement is a viable option, direct recourse to a remedy that deprives the debtor of property should be avoided. In this perspective, the effect of a successful debt rearrangement would be to prevent deprivations of property that would have been arbitrary for failing to maintain a proportionate balance between the purpose of the deprivation and the effects thereof on individual debtors.11

Although other aspects of the Act also serve to protect and grant relief to struggling debtors – and therefore similarly contribute to establishing a constitutionally-appropriate balance between the parties’ rights – I limit my discussion to the role of debt rearrangement, particularly because it functions as substantive relief that renders sale in execution avoidable. As important as

5 NCA s 8(1)(b) read with s 8(4)(d). See also Collett v FirstRand Bank Ltd 2011 (4) SA 508 (SCA) para 1. It is important to consider that the NCA does not apply to every credit agreement the enforcement of which will result in the sale in execution of the debtor’s property. For example, s 9(4) read with s 4(1)(a)(i) and 4(1)(b) of the NCA determines that the Act does not apply to credit agreements where the mortgagor is a juristic person: see Van Heerden (note 3 above) 632 fn 1. Furthermore, in terms of s 4(1)(a)(i), 4(1)(b), 4(2)(c) the NCA does not provide protection for a surety that has mortgaged his property for the debt of juristic person or that of another natural person: see especially M Kelly-Louw ‘Should all Natural Persons Standing Surety be Protected by the National Credit Act 34 of 2005?’ (2012) 24 SA Merc LR 298; PN Stoop & M Kelly-Louw ‘The National Credit Act Regarding Suretyships and Reckless Lending’ (2011) 14 PELJ 67. These instances fall outside the scope of this article, but it is assumed (with taking a position) that these property owners’ constitutional rights will enjoy appropriate protection in other ways.


8 NCA s 3.

9 Ibid s 2(1) states that the Act must be interpreted in a manner that gives effect to its purposes. Also see Scholtz (note 7 above) 2–9.

10 See part II(c) below.

11 The arbitrariness test is explained in part III below.
procedural protection is, for present purposes the focus will consequently fall on the substantive protection that debt rearrangement can offer as a potentially viable alternative to foreclosure, rendering the deprivation of property unnecessary.

After explaining in part II that a sale in execution amounts to a deprivation of property for constitutional purposes, part III scrutinises the sale-in-execution remedy under the non-arbitrariness requirement in s 25(1) and emphasises the importance of debt relief measures, especially debt rearrangement.

II FORCED SALE AND CONSTITUTIONAL PROPERTY LAW

(a) The s 25 analysis

Section 25(1) of the Constitution provides that ‘[n]o one may be deprived of property except in terms of law of general application, and [that] no law may permit arbitrary deprivation of property’. First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance is still the leading case on the property clause and it provides a methodology for adjudicating s 25 disputes. The first four steps of the FNB methodology, taken from Roux’s seven-step list, are (a) Does that which is taken away from [the property holder] by the operation of [the law in question] amount to property for purpose of s 25; (b) Has there been a deprivation of such property by the [organ of state concerned]? (c) If there has, is such deprivation consistent with the provisions of s 25(1)? (d) If not, is such deprivation justified under s 36 of the Constitution?

For current purposes I limit the discussion to s 25(1) and do not consider the subsections pertaining to expropriation or land and related reforms.

Firstly, I explain how the interest affected by a judicial sale is ‘property’ for purposes of s 25; and, secondly, why a forced sale should be regarded...
as a ‘deprivation’. These two steps are threshold questions and will often be uncontroversial. Moreover, it has become clear, as Roux predicted, that the s 25 enquiry will mainly focus on whether or not the deprivation is arbitrary.\(^1\)

For this reason my main focus is on the non-arbitrariness test. It is furthermore becoming increasingly clear that the fourth step, namely whether an arbitrary deprivation can be justified under s 36(1) of the Constitution, will not play a major role in the s 25 analysis. The reason for this is that it is unlikely that an arbitrary deprivation can be ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’.\(^2\)

(b) Deprivation of property

Section 25(4)(b) states that property is not limited to land, which means that land (immovable property) must necessarily qualify as ‘property’.\(^3\)

Therefore, it is beyond doubt that a debtor’s immovable residential property and his right of ownership in the home qualify as interests that are protected under s 25.

The Constitutional Court defined deprivation by holding that ‘any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned’.\(^4\)

Hence, deprivation entails ‘all species’ of ‘interference’, while expropriation forms a specific subcategory of deprivation.\(^5\)

A forced sale of one’s property should qualify as ‘any interference’ with property, since it is a state-sanctioned and judicially-approved interference against the owner’s will. When the sheriff disposes of the debtor’s property by way of sale in execution, he acts as an executive of the law and not as an agent of any person.\(^6\)

When the sheriff commits himself to the conditions of sale, he does so in his own name according to his statutory authority and may also enforce it as such.\(^7\)

This power is implicit in the duty to pass transfer in terms of the

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\(^{1}\) The author refers to the non-arbitrariness test as a ‘vortex’ in which the entire s 25 analysis will be sucked into: see Roux (note 13 above) 46-2 – 46-5. Also see Van der Walt (note 13 above) 109. For recent case law that illustrates this observation, see Opperman v Boonzaaier (24887/2010) [2012] ZAWCHC 27 (17 April 2012); Opperman (CC) (note 15 above).


\(^{3}\) Also see FNB (note 14 above) para 51; Transvaal Agricultural Union v Minister of Land Affairs 1996 12 BCLR 1573 (CC); Van der Walt (note 13 above) 108; Roux & Davis (note 13 above) 20-17.

\(^{4}\) FNB (note 13 above) para 57. The Constitutional Court later apparently retreated from this wide interpretation of ‘deprivation’ in Mkontwana (note 15 above) para 32 by requiring a substantive interference that ‘goes beyond the normal restrictions on property in an open and democratic society’. However, this definition is not generally accepted and has been criticised by AJ van der Walt ‘Retreating from the FNB Arbitrariness Test Already? Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) (CC)’ (2005) 122 SALJ 75, 75–89. Also see the more recent decision on s 25(1) in Opperman (CC) (note 15 above) para 66.


\(^{6}\) Ivoral Properties (Pty) Ltd v Sheriff, Cape Town 2005 (6) SA 96 (C) para 66.

\(^{7}\) Sedibe v United Building Society 1993 (3) SA 671 (T) 676.
court rules, which oblige the sheriff to do anything necessary to register the transfer.\textsuperscript{26} The sheriff must give transfer to the purchaser against payment of the purchase price and upon performance of the conditions of sale, and may for that purpose do whatever is necessary to effect registration of transfer.\textsuperscript{27} Anything done by the sheriff in the process of giving transfer of the property to the auction purchaser is as valid and effectual as if he were the owner of the property.\textsuperscript{28}

Therefore, a deprivation of ownership of immovable property takes place when the property is transferred by the sheriff to the auction purchaser. The owner is not a party to the sale transaction that takes place at the auction or to the transfer of ownership that takes place during registration. Rather, what occurs is a state-orchestrated, involuntary reallocation of property to serve a public purpose, namely the orderly enforcement of debt. Consequently, insofar as sale in execution amounts to a person being deprived of property, the first two \textit{FNB} questions have been answered in the affirmative and consequently the requirements of s 25(1) must be satisfied.

(c) Law of general application and the subsidiarity approach

As a first requirement, s 25(1) insists that a valid deprivation must be authorised by ‘law of general application’. The focus of this part of the enquiry is hence not on the interference that causes the deprivation, but on the \textit{law that permits it}.\textsuperscript{29} Commentators assume that law of general application (a concept that also appears in s 36(1)) will be interpreted widely to include all original and delegated legislation, including court rules and principles of the common law.\textsuperscript{30} Court rules\textsuperscript{31} authorise and oblige the sheriff to attach the applicable property by notice, as ordered by a writ (or warrant) of execution. The warrant of execution is issued by a registrar or clerk after a judge or magistrate declares the property executable\textsuperscript{32} and, if the warrant is valid on face value, it serves as absolute justification for everything the sheriff does in order to execute the warrant.\textsuperscript{33} The sheriff has no discretion in this regard and merely adheres to the court order.\textsuperscript{34} The forced transfer of property is therefore conducted in terms of law of general application, namely the court rules that authorise the sheriff’s actions. The underlying common law and legislative principles that

\begin{itemize}
\item \textsuperscript{26} High Court Rule 46(13); Magistrates’ Courts Rule 43(13).
\item \textsuperscript{27} Ibid.
\item \textsuperscript{28} Ibid.
\item \textsuperscript{29} Van der Walt (note 13 above) 235.
\item \textsuperscript{31} The process is authorised by High Court Rule 46 and Magistrates’ Courts Rule 43, which are applicable to the procedures in the respective courts.
\item \textsuperscript{32} See, for example, \textit{ABSA Bank Ltd v Setai} (14498/11) [2012] ZAGPHC 100 (13 June 2012).
\item \textsuperscript{33} Deputy-Sheriff, Cape Town v South African Railways and Harbours 1976 (2) SA 391 (C) 396.
\item \textsuperscript{34} Supreme Court Act 59 of 1959 s 36(1)–(2) and the Magistrates’ Courts Rule 8 oblige the sheriff to execute all processes directed at him, including writs of execution.
\end{itemize}
govern the way courts decide whether to declare such properties executable also form part of the law that authorises this deprivation.\footnote{35}

In terms of the subsidiarity principles,\footnote{36} the source of law is important when the constitutional validity of an action is challenged. The Constitutional Court has held that, firstly, when a party argues that a constitutional right had been infringed, he must rely on legislation that had been promulgated to give effect to that right.\footnote{37} In other words, the claimant may in such a case not directly rely on the constitutional provision and simply ignore the legislation in place, although the constitutional validity and effectiveness of the legislation may be attacked based on non-compliance with the underlying constitutional provision.\footnote{39} The legislation must also be interpreted with reference to the constitutional provision.\footnote{39} The Constitutional Court’s second subsidiarity principle is that, when legislation had been promulgated to give effect to a constitutional provision, the litigant must rely on the legislation and not directly on the common law.\footnote{40} Accordingly, the common law should not be developed if legislation had already been enacted to protect the relevant constitutional right or to promote the constitutionally desired result.

Therefore, the subsidiarity principles emphasise the importance of legislation in situations where legislation is in place to regulate certain matters. In evaluating whether sales in execution comply with s 25(1) the point of departure must be the current legal framework, namely the common law principles and the procedural rules and legislation. These must be interpreted

\footnote{35} The Constitutional Court has also decided that the common law qualifies as law of general application for purposes of s 25(1): see Du Plessis v De Klerk 1996 (3) SA 850 (CC) para 44; S v Thebus 2003 (6) SA 505 (CC) paras 64–5.


\footnote{38} Van der Walt (note 13 above) 66; Van der Walt (2008) (note 36 above) 101, 104 & 115, referring to South African National Defence Union ibid para 52; Minister of Health NO v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign as amici curiae) 2006 (2) SA 311 (CC) para 437; Sidumo v Rustenburg Platinum Mines Ltd 2008 (2) SA 24 (CC) para 249; Engelbrecht v Road Accident Fund 2007 (6) SA 96 (CC) para 15.

\footnote{39} Constitution s 39(2).

\footnote{40} Van der Walt (note 13 above) 66–7; Van der Walt (2008) (note 36 above) 103–5, relying on Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs 2004 (4) SA 490 (CC) para 25; New Clicks (note 38 above) para 96; Chirwa (note 37 above) para 23; Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2007 (6) SA 4 (CC) para 37; Walele (note 37 above) para 15.
so as to not ‘permit arbitrary deprivation of property’. Accordingly, the question is whether the current legal principles are sufficient to ensure that arbitrary deprivations of property do not take place in the sale-in-execution context. As it becomes clear below, I emphasise the NCA and show that its provisions are able to ensure that s 25(1) is respected in these cases. The existence of the NCA also implies that it is not permissible to develop the common law principles of mortgage foreclosure in order to promote constitutional aspirations, since the NCA already provides for constitutionally compliant outcomes (or at least has the potential to do so). The idea behind subsidiarity is that South Africa has a single system of law and that the common law should not be developed as a strand of law that is separate from statutory and constitutional law. If statutory law already gives effect to constitutional principles, it is not allowable to develop the common law in order to do something that a statute (for instance, the NCA) already does or envisions doing. Moreover, if there is legislation in place, s 39(2) of the Constitution requires it to be interpreted for compliance rather than developing the common law for the same purpose.

III IS THE DEPRIVATION ARBITRARY?

(a) The test

If the law that authorises the state to conduct forced judicial sales of debtors’ properties ‘does not provide sufficient reason for the particular deprivation in question’, the deprivation will be arbitrary. It will also be arbitrary if the deprivation is ‘procedurally unfair’. This article only focuses on the sufficient-reason part of the test and hence assumes (without taking a position) that the current sale-in-execution procedure is fair.

To establish whether there is sufficient reason for a deprivation, the relationship between the deprivation and the purpose of the law must be investigated. For purposes of this analysis, ‘[a] complexity of relationships has to be considered’. These include the relationship between the purpose of the deprivation and the person whose property is affected, and the relationship between the purpose of the deprivation and the nature of the property. There must be a sufficient nexus between, on the one hand, the deprivation in question and the effect that it has on the owner (the means used) and, on the other hand, the reasons for the deprivation (the end achieved).

41 Pharmaceutical Manufacturers Association of SA In re Ex parte President of the Republic of South Africa 2000 (2) SA 674 (CC) para 44. Also see Du Plessis (2008) (note 36 above) 32–152.
42 See further Brits (note 3 above) paras 3.5 & 6.2.2.
43 FNB (note 14 above) para 100.
44 Ibid.
45 For example, the former lack of judicial oversight could have been attacked as leading to procedurally arbitrary results. See also AJ van der Walt ‘Procedurally Arbitrary Deprivation of Property’ (2012) 23 Stellenbosch LR 88, 93–4.
46 FNB (note 14 above) para 100(a).
47 Ibid para 100(b).
48 Ibid para 100(c)–(d).
The nature of the test may vary between, in some cases, establishing a mere rational relationship between the means sought and the ends achieved and, in other cases, conducting an evaluation closer to a proportionality-like test as in s 36 of the Constitution. Therefore, the court has a discretion as to how ‘thick’ or ‘thin’ the test should be, depending on the nature of the property and the extent of the deprivation. Ultimately, ‘sufficient reason’ will be established based on the facts of each particular case. Because a sale in execution effects the deprivation of ‘land’ and involves ‘all the incidents of ownership’, a ‘more compelling’ purpose would generally have to be presented than may otherwise be the case. The test would be even stricter if the debtor faces poverty and homelessness.

The FNB analysis implies that the non-arbitrariness standard consists of two elements, a broader and a narrower enquiry. The broader question is whether the kind of forced transfer of property one is dealing with (that is, sale in execution) generally serves a valid and legitimate public purpose. It has been argued on logical grounds (and based on foreign examples) that s 25(1) includes this implicit public-purpose requirement as part of the non-arbitrariness test. As I elaborate below, few will deny the general need and justification for selling immovable property (even residential) to execute valid debts, especially those secured by mortgage bonds. Yet, one might become more sceptical of forced sales in certain individual cases where socio-economic hardships are present. This is where the second, narrower enquiry comes in, during which one assumes that the kind of deprivation is generally acceptable, but it is nevertheless necessary to scrutinise individual cases to assess whether the sale in execution will be non-arbitrary under those particular circumstances. After all, FNB does not merely require ‘sufficient reason’ generally, but ‘sufficient reason for the particular deprivation in question’.

(b) Non-arbitrariness on a general level

In Gundwana v Steko Development, a case dealing with the impact of the housing clause on the mortgage foreclosure process, the Constitutional Court explained that, because sale in execution is ‘part and parcel of normal economic life’, it is ‘in itself … not an odious thing’. This statement reflects the stance that execution against homes is generally legitimate. The fact that the debt was voluntarily secured by registering a mortgage bond over

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49 Ibid para 100(g).
50 See Van der Walt (note 13 above) 246.
51 FNB (note 14 above) para 100(h).
52 Ibid para 100(e) & (f). For a good example of how the FNB non-arbitrariness test was applied in recent case law, see Opperman (CHC) (note 19 above) and Opperman (CC) (note 15 above).
53 See Van der Walt (note 13 above) 225–7, where he discusses foreign law in which an implicit public purpose requirement has been accepted.
54 FNB (note 14 above) para 100 (my emphasis).
55 2011 (3) SA 608 (CC). See Van der Walt & Brits (note 3 above).
56 Gundwana ibid paras 54 & 53.
the property is the main factor when analysing the justification of the forced sale. Moreover, the sale in execution of mortgaged homes (under appropriate circumstances) is justifiable because mortgage bond finance is an ‘important socioeconomic tool’ that, amongst others, enables people to purchase homes and enjoy capital growth over time. Therefore, society’s belief that courts will uphold mortgage bonds ought not to be undermined. Execution against homes is necessary for promoting the value of having a home because it facilitates credit. In addition, the provision of home loans by the private sector assists the state in fulfilling its obligation of providing housing to the poor. Any over-cautious hindrance in the way of private home loan provision may accordingly undermine the state’s housing and poverty relief initiatives. Exempting homes as such from the sale-in-execution process will also defeat the purpose of registering mortgage bonds, which will leave many people in a ‘poverty trap’.

Consequently, the general justification for having mortgaged property – even homes – sold in execution can be accepted, particularly also because mortgages are freely agreed-upon security arrangements. Broadly speaking, there is ‘sufficient reason’ to allow this kind of deprivation of this kind of property for this kind of purpose. In fact, in the hands of the mortgage creditor, the real security right is in itself also ‘property’ for constitutional purposes and hence protected against arbitrary interference.

The argument finds support in FNB, where Ackermann J held, in the process of doing the non-arbitrariness test, that ‘to exact payment of a customs debt … is a legitimate and important legislative purpose’. By analogy, the same can be said for the enforcement of private debts. FNB concerned legislation that provided for the creation of a statutory security right over all the property present on the custom debtor’s premises, whether owned by the debtor or not. The enforcement procedure in this case – the means that the legislation

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57 Nedbank Ltd v Fraser and Four Other Cases 2011 (4) SA 363 (GSJ) para 26, relying on Jaftha (note 1 above) paras 58 & 60. See also ABSA Bank Ltd v Petersen 2013 (1) SA 481 (WCC) paras 33–7.
58 FirstRand Bank Ltd v Folscher, and Similar Matters 2011 (4) SA 314 (GNP) para 39.
60 Fraser (note 57 above) para 22.
62 The Constitutional Court rejected proposals to introduce an exemption for homes below a certain value, since it would lead to a ‘poverty trap’ for those who can only afford homes below this threshold: see Jaftha (note 1 above) para 51. However, Van Heerden & Boraine (note 3 above) 347–52 suggest that exempting homes under certain circumstances may prove to be less expensive and more appropriate in some cases. See also Steyn (2012) (note 3 above) 345 & 410–1.
63 In FNB (note 14 above) para 51, the Constitutional Court confirmed that constitutional property not only refers to objects of property, but also to rights in property. Commentators agree that real rights in property (for example mortgages) will be regarded as ‘property’ for s 25 purposes: see Van der Walt (note 13 above) 140; I Currie & J de Waal The Bill of Rights Handbook 5 ed (2005) 538; PJ Badenhorst, JM Pienaar & H Mostert Silberberg and Schoeman’s the Law of Property 5 ed (2006) 536; Roux (note 13 above) 46-13.
64 See further Brits (note 3 above) paras 6.4 & 7.2.
65 FNB (note 14 above) para 108.
employed to achieve its end – involved the deprivation of property under circumstances where (a) the affected property owner had no connection with the debt; (b) the property itself had no connection with the debt; and (c) the property owner did not transact with or place the property in the debtor’s possession.  

Therefore, the Constitutional Court found that, despite the legitimate and important purpose of the deprivation, there was insufficient reason for the legislation to deprive persons other than the debtor of their property. These three factors can be formulated as the following questions: (a) Is there a connection between the property owner and the debt? (b) Is there a connection between the property and the debt? (c) Did the parties transact with each other to create the debt and the right of security? The answer to all three questions will be positive in every typical mortgage case, which fact distinguishes these cases not only from FNB but also from Jaftha. Firstly, the owner is the one who owes the debt. Secondly, there is no closer relationship between debt and property than the one established by the real security right of mortgage. Thirdly, the parties voluntarily agreed to the conclusion of the home loan and the registration of the mortgage bond. This conclusion expresses the justification for the enforcement of mortgage debts on a general level. If these were the only requirements for establishing whether the sale in execution of a mortgaged home is arbitrary, all such sales would always be constitutionally valid. However, one would have to take the enquiry one step further and evaluate the effect that sale in execution would have on the individual homeowners – especially in light of poverty and homelessness concerns.

(e) The narrower case-by-case scrutiny

The fact that the creditor is relying on a mortgage bond is probably sufficient to classify the sale in execution as rational, despite the outcome. The reason for this proposition is that sales in execution of mortgaged homes are generally justifiable and therefore it would not be irrational for a creditor to make use of its valid entitlement to insist on this remedy. However, the individual case-by-case scrutiny would often have to move closer to the ‘thicker’,
proportionality side of the continuum, due to the extent of the impact that the deprivation has on specific debtors. During this case-by-case test one must consider the impact on the individual debtors despite the fact that the creditor has a rational and valid expectation to insist on sale in execution. It would be arbitrary for the law to allow a sale in execution when there is a disproportionate relationship between the creditor’s rational expectation (and purpose) and the impact this would have on the debtor. Just how ‘thick’ the test should be will depend on the facts of each case.\textsuperscript{74} For example, where the sale will result in permanent homelessness, the test should be more stringent than the case where the debtor can readily attain alternative accommodation.

The difference in ‘thickness’ of the test necessitates a debt enforcement system and relief mechanisms that would be sufficiently nuanced to take account of variances in individual cases. One must establish whether, in a narrow sense, arbitrariness is or can be avoided in individual cases, based on the impact that the deprivation would have on the individual owner. The test would also require (similar to the test under the housing clause) that ‘regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes’.\textsuperscript{75} In \textit{Gundwana}, Froneman J went on to explain that ‘[i]f the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders’.\textsuperscript{76} The same can be said from a s 25(1) perspective.

Therefore, when investigating sales in execution on an individual basis the emphasis is on alternative ways to achieve the purpose of the sale. If there are alternatives that would still give effect to creditors’ legitimate expectations, but that can avoid the loss of the home, then going ahead with the sale will be unjustifiable.\textsuperscript{77} In the phraseology of s 25(1), the deprivation of property will be arbitrary, since the reason for selling the home is not ‘sufficient’ under circumstances where other, less restrictive ways are available. However, a strict application of the traditional common law principles of mortgage law does not allow for such an inquiry into alternatives.

One of the fundamental principles of mortgage foreclosure is that the creditor is entitled to direct execution against the immovable property that is burdened with the mortgage.\textsuperscript{78} This principle makes sense in view of the fact that the creditor has a property right (that is, a limited real right) to that particular object, which is the essence of the mortgage creditor’s security. Therefore, the creditor is entitled to execute its claim for the outstanding debt against the mortgaged home notwithstanding that the debt can be satisfied in another way – for example, by executing it against other assets.

\textsuperscript{74} \textit{FNB} (note 14 above) para 100(g); Van der Walt (note 13 above) 246.
\textsuperscript{75} \textit{Gundwana} (note 55 above) para 53.
\textsuperscript{76} Ibid para 53.
\textsuperscript{77} See \textit{Jaftha} (note 1 above) para 59.
Unlike unsecured debts, the mortgage creditor is under no obligation to first seek execution against other assets before it applies to have the mortgaged property declared executable. Yet, this state of affairs may seem unsatisfactory in some individual cases. The debtor might accordingly be deprived of property even though such deprivation is not necessary to fulfil the purpose of the deprivation. In other words, foreclosure and sale in execution can technically go ahead even though there is the possibility that the debt can be satisfied or the arrears purged in a way that does not require the drastic measure of having the home sold. The result would be arbitrary, since there would not be ‘sufficient reason’ to effect the deprivation of property under those particular circumstances.

Therefore, although there is generally sufficient justification for the sale in execution of mortgaged homes, it is clear that this will not always be true in every individual case. In some cases, the impact that the sale would have on the individual homeowners would be disproportionate to the size of the debt and in view of personal hardships. The primary solution to this potential arbitrariness of execution is to seek creative alternatives to sale in execution, which is something for which the strict application of the common law currently does not allow.

(d) Debt rearrangement as an alternative

The foregoing discussion illustrates that strict enforcement of a mortgage creditor’s rights under the common law might sometimes result in arbitrary deprivation of the debtor’s property. The reason for this is that the home is sold in execution despite the fact that the creditor’s purpose could be satisfied in another, less invasive manner. The question is whether the common law should be developed so as to place an obligation on mortgage creditors not to seek execution against homes before alternatives have been exhausted. In view of the subsidiarity principles discussed in part II(c) above, I argue that such a constitutionally inspired development of the common law is not permissible, since there is already legislation in place that can give effect to the Constitution in this respect. Consequently, it is suggested that the NCA and its debt relief mechanisms are prime sources for a solution to the arbitrariness that might ensue in certain cases if foreclosure is strictly enforced. Hence, the NCA serves as the bridge between mortgage doctrine and the requirements of constitutional property law.

Although there is room for improvement and further development, the Act has brought us closer to the ideal that sale in execution should only take place as a last resort. It seems apparent that someone who falls in arrears with a credit agreement and is unable to purge such default is over-indebted. Accordingly, mortgage default can generally be ascribed to what the NCA calls ‘over-indebtedness’. The Act provides certain mechanisms to assist debtors

79 See Jaftha (note 1 above) para 59.
80 For the definition of over-indebtedness, see s 79(1) of the NCA.
who are over-indebted so as to resolve their problems (if feasible) in a way that would avoid full debt enforcement and foreclosure. To restrict the length of this article, I do not discuss the NCA in detail. I only mention the debt-review option without discussing its exact operation or the uncertainties surrounding it. I also particularly focus on one of the consequences of a successful debt review, namely debt rearrangement. Despite practical and interpretational problems, my argument is that debt rearrangement in principle has the potential to give effect to the s 25(1) non-arbitrariness standard and that it can be of help in the context of poverty relief. Other consumer protection aspects of the Act, although not discussed here, no doubt also contribute to the protection of mortgage debtors, both generally and with regard to their property.

The Constitutional Court has also confirmed that the NCA must be interpreted to establish a balance between the interests of debtors and creditors; although the NCA aims to protect consumers, the interests of creditors must not be disregarded. In my view, the arbitrariness test presents a useful paradigm to determine this balance, the reason being that it compares the purpose of sale in execution (namely the enforcement of the creditor’s valid entitlements) and the impact that this would have on the debtor’s welfare. Rearrangement of the debt can bring the two parties’ interests closer to each other, on the one hand, still giving effect to the creditor’s rights (albeit postponed and restructured) while, on the other hand, keeping the debtor in his home if at all possible.

A debtor who wishes to make use of the NCA’s debt review process can do so by following one of two routes. Firstly, before debt-enforcement proceedings begin by receipt of the notice of default (if the debtor has not yet defaulted or if he has defaulted but the creditor has not yet taken action), the debtor can approach a debt counsellor and apply to be placed under debt review. When the counsellor accepts the application, a notice must be sent to the creditor, after which the creditor is prohibited from taking debt enforcement action until the debt review process is completed.

However, if the matter is not completed within 60 business days, the creditor can have the debt review terminated by

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81 For more information, standard academic works can be consulted: see, for example, JM Otto & R-L Otto The National Credit Act Explained 3 ed (2013); Scholtz et al (note 7 above); M Kelly-Louw Consumer Credit Regulation in South Africa (2012).

82 An example of another useful protection mechanism that the Act provides is found in s 129(3)–(4), namely the debtor-in-default’s right to have the credit agreement reinstated by getting the amount in arrears (as well as some other charges) up to date, thereby preventing or even overturning the creditor’s election to foreclose the bond. For more detail on this mechanism, see R Brits ‘Purging Mortgage Default: Comments on the Right to Reinstate Credit Agreements in Terms of the National Credit Act’ (2013) 24 Stellenbosch LR 165.

83 Sebola v Standard Bank of South Africa Ltd 2012 (5) SA 142 (CC) para 40 (with reference to the purposes of the Act in s 3, and quoting with approval from Nedbank Ltd v National Credit Regulator 2011 (3) SA 581 (SCA) para 2; and Rossouw v FirstRand Bank Ltd 2010 (6) SA 439 (SCA) para 17.

84 NCA s 129(1)(a).

85 Ibid s 86(1).

86 Ibid ss 86(4)(b)(i) & 88(3).
way of a notice. On application, a magistrate may nevertheless order the review to continue under just conditions. During the review process, the counsellor must assess all of the debtor’s financial information and make a proposal as to whether or not the debtor should be declared over-indebted, along with a suggestion on how the debtor’s obligations can be restructured (if possible).

If the debtor does not apply for debt review before he receives the notice of default, he can no longer apply for the full debt review process described above. However, if an allegation of over-indebtedness is made during any proceedings that concern a credit agreement, the court has a discretion to refer the matter to a debt counsellor or to itself make an order of over-indebtedness. Various cases have developed principles as to how courts should exercise this discretion. To mention a few examples: the allegation should be made in good faith; the debtor should explain its failure to apply for debt review earlier; the viability of debt rearrangement must be shown; and sufficient information must be provided to establish over-indebtedness and to enable the court to exercise its discretion. I propose that, during the exercise of this discretion, courts should be particularly attentive of the

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87 Ibid s 86(10).
88 Ibid s 86(11). On the interpretation of s 86(10)–(11), see Collett (note 5 above).
89 Ibid s 86(6)–(7). For present purposes I do not consider the situation where the mortgage loan was concluded recklessly, in which case certain remedies (including debt rearrangement) are available that might similarly prevent the sale of the home. See ss 80–4 of the NCA. In general, also see CM van Heerden & A Boraine ‘The Money or the Box: Perspectives on Reckless Credit in Terms of the National Credit Act 34 of 2005’ (2011) 44 De Jure 392; A Boraine & C van Heerden ‘Some Observations Regarding Reckless Credit in Terms of the National Credit Act 34 of 2005’ (2010) 73 THRHR 650; ML Vessio ‘Beware the Provider of Reckless Credit’ 2009 Tzar 274.

90 NCA s 86(2). On the interpretation of this provision, see National Credit Regulator (note 83 above).


93 Olivier ibid paras 17–9; Panayiotts ibid para 28; Standard Bank of South Africa Ltd v Hales 2009 (3) SA 315 (D) para 17.

94 Mvelase (note 92 above) paras 60 & 69; FirstRand Bank Limited v Swarts (25699/2009) [2010] ZAWCHC 35 (1 March 2010) para 8; Allard (note 92 above) paras 35–43; Hales ibid para 23; Rees (note 92 above) para 19; First National Bank v Adams 2012 (4) SA 14 (WCC) para 30; FirstRand Bank Ltd v Munsamy (00/0000) [2013] ZAWCHC 13 (14 February 2013) paras 20–3; FirstRand Bank Ltd v Mdulu (149/2012) [2012] ZAECGH 23 (3 May 2012) paras 9–12.

95 Olivier (note 92 above) para 20; FirstRand Bank Ltd v Bernardo (608/09) [2009] ZAECPEHC 19 (28 April 2009) paras 18–21; Panayiotts (note 92 above) paras 8–10, 24, 42, 52; FirstRand Bank Ltd formerly known as First National Bank of South Africa Ltd v Meiring (22041/10) [2011] ZAWCHC 92 (19 April 2011) paras 12–4, Hales (note 93 above) para 22; Swarts ibid para 7.
debtor’s socio-economic circumstances. If debt enforcement will result in the sale of the debtor’s home, courts should not lightly allow proceedings to go ahead before debt review is not duly considered.96 Moreover, even though the NCA does not technically allow the court mero motu to exercise this discretion (an allegation of over-indebtedness must be made first), it should nevertheless be attentive in cases where debtors do not make appearances to defend.97 Courts should be reluctant to grant default judgments (that will lead to sale in execution) under circumstances where debt counselling has not been conducted, but on the facts appears to be an appropriate option.98 If a home is sold in execution without even considering the alternatives (for instance, debt review), the resultant deprivation will fall short of the non-arbitrariness standard – not only substantively, but possibly also on a procedural level.

The point is that a debtor whose indebtedness is capable of rearrangement should in principle find help in the NCA’s provisions. The value of rearrangement lies therein that it aims to establish a more proportionate balance between the interests of the debtor and creditor than would otherwise be the case. Instead of giving full effect to the creditor’s rights and instead of completely denying the creditor’s rights to protect the vulnerable debtor, the Act provides a way to uphold both parties’ rights. If the review is successful, the debtor will retain his home and have a restructured payment plan – for example, a lower monthly instalment over an extended time period. The creditor will still receive repayment of the debt, albeit over a longer period, which is the compromise it would have to accept in view of the protection that the home-owning debtor requires.

The NCA leaves room for some degree of creativity when it comes to the content of restructuring orders. A one-size-fits-all way of rearranging consumers’ obligations should be avoided, since it is important to structure the specific payment plan in a way that is tailored to the debtor’s circumstances. Moreover, courts should not be too conservative with the content of restructuring orders, especially when the loss of a debtor’s home is at stake. At the same time, an unrealistic rearrangement order (with very long repayment periods) that keeps the homeowner indebted for most (if not all) of the rest of his life should also be avoided. Accumulating interest will furthermore result in debtors paying more than they otherwise would have. Therefore, debt relief in the form of a rearrangement order should be regarded

96 See Gundwana (note 55 above) para 53, where the Constitutional Court held that alternatives should be judicially considered before a home is declared executable. See also Kreuser (note 91 above) 16–7.

97 For example, as Otto (note 91 above) 406–7 points out, the failure of the Act to provide for a mero motu power to refer the matter to debt counselling is one of the shortcomings of the process. I nevertheless argue in Brits (note 3 above) para 4.3.4.7 that the courts should read such a power into the discretion so as to give proper effect to vulnerable debtors’ constitutional rights.

98 See Firstrand Bank Ltd v Maleke and Three Similar Cases 2010 (1) SA 143 (GSJ), where the court did not want to uphold the foreclosure action because the circumstances appeared ripe for debt review, which would render sale of the homes unnecessary. In essence, this case supports the contention that, to grant the execution order without first making use of debt counselling would, under certain circumstances, lead to disproportionate (and arbitrary) results.
as a temporary solution to prevent the forced loss of the family home and the
concomitant socio-economic consequences. The wise debtor would use the
breathing room provided by debt relief to escape his financial troubles so as
to once again increase the monthly instalments and eventually repay the debt.
The time could also be used to effect a private sale of the house, since this
option would keep him and his family’s dignity intact and, if he waits until the
housing market is healthier, the sale might fetch a better price than it would at
an auction. Hence, the true benefit of debt review and debt rearrangement is
time, which is often exactly what an over-indebted homeowner needs during
periods of economic turmoil. If default is a result of sudden unemployment,
I would even support a restructuring order that postpones all payments for a
certain period, for example a reasonable time within which one can expect
the debtor to find new employment. There are certainly other creative ways to
accommodate debtors in a viable manner.99

It is important to realise that there will be circumstances where the debtor’s
financial situation is so dire that debt review and rearrangement is simply
not a commercially realistic option. Debt review cannot prevent all sales in
execution, because creditors’ valid claims must be upheld as well. Indeed,
the ideal is that the debt counsellor’s conclusions should indicate whether
or not sale in execution can be prevented in the process of remedying the
debtor’s over-indebtedness. If, as a last resort, the property has to be sold, the
resulting deprivation will not be arbitrary because there is sufficient reason
for it. However, I emphasise that one should not be too quick to come to the
conclusion that one has reached the stage where sale in execution is inevitable.

IV CONCLUSION

The law that governs the judicial sale of residential property has become an
example of what Mokgoro J referred to as a welfare issue becoming a property
issue.100 This article does not encourage courts to not enforce valid contractual
debs or to refuse the entitlements of mortgage creditors. It has to be accepted
that sometimes there will be no other way than to have the debtor’s property
sold, even if it is his home and even if the sale will render him and his family
homeless. Section 25(1)’s non-arbitrariness test will often be satisfied in view
of the public importance of an effective debt enforcement system and the fact
that there is no other way to achieve that purpose in the individual case.

Nonetheless, courts should ensure that the NCA is made use of when
appropriate. The interpretation given to the debt relief mechanisms of this
Act should take socio-economic considerations into account and not only
financial factors. Specifically, the non-arbitrariness standard of the property
clause should be infused into the way courts grant relief in terms of the NCA.
Disproportionate results (that is, arbitrary deprivations) should be avoided in

99 For instance, see the way in which the court in Munsamy (note 94 above) para 28 made suggestions
as to how the debtor’s short-term cash flow problem might be solved.
100 Jaftha (note 1 above) para 30.
sale-in-execution cases. Debt review – and especially a creative development of the debt-rearrangement remedy – will go a long way to ensuring that the law of debt enforcement is sensitive to the impact that forced sales can have on debtors’ welfare. The NCA is by no means perfect, and periodical amendments should take place to improve debt relief mechanisms so that they become increasingly creative and accommodating to the needs of property-owning debtors’ constitutional rights.

The fact that a debtor is poor and/or facing homelessness should not – on its own – be enough to deny a sale in execution. As Bertelsmann J has commented, courts should not be seen to interfere ‘willy-nilly’ with established practices such as mortgage foreclosure.\(^{101}\) Hence, what is needed is a more detailed proposal as to how the law can be of assistance to debtors who face the sale in execution of their homes. Also, in cases where alternatives such as debt-relief mechanisms would impose more than the normal restrictions on creditors’ rights, such impositions would have to be reasonably predictable and justified in constitutional terms as well. An appropriate balance is certainly necessary, but one should not exclude the possibility that the balance of protection might sometimes weigh heavier on the side of the vulnerable homeowner, and that creditors might then have to be content with waiting longer for their claims to be satisfied. However, even in such cases, a nuanced regulatory framework should be developed in a way that would not leave creditors in such an uncertain position as to discourage lending to certain classes of the population. I believe such a framework is possible, starting from what the NCA currently provides and developing its mechanisms further.

\(^{101}\) *Ntsane* (note 73 above) para 72.