IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED:

In the applications of:

Case number: 2018/00612

ABSA BANK LIMITED Plaintiff /Applicant

and

DOKKIE KENNETH MOKEBE Defendant / Respondent

Case number: 2017/48091

ABSA BANK LIMITED Plaintiff /Applicant

and

REASCAR LEBOGANG KOBE Defendant / Respondent

Case number: 2018/1459

ABSA BANK LIMITED Plaintiff / Applicant

and

MALIBONGWE NOEL VOKWANI Defendant / Respondent

Case number: 2017/35579

THE STANDARD BANK OF SOUTH AFRICA LIMITED Plaintiff / Applicant

and

ILLAN SAMSON COLOMBICK First Defendant / Respondent

PAMELA EVLIN KIMBERG Second Defendant / Respondent

INVESTEC BANK LIMITED First Amicus Curiae

NATIONAL CREDIT REGULATOR Second Amicus Curiae

SOCIO-ECONOMIC RIGHTS INSTITUTE OF SOUTH AFRICA Third Amicus Curiae

LEGAL AID SOUTH AFRICA Fourth Amicus Curiae

LAW SOCIETY OF SOUTH AFRICA Fifth Amicus Curiae

LUNGELO LETHU HUMAN RIGHTS FOUNDATION Sixth Amicus Curiae

Coram: TSOKA ET PRETORIUS ET WEPENER JJ

Heard: 28 August 2018

Delivered: 12 September 2018

Summary: Foreclosure - The monetary judgment is part of the cause of action when execution against immovable property is concerned – the issues are intrinsically connected and must be brought in one proceeding and not piecemeal. All the facts should be placed before the court to sustain the

relief sought. A failure to do so, disentitles a party to relief. When a court is appraised of all the facts, a decision whether to place a reserve price on the sale of a house that may be sold in execution, can be properly taken. Each matter will depend on its own facts.

JUDGMENT

THE COURT:

Introduction

[1] It is an economic reality that most citizens who acquire immovable property are unable to afford to pay the cash price of such property due to the marked difference in property prices and the wealth, or lack thereof, of ordinary citizens. The mechanism, developed over many centuries, to assist the man in the street to acquire property is by way of a loan (home loan) from lenders, usually banks[1], who grant a loan to the home owner[2] and then register a bond over the property purchased by the home owner. Bond finance is consequently an important socio-economic tool, which enables individuals to acquire a home. The corollary of this is the security given to lenders against the finance afforded to borrowers by way of mortgage bond. The lender or mortgagee becomes a secured creditor in the estate of the home owner[3]. The security and legal benefits

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[1] The terms 'bank', 'creditor', 'in judgment creditor', 'credit grantor', 'bond holder', 'lender' and 'mortgagee' are used interchangeably.

[2] The terms home 'owner', 'consumer', 'borrower', 'debtor' and 'mortgagor' are used interchangeably.

[3] An apt, succinct summary of the background can be found in para 41 of the judgment of Vally J in *Absa Bank Limited v Lekuku 2014* JDR 2137 (GP): 'For a considerable time this Court has been inundated on a weekly basis with hundreds of applications for default judgments involving the foreclosure of a property which is the primary residence of the debtor and the debtor's family. The applicant in all cases is a bank which had advanced a loan to the debtor. The advancing of the loan is crucial for the debtor/home owner, for without it she would be unable to purchase the property. In most cases the loan advancement takes the form of a bilateral contract between the debtor/home owner and the creditor/bank. The contract is in all cases standard one utilised by the particular bank for the loans it advances towards the purchase of the property. To protect its interests the bank requires that the property be hypothecated. Absent this, the loan would, in all probability, not be granted. The debtor agrees to the condition. The agreement caters for a monthly repayment of the loan. Failure by the debtor to meet a monthly repayment on the due date triggers an acceleration clause in terms of which the full outstanding amount becomes

bestowed upon a mortgagee[4] is not the topic of discussion in this judgment nor are cases where home loan agreements are cancelled. It is apt to refer to the words of Wille[5]:

> 'The right of the mortgagee or pledgee is to retain his hold over the secured property until his debt is paid and, if the mortgagor or pledgor is in default, to have the property sold and obtain payment of his debt out of the proceeds of the sale.'

[2] In *Saunderson* it was said:

> 'A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later, when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself.'[6]

[3] It so happens that, and depending on the economic climate at any given time or financial hardship suffered by the mortgagor (home owner), the latter defaults on repayment of the loan secured by the mortgage bond. When this occurs the mortgagee invariably exercises its rights in terms of the agreement of loan, the terms of which are usually also contained in the mortgage bond, and forecloses by seeking to execute against the property. The rights are varied but generally speaking include the right to call up the loan, accelerate payment and claim execution[7] against the property which forms the subject matter of the loan and mortgage bond. Courts have dealt with matters where banks exercise their rights in terms of the loan agreements and mortgage bonds

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due. Sometimes the bank waits for a few months, during which period it tries to take steps to avert approaching the Court for relief. However, this does not halt the operation of the acceleration clause. When the bank decides that its only option is to approach the Court it does so on the basis of the full outstanding amount, and not just on the amount of arrears, being due.'

[4] See *Standard Bank of South Africa v Saunderson and Others* 2006 (2) SA 264 (SCA); 2006 (9) BCLR 1022.

[5] Scott and Scott: *Willes' Mortgage and Pledge in South Africa* 3 ed (1987) p5.

[6] At para 2.

[7] 'It must be accepted that execution in itself is not an odious thing. It is part and parcel of normal economic life' – per Froneman J in *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC) para 54.

for many years. They were dealt with as ordinary commercial matters. However, since the right to adequate housing is a fundamental human right enshrined in the Bill of Rights of our Constitution,[8] the orders to levy execution against property, which are primary residences, are required to be in harmony with the Constitution, which applies to all law.[9]

Background

[4] During April 2018 a number of foreclosure matters served in the motion court before Van der Linde J by way of application. At that time several judgments from this and other High Court Divisions had seen the light. These judgments dealt with foreclosure and some of the various aspects that affect the granting of money judgments and foreclosure.[10] In this Division there is also a Practice Manual, which regulates certain aspects of cases in which foreclosure is sought[11]. Van der Linde J had regard to the various judgments and the 'new'[12] Uniform Rule 46A in regard to the applications before him based on the divergent issues and the words of Coetzee J who said the following[13]:

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[8] Section 26 of the Constitution: '**Housing**
(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.'

[9] Section 8 of the Constitution: '**Application**
(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court—
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).'

[10] *FirstRand Bank Ltd v Stand 949 Cottage Lane Sundowner (Pty) Ltd and Another* [2014] ZAGPJHC 117 (4 June 2014); *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* (18581/2016, 19362/2016, 30634/2015)[2016] ZAGPJHC 203; 2016 (6) SA 400 (GJ) (29 July 2016); *ABSA Bank Ltd v Njolomba, RC and Another*, Case no. 20321/2017 (5 March 2018).

[11] Chapter 10.17 of the Practice Manual of the Gauteng Local Division of the High Court of South Africa.

[12] Effective since 22 December 2017.

[13] *Trade Fares and Promotions (Pty) Ltd v Thomson and Another* 1984 (4) SA 177 (W) at 187.

> 'Judicial comity also lies at its root. And so does common sense. Loyalty to the higher tribunal in the hierarchy of authority is essential for the smooth working of the system. The dignity of the Courts is bound to suffer irreparable harm if every one of the 34 Transvaal Judges can go his own merry way.'

That was some thirty four years ago. Presently, this Division (Johannesburg and Pretoria) has approximately 80 judges. One can imagine the harm caused to the dignity of the Courts if everyone is to go his or her own way.

[5] Van der Linde J decided to invoke the provisions of s 14(1)(b) of the Superior Courts Act.[14] The learned judge, however, said:[15]

> 'I fully accept the possibility that in the case of one or more of these applications they may, strictly speaking, be disposed of without actually engaging the matters of principle to which I have eluded; but it would be wholly impractical if not impossible to wait until a default judgment is enrolled in the motion court that perfectly fits every aspect of the relevant statutory and common law rules that regulate the foreclosure of a bond over a primary residence, and its interaction with s 26(3) of the Constitution.'

[6] Subsequent thereto, the Judge President of this Division issued a directive[16] in terms of s 14(1)(a)[17] of the Superior Courts Act setting out the issues requiring determination as follows:

> '6. The following issues have been raised in judgments, and there may be others, concerning the legal propriety and desirability of granting a money judgment for the accelerated full outstanding balance under the bond, and yet then postponing the application to declare the property secured by the bond specially executable:

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[14] Section 14(1)(b) of the Superior Courts Act 10 of 2013: 'A single judge of a Division may, in consultation with the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, at any time discontinue the hearing of any civil matter which is being heard before him or her and refer it for hearing to the full court of that Division as contemplated in paragraph (a).'

[15] At para 17.

[16] Dated 2 May 2018.

[17] 'Save as provided for in this Act or any other law, a court of a Division must be constituted before a single judge when sitting as a court of first instance for the hearing of any civil matter, but the Judge President or, in the absence of both the Judge President and the Deputy Judge President, the senior available judge, may at any time direct that any matter be heard by a court consisting of not more than three judges, as he or she may determine'

(a) Does a court have a discretion, when postponing an application for executability to afford the mortgagor an opportunity to "... remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue ..." under the NCA[18], and the mortgagee asks for an immediate money judgment for the accelerated full outstanding balance under the bond, to decline that request and postpone it too so that it too is ultimately dealt with at the same time and in the same enquiry when the executability application is dealt with?

(b) If the court does have such a discretion, meaning that the court may in its discretion decline immediately to grant a default money judgment for the accelerated full outstanding balance, should the Practice Manual request uniformity of treatment, meaning uniformity of manner of exercise of discretion, by the judges in this Division?

(c) If so, what should that uniformity of treatment be? In particular, is the current suggested manner of dealing with the issue, as stated in the latest version of the Practice Manual, being the postponement of the application for the money judgment as well, objectionable/desirable?

(d) Does such an immediate money judgment for the accelerated full balance qualify as "any other court order enforcing that agreement" for purposes of s.129 (3) and (4) of the NCA? If it does so qualify, does it have the consequence of prohibiting the credit provider from reinstating or reviving the credit agreement – despite the arrears having been paid up - once the mortgagee bank, on the strength of such a judgment for the accelerated full balance, will have attached and sold in execution movable property of the mortgagor?

(e) Even if such a judgment could be given on the basis that it would be capable of subsequently being set aside or declared null and void if the mortgagor does "... remedy a default in such credit agreement by paying to the credit provider all amounts that are overdue ...", is it desirable that the court makes such an order, given -

(i) its potential for attachment and execution of movables in the meantime? and

(ii) 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?

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[18] The National Credit Act 34 of 2005.

7. The Full Court will also be required to consider under what circumstances should a court set a reserve price and how this is to be determined in terms of the new uniform rule 46A, effective since 22 December 2017.'

[7] This Court is enjoined to answer the issues referred to it and which were issues in the matters before Van der Linde J.[19] Although the directive of the Judge President refers to other issues in the preamble of para 6, it is apparent that it is not so wide as to include such matters as costs on an attorney and client scale or the legality of acceleration clauses, as was submitted by Legal Aid South Africa in its affidavit. The banks did not deal with these additional issues and it is not properly before us. These were also not issues identified by Van der Linde J as matters requiring attention in the cases that served before him. The impact of the directive is directed at the separation of the money judgment and the levying of execution against immovable property.

Parties

[8] The parties appearing in the matter are as follows:

[8.1] The first applicant is Absa Bank Limited, a public company (with limited liability) duly registered and incorporated in accordance with company laws of the Republic of South Africa and a registered credit provider with registration number NCRCP7 (hereinafter referred to as 'Absa').

[8.2] The second applicant is the Standard Bank of South Africa Limited, a company with limited liability duly registered in terms of the Company Laws of the Republic of South Africa, registered as a financial service provider and credit provider in terms of the National Credit Act 34 of 2005 under registration number NCRCP 15 (hereinafter referred to as 'Standard Bank').

[8.3] The first *amicus curiae* is Investec Bank Limited. Investec Bank is an international specialist banking and asset management group. It provides a range of

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[19] Van der Linde J said at para 17 'I suggest respectfully that even relevant obiter dictum from a full court will provide guidance in an area where currently individual judges' approaches are so inconsistent.'
No doubt, due to the hint given by Van der Linde J, some of the parties attempted to argue several issues which were not referred to this Court. We, however, decline the invitation to express our view on matters not properly before us for consideration and do not address the additional issues.

financial products and services to a client base in three principal markets: the UK and Europe, Southern Africa; and Asia-Pacific (hereinafter referred to as 'Investec').

[8.4] The second *amicus curiae* is the National Credit Regulator. It was established in terms of s 12 of the National Credit Act for purpose of, *inter alia*, promoting a fair and non-discriminatory marketplace for access to consumer credit, to prohibit certain unfair credit and marketing practices and to provide for debt re-organisation in cases of over-indebtedness (hereinafter referred to as 'NCR').

[8.5] The third *amicus curiae* is the Socio-Economic Rights Institute of South Africa. The Socio-Economic Rights Institute of South Africa (SERI) is a non-profit human rights organisation. They work with communities, social movements, individuals and other non-profit organisations in South Africa and beyond to develop and implement strategies to challenge inequality and realise socio-economic rights (hereinafter referred to as 'SERI').

[8.6] The fourth *amicus curiae* is the Legal Aid South Africa. Legal Aid South Africa obtains its mandate from the Constitution of the Republic of South Africa[20] (hereinafter referred to as 'Legal Aid')

[8.7] The fifth *amicus curiae* is the Law Society of South Africa. The Law Society is an association representing all practising attorneys in the Republic of South Africa. The constituent members of the Law Society are:

a) The Black Lawyers Association;

b) The Cape Law Society;

c) Kwazulu-Natal Law Society;

d) The Law Society of the Free State;

e) The Law Society of the Northern Provinces; and

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[20] The Legal Aid South Africa Act 39 of 2014, as reads with the Legal Aid Regulations (Policy Provisions) and Legal Aid manual (Procedural Provisions), as well as other national legislation which gives content to the rights and obligations enshrined in the Constitution.

f) The National Association of Democratic Lawyers

(hereinafter referred to as 'Law Society').

[8.8] The sixth *amicus curiae* is the Lungelo Lethu Human Rights Foundation. The Lungelo Lethu Human Rights Foundation is a duly registered private company with enterprise number 2014/134433/07 (hereinafter referred to as 'Lungelo Lethu').

Granting of monetary judgment separately from the application for execution

[9] The banks were unanimous in their argument that a court does not have a discretion to postpone a money judgment despite a request to postpone the executionary relief, save that Standard Bank submitted that it is preferable that both the money judgment and the application to declare property specially executable should be heard and decided together. Standard Bank also conceded that

> '(O)rders granting a money judgment and executability do naturally form part of the same process. But for a default on a repayment obligation, a creditor cannot obtain an order for executability.'

Absa too conceded that it would be appropriate for the application for a money judgment to be heard at the same time as the application of foreclosure.

[10] However, that is not the end of the matter. But for the monetary judgment, a creditor cannot obtain an order for executability. In its affidavit, the Law Society referred to the sale of properties for a consideration far less than the market value of the property as a result of collusion during the auction process and supported the contention that both aspects of the matters be heard together[21]. Collusion aside, there are ample examples of cases where properties are sold for trifling prices. Legal Aid and the NCR submitted that the money judgment and the order of executability are both part of the same process and they are inextricably linked[22]. Although all the parties

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[21] See para 59 below. Cases referred to by the parties, show that the process followed and judgments sought are not necessarily in harmony with that set out by the banks. Homes are sold for amounts such as R14 and R40.

[22] Van der Linde J, aptly, put it as follows:

'[12] The starting point of the discussion is that the loan agreements all have acceleration clauses. These, and their having been triggered, are essential for the success of the applicants' applications, because in the light of rule

approached the matter on the basis of a postponement of a case – this issue will eventually become moot, should both issues be heard and determined together as a mortgagee will be obliged to place all facts before the court from the outset of the matter, based on all the relevant evidence in order to obtain both a money judgment and an order for execution.

[11] In order for a court to exercise its judicial oversight, it is incumbent upon a mortgagee to disclose whether it holds security and the nature of the security in all matters where a claim is made pursuant to a home loan[23], when the mortgagee claims or intends to claim for execution against the property. If it fails to do so, it risks being denied the relief for special executability, if such is sought separately, due to the well-established rule of practice that the money judgment and the executability of immovable property should be dealt with together.

[12] Prior to the amendment of Uniform Rule 46 and the promulgation of Rule 46A, the execution procedure that lenders followed was prescribed by the former Rule 46, the latter which did not *per se* require the intervention of a court. It was an administrative process controlled by the judgment creditor with the assistance of the Sheriff and the Registrar. The substitution of Rule 46 in 2010[24] introduced specific and detailed provisions applicable to court oversight. This, in turn, requires full disclosure of all relevant facts to the Court when judgment is sought as any monetary judgment may impact on the discretion which a court is required to exercise when execution is sought. The executionary relief has become an integral part of the lender's cause of action and is required to be set out when it makes its claim or, at least, it forms part of the relief when it makes a claim.[25]

46(1)(a)(ii) and of s 26(3) of the Constitution, a court is unlikely to grant executability for a say mere three months' arrears in a say 240-month loan repayment scheme.

[13] This last observation already shows how integrated the claim for default judgment for the capital amount is with the claim for a declaratur for executability. The claim for the full outstanding balance under the home-loan agreement is only possible because the acceleration clause enables it; and in turn the claim for a declaration of executability would likely not have been successful had it not been preceded by a claim for F the accelerated full outstanding balance.'

[23] *Mortinson v Nedbank Ltd* 2005 (6) SA 462 (W) para 33.1.5.

[24] Government Notice 981 of 19 November 2010.

[25] See also *FirstRand Bank t/a First National Bank v Zwane and Two Other Cases* 2016 (6) SA 400 (GJ) para 20.

[13] That, as far as the institution of a claim is concerned. Furthermore, to grant judgment for the repayment of the accelerated money debt and postpone the relief to declare the hypothecated immovable property specially executable, is a course which gives rise to an undue protraction of the proceedings and piecemeal handling of the matter with a resultant increase in costs. It is a trite rule of practice that piecemeal adjudication of applications should be discouraged.[26] It is, as was said by Howie JA in *Guardian National Insurance Co Ltd v Searle*[27], although in the context of 'the piecemeal appellate disposal of the issues in litigation', not only 'unnecessarily expensive', but 'generally it is desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time'.[28] Piecemeal adjudication of applications is the exception, not the rule.[29]

[14] In our view, the money judgment is an intrinsic part of the cause of action and inextricably linked[30] to in the *in rem* claim for an order for execution, the latter which is non-existent without the money judgment. The default of the debtor and the money judgment is a pre-condition for the entitlement of the mortgagee to foreclose.[31]

[15] It is also intrinsically linked because the claim for execution is accessory in nature and is dependant for its existence on the obligation which it secures. In *Klerck N.O. v Van Zyl and Maritz*[32] it was held:

> 'A convenient starting point for the consideration of this issue is an analysis of the nature of the real right which is constituted by a mortgage bond. A mortgage bond may be defined as an instrument hypothecating landed property to secure a debt, existing or future. *Lief NO v Dettmann* 1964 (2) SA 252 (A) at 259B; *Thienhaus NO v Metje & Ziegler Ltd and Another* 1965 (3) SA 25 (A) at 31F. At 259E of the former case the following appears:

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[26] See *Bader and Another v Weston and Another* 1967 (1) SA 134 (C) at 138D; *Dawood v Mahomed* 1979 (2) SA 361 (D) at 365H.
[27] 1999 (3) SA 296 (SCA) at 301B-C.
[28] Also see *Health Professions Council of South Africa and another v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) para 16.
[29] *Atterbury Property Holdings (Pty) Ltd v Municipal Manager: City of Tshwane* 2017 JDR 1844 (GP) para 17.
[30] *Atterbury* supra para 25; *Zwane* ibid.
[31] Scott and Scott: Wille's Mortgage and Pledge p128.
[32] 1989 (4) SA 263 (SE) at 275.

"The only real rights in favour of the mortgagee created by the registration of a bond are rights in respect of the mortgaged property, eg the right to restrain its alienation and a right to claim a preference in respect of its proceeds on insolvency of the mortgagor. The real rights, however, can only exist in respect of a debt, existing or future, and it follows that they cannot be divorced from the debt secured by them."

At 264 and 265 it was said that a mortgage bond is an acknowledgment of debt and at the same time an instrument hypothecating landed property or other goods and that the object of a mortgage bond is not merely hypothecation, but the settlement of the terms of the obligation it secures. See, too, *Thienhaus'* case supra at 38. It follows therefore that the real right created by a mortgage bond is accessory in nature and is dependent for its existence on the existence of the obligation which it secures.

If there is no valid principal obligation for the mortgage bond to secure, there can be no valid mortgage bond and no real right of security in the hands of the mortgagee. See, too, *Kilburn v Estate Kilburn* 1931 AD 501 where the following was said at 505 - 6:

"... (Y)ou cannot have a settlement of a security apart from the thing which is secured, be it a money debt or the performance of an act. The settlement of a security divorced from an obligation which it secures seems to me meaningless....

It is therefore clear that by our law there must be a legal or natural obligation to which the hypothecation is accessory. If there is no obligation whatever there can be no hypothecation giving rise to a substantive claim. Now the Court below has found as a fact that there was no serious promise of £500 and no intention to pay the wife that sum, but that the whole intention of the spouses was that the wife should claim £500 if and when the husband became insolvent. There was therefore no obligation secured by this bond, and therefore in a *concursus creditorum* the appellant cannot claim on the bond."

Reference may further be had to *Thienhaus'* case supra at 32 where, after stating, with reference to Kilburn's case *supra*, that it is clear that a mortgage bond as a deed of hypothecation must relate to some obligation, Williamson JA added:

"If on a *concursus creditorum* a mortgagee, or a pledgee fails to establish an enforceable claim which it was intended should be secured by the hypothecation, the bond, or the pledge, as the case may be, falls away."

At 43 and 44, in the minority judgment of Wessels JA, the following passages appear:

"When the mortgagor causes a mortgage bond to be registered in favour of the mortgagee he does so to give effect to an antecedent agreement between them - which may be either in writing or verbal - in terms of which the former bound himself to grant to the latter, as security for a debt, a real right in the immovable property concerned....

It is of the essence of the real right which is constituted by the registration of a mortgage bond that it should be related to a debt, and the substantial reason why the antecedent agreement must of necessity refer to the debt which it is intended to secure is so that the nature and extent (ie the content) of the real right, which it is intended to constitute by the registration of a mortgage bond, may be exactly determined. It follows from this that the obligation resting upon the debtor is to effect the constitution of a real right in the immovable property concerned in favour of the creditor in accordance with the definition thereof in the agreement in question."

Although these last two passages appear in the minority judgment and in a context different from that which obtains in *casu*, reference to the principles set out therein is apposite in this judgment. Reference may finally be had to Wille Mortgage and Pledge 3rd ed at 4 and Lubbe on 'Mortgage' in Joubert (ed) *Law of South Africa* vol 17 para 398, and the authorities there cited.'[33] (own underlining)

[16] Lamont J held in *FirstRand Bank v Stand 949 Cottage Lane Sundowner (Pty) Ltd and Another*[34] that:

'It is a long standing practice for the creditor to claim judgment for the money debt and for executability of the pledged goods in one action.'

The learned judge referred to *Barclays Nasionale Bank Bpk v Registrateur van Aktes, Transvaal, en 'n Ander*[35] for the proposition that[36]:

'. . . it is open to the creditor to raise the personal' money judgment 'and the hypothetical action' execution 'together and lump both of them in a single statement of claim.'

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[33] And see *Standard Bank of South Africa Limited v Gordon and others* (2011/6477) [2011] ZAGPJHC 244 (21 September 2011).
[34] (2014/10545 [2014] ZAGPJHC 117 (4 June 2014) para 6.
[35] 1975 (4) SA 936 (T).
[36] *Stand 949 Cottage Lane* para 6.

[17] We are, however, of the view that it is obligatory for a mortgagee seeking execution to find a cause of action based on execution to allege and prove its entitlement to the money judgment which, in turn, is a necessary averment in order to sustain the action to obtain an order for execution. Coetzee J said in *Barclays Nasionale Bank*[37] that when the mortgagor is sued it is really both actions that are instituted, the personal action aims at recovery of the debt and the other for utilising the property to pay the debt.

[18] We do not regard this as a sanction for the executionary judgment to be sought separately but indeed as support for the view that personal action for a money judgment goes hand in hand with the claim *in rem* based on the bond.

[19] The difficulty foreseen in para 16 of the judgment of Lamont J has fallen away.[38] The creditor who does not rely on its security and who obtains a monetary judgment against the home owner is subject to Rule 46A in the same manner as a secured creditor, save that it does not have the advantages that a bondholder has in terms of its security. Since the introduction of Rule 46A, the judgment of Lamont J cannot be followed.

[20] Arguments that the money judgment stands on a different footing, misses the fact that it is the cornerstone of the order for execution; it is a necessary averment that forms part of the cause of action to obtain an order for execution.

[21] A concern expressed by Van der Linde J[39] is relevant:

> 'If such a money judgment is given, what often occurs is that the creditor bank, armed with the judgment for the accelerated full outstanding balance under the bond, proceeds immediately to attach and sell in execution movable assets of the debtor, such as a motor vehicle, in partial satisfaction of the judgment debt for the accelerated full outstanding balance.'

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[37] At 940C-D: '. . . wanneer die verbandgewer aangespreek word albei aksies eintlik ingestel word, die persoonlike een gerig op die skuldinvordering en die ander vir aanwending van die vasgoed ter skulddelging.'
[38] See para 28 below.
[39] In para 21 (when referring the matters under consideration to the Judge President).

[22] To this can be added the prospects of the attachment of a debtor's income and a resultant garnishee order which would affect his or her ability to repay the judgment amount. This, of necessity, adversely affects the debtor's ability to make further arrangements regarding the debt and a future foreclosure should both the issues not be dealt with simultaneously[40]. It is consequently both desirable and necessary for the *in personam* and *in rem* claims to be heard simultaneously as is envisaged in the Practice Manual of this Division. Judgments to the contrary should not be followed as the failure to do so results in consequences detrimental to debtors, which consequences can be avoided by the simultaneous hearing of both issues. It will remove the obstacle for a debtor to search and apply for financial assistance from another source without the judgment having recorded against his or her name. Van der Linde J said in *Zwane* the following[41]:

> '[23] It is true that if a default judgment were granted at the outset, that judgment might in any event ultimately be rendered nugatory if the debtor pays the arrears; why then refuse the judgment? The only difference is that if in the interim period there is no default judgment for the accelerated full outstanding capital amount, the creditor is precluded from seeking execution against movables during the period when the debtor will be trying to pay the arrears. That is a far more preferable situation and, as the Practice Manual says, it fits the purpose of the postponement of the application for a declaration of executability.
>
> [24] There is another way of reaching the same result. The inherent power and obligation under s 173 '(of the Constitution)' to regulate own process, taking into account the interests of justice, justifies the court postponing also the applications for default judgment for the accelerated full balance, for the reasons advanced above.'[42]

This accords with the purpose of the NCA as set out in s 3 thereof[43].

[23] It was argued that Rules 46 and 46A anticipate the possibility, though not necessarily, of a money judgment preceding an order of executability.[44] However, the

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[40] See *Zwane* para 17.
[41] *Ibid*, paras 23-24.
[42] See also *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 (4) SA 363 (GSJ) para 42; *Duma v Absa Bank Limited* (8247/20160 [2017] ZAGPPHC 616; 2018 (4) SA 463 (GP) (2 October 2017) para 24.
[43] See note 51 below.

submission that Rule 46(1)(a)(i) presupposes that a money judgment may be obtained separately from and prior to, an order of executability, cannot be upheld. The very fact that both the money judgment and the order for executability are given at the same time, is not in conflict with the Rule which requires certain steps against movables prior to execution against the immovable property. It is purely a prior procedural step before a writ against the immovable property is issued. It is a step separate from the monetary judgment and the order declaring the immovable property executable.

[24] All the banks alleged that legal proceedings and the execution processes are reached as a last resort. If all the information is then placed before the court, it can consider the matter properly as there would be no reason to postpone either part of the application. We return to the aspect of the information that is available, below.

[25] The banks did not argue that they would suffer any prejudice, should the money judgment and order for execution be granted at the same time. No such prejudice is apparent and the banks remain secured in their claim by virtue of the mortgage bond, should a matter be postponed.

[26] Lastly, we are of the view that Legal Aid correctly submitted that costs would be substantially less when orders are sought and given at the same time and not at separate hearings.

[27] In addition, a claim for the accelerated full outstanding balance is a claim seeking specific performance. It is well established that a court has a discretion to grant or refuse an order for specific performance.[45] We agree with the argument put forward by counsel for Lungelo Lethu that a court has the greater power to decline to grant the remedy, and, therefore the lesser power to postpone the hearing of the application at which it will consider whether to grant specific performance.

[28] We do not deal herein with a matter where a lender sues for money lent and advanced and does not rely on the security of a bond. Such lender who abandons reliance on its security, cannot introduce it at a future date to obtain a judgment for

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[44] See also *Njolomba* para 17.

[45] *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 782I-J.

special executability and its execution will be without the benefits afforded by a mortgage bond due to the bar to bring matters piecemeal. The banks argued that the unsecured creditor is in a better position than a secured creditor because the former is able to obtain a money judgement without any baggage, should the claim be pleaded correctly whilst the mortgagee has an additional onus. The argument does not pass muster. Rule 46A is not confined to secured creditors. The unsecured creditor armed with its judgment without security, has an obligation to satisfy the Court of its entitlement to have a primary home declared executable, and not specially, in the same manner that is provided for in Rule 46A. It has a more onerous process to follow. This obligation arises at a next court proceeding, after executing against other property of the debtor. The comparison and perceived more onerous obligation on the mortgagee is consequently not valid.

[29] There is, therefore, a duty on banks to bring their entire case including the money judgment, based on a mortgage bond, in one proceeding simultaneously[46]. Should the matter require postponement for whatever reason, the entire matter falls to be postponed and piecemeal adjudication is not competent.[47]

[30] All factors hitherto required by statute or precedent to be included in applications for foreclosure remain unaffected.

Question 6(a)

[31] As a result of our finding that the claim for payment and the claim for execution must be heard simultaneously, it stands to reason that in the event of the claim for execution not being finalised and being postponed, the monetary claim should be dealt with in the same way. There was no argument against the court's power to exercise its

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[46] In applications the applicant must allege all the facts entitling it to relief. In *Hart v Pinetown Drive-Inn Cinema (Pty) Ltd* 1972 (1) SA 464 (D) it was stated 469C-E that:
'. . . where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What might be sufficient in a declaration to foil an exception, would not necessarily, in a petition, be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration but also of the essential evidence which would be led at a trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that it does not support the relief claimed is sound.'

[47] This answers the question in para 24 posed by Van der Linde J when he invoked the provisions of the Superior Courts Act.

discretion to postpone the granting of an order declaring property executable or to defer its operation where the property is a debtor's primary residence because the order implicates a constitutional right - the Constitutional s 26 right to adequate housing. Section 172(1)(b) of the Constitution empowers courts with a broad discretion when deciding a constitutional matter within its power to grant just and equitable relief.

Question 6(b)

[32] In so far as this judgment binds single judges of our Division, we are of the view that a uniform approach is established herewith and that the Practice Manual of both Divisions, should be amended, to remove the reasons therein stated why the money judgment must be heard together with the claim for executability. The reason furnished in the Practice Manual is not in accordance with the judgment in *Nkata*[48]. Most, if not all, parties who appeared before us recognised the need for a degree of uniformity, which takes into account the facts and circumstances of each case and the remarks of Coetzee J in 1984[49] remain as relevant today as it was then.

Question 6(c)

[33] The postponement of the money judgment is both desirable and necessary and is to be heard together with the question of executability, should any part of the matter be postponed.

Question 6(d)

[34] This issue has partially been resolved by the critical finding in this matter. However, the question whether a money judgment for the accelerated full balance qualified as 'any other Court order enforcing that agreement' for purposes of s 129(3)

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[48] See note 55 below.

[49] See also *Camps Bay Ratepayers' and Residents' Association and Another v Harrison* and Another 2011 (4) SA 42 (CC) para 28 where Brand JA stated: '"(C)ertainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of *stare decisis*." Observance of the doctrine has been insisted upon, both by this court and by the Supreme Court of Appeal. And I believe rightly so. The doctrine of precedent not only binds lower courts, but also binds courts of final jurisdiction to their own decisions. These courts can depart from a previous decision of their own only when satisfied that that decision is clearly wrong. *Stare decisis* is therefore not simply a matter of respect for courts of higher authority. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.'

and (4) of the NCA is implicit in the directive issued by the Judge President and requires consideration.

The proper interpretation of section 129(3) and (4) of the National Credit Act 34 of 2005 ('NCA')

[35] The interpretation of ss 129(3) and (4) must evidently be the promotion of the principles of the NCA. The purpose of the Act, in the main, is to balance the rights and obligations of consumers and credit providers. This balancing act is difficult as the rights of the credit providers are driven by profit, while that of consumers are driven by the ability to access the credit market. Difficult as it might be, courts are however enjoined by the provisions of s 2[50] of the Act to promote the purpose of the Act as spelled out in s 3[51]: to level the playing field in the credit market and to advance the social and economic welfare of all South Africans.

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[50] **'Interpretation**
2. (1) This Act must be interpreted in a manner that gives effect to the purposes set out in section 3.
(2) Any person, court or tribunal interpreting or applying this Act may consider appropriate foreign and international law.'

[51] **'Purpose of Act**
3. The purposes of this Act are 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, by-
(a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
(b) ensuring consistent treatment of different credit products and different credit providers;
(c) promoting responsibility in the credit market by -
(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and
(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;
(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;
(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by-
(i) providing consumers with education about credit and consumer rights;
(ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and
(iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;
(f) improving consumer credit information and reporting and regulation of credit bureaux;
(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;
(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

[36] Sections 129 (3) and (4) previously provided that –

'(3) Subject to subsection (4), a consumer may –

(a) at any time before the credit provider has cancelled the agreement re-instate a credit agreement that is in default by paying to the credit provider all amounts that are overdue, together with the credit provider's permitted default 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 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'.

[37] It is evident from subsection (3) that a consumer, who is in financial distress and arrears with his/her mortgage obligations, may reinstate a credit agreement. The reinstatement is subject to certain conditions. First, the reinstatement must not be a victim of the provisions of subsection (4); secondly, the agreement must still be alive in that it has not been cancelled by the credit provider; thirdly, all amounts that are overdue, together with the credit provider's default charges and the reasonable costs incurred in the enforcement of the agreement up to the time of reinstatement, must be paid. In other words, the mortgage bond repayments must be up to date with the arrears and costs, and the credit provider must not be owed any moneys at the time of reinstatement. The parties must be in the same position as they had been prior to the default. This will promote the purpose of s 3 of the NCA: advancement of 'social and economic welfare of South Africans'.

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.

[38] The difficulty with the reinstatement of a mortgage bond has been the 'default charges and reasonable costs' incurred by the credit provider when the reinstatement of the agreement occurs. Credit providers, invariably, add the default charges and their reasonable charges to the monthly instalments payable by credit consumers which may result in the latter's obligation being higher than it was at commencement of the agreement. This results in the consumers being burdened with charges that they were not aware of and did not consent to. The reasonableness of such charges was not determined.

[39] Fortunately, the majority judgment in *Nkata v Firstrand Bank and Others*,[52] resolved this issue. The Constitutional Court reasoned that the credit provider's legal and reasonable costs of enforcement would become due and payable

> 'only when they are reasonable, agreed or taxed, and on due notice to the consumer'[53]

Once the arrears are paid in full, and the consumer having been given no notice of the legal and enforcement charges which he has not agreed to, and such costs have not been taxed, it cannot be said that such costs are reasonable. They are not at that stage due and payable as the reasonableness has not been agreed to or determined. The non-payment of only these costs cannot prevent the reinstatement of the agreement.

[40] The difficulty that arises in this matter that is required to be answered by the Judge President, is s 129(4)(b) of the NCA, which prohibits the reinstatement of the agreement by a consumer [54] – now credit provider- after the execution of any other court order enforcing that agreement.

[41] Does the fact that the money judgment and the order for executability had been given, amount to any such other court order, which prevents the reinstatement – or now reinstatement or revival - of the credit agreement?

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[52] 2016 (4) SA 257 (CC).
[53] *Ibid*, para 123.
[54] The amended s 129(4)(b) provides for preclusion of reinstatement by the credit provider, while the old s 129(4)(b) refers to 'consumer'.

[42] Similarly, this issue has been authoritatively resolved by the *Nkata* judgment. At para 131 of that judgment, Moseneke DCJ reasoned thus –

> '...The provision amounts to a statutory remedy for rendering a default judgment and attachment order ineffectual'.

At para 136, Moseneke DCJ went on to say -

> 'Although there had been an attachment of the bonded property, no sale in execution of the property occurred and no proceeds of sale realised at any time...'

[43] *Cadit quaestio*. What prevents the reinstatement in terms of s 129(4)(b) is only the sale in execution of the immovable property and the realisation of the proceeds of such sale.[55] Prior to the realisation of the proceeds of the sale, the mere attachment is no hindrance to the reinstatement of the agreement. The fact that the mortgaged property has been attached pursuant to a default judgment and an order declaring the mortgaged property specially executable, is of no moment. It is only when the mortgaged property has been sold and the proceeds of the sale have been realised that there can be no reinstatement. This is self-evident as there is nothing to reinstate. The agreement is at an end. It is no more. Accordingly, the granting of the money judgment and the executionary order is not a bar to reinstatement of the agreement. It is only when the mortgaged property is sold and its proceeds realised that reinstatement is impermissable. In the words of *Nkata*, the reinstatement 'would be of no use to either party'.

[44] However, s 129(3) has been substituted by s 32(a) of the National Credit Amendment Act No. 19 of 2014 which came into effect on 13 March 2015. The amended subsection 3 now speaks of a consumer remedying the default under the agreement instead of a consumer reinstating the agreement.

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[55] In *Nkata* the Constitutional Court said at para 131: There is no compelling reason why the meaning of "execution" in section 129(4)(b) should be given extended meaning preferred by the Bank. The extended construction would render the section unuseful. The High Court was correct that the barrier to a revival of the credit agreement applies only when proceeds from a sale in execution have been realised. Only then would revival be of no use to either party.'

[45] It seems to us that the Legislature in effecting the amendment, intended to remedy the impression created that a credit agreement that has not been cancelled, could be reinstated. Prior to cancellation of the agreement, the agreement is extant. There is therefore nothing to reinstate. That being the case it makes sense to speak of remedying the default rather than reinstating the extant agreement. The prohibition of reinstatement of the agreement in subsection (4) must be read in conjunction with the Constitutional Court judgment in *Nkata* where it was stated that the provisions of s 129(4)(b) must be narrowly interpreted. This accords with the submission of counsel for Absa who, in argument, submitted that a narrow interpretation[56] would accord with the clear purpose of the NCA. This argument was adopted by all the banks, as well as Legal Aid. A wider interpretation, so the submission went, would not be businesslike. It would defeat the purpose of the NCA which is to grant relief to the consumers who have fallen on hard times but are able to save their primary homes. We adopt and agree with the interpretation given to the section by Rogers J, which interpretation was endorsed by the Constitutional Court. The interpretation which was argued by the banks, accords with the provisions of the Constitution and the purpose of the Act: that is that the reference in s 129(4)(b) of the NCA, narrowly interpreted, is a reference to execution against the security given under the bond. A wider interpretation - that it refers to any other court order - would lead to obvious anomalies. The result is that execution against movables would not be execution of any other court order as contemplated by s 129(4)(b) of the NCA. A narrow interpretation would promote the values of fairness, good faith, reasonableness and equality[57]. This is indeed a compelling reason why the meaning of 'execution' in s 129(4)(b) should be given the narrow meaning contended for by the parties, thus removing the barrier to remedy the default.[58]

[46] In conclusion, with regard to question 6(d), it is necessary to have regard to the provisions of s 39(2) of the Constitution which enjoins courts when interpreting any legislation, such as the NCA, and in particular the provisions of s 129(3) and (4) of the NCA, to promote the spirit, purport and objects of the Bill of Rights. Foreclosure of

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[56] That execution against movables would not satisfy the requirement of the section. See *Nkata v FirstRand Bank Ltd and Others* 2014 (2) SA 412 (WCC) para 48 (Rogers J).
[57] *Nkata* paras 94-96.
[58] *Nkata* para 131.

immovable property, which is the primary residence of a consumer, has a major impact on the right contained in s 26(1) of the Constitution: the right to have access to adequate housing. Section 129(3) and (4) of NCA must therefore be interpreted to promote this right. A default judgment and declaration of the immovable property as specially executable, and the sale of immovable property in satisfaction of such default judgment should not be a bar to revival of the agreement. What militates against the revival of the agreement, is inter alia, the sale and receipt of the proceeds of such sale. Before then, a consumer may revive or reinstate the agreement. In order to ensure that the home owner understands his or her right, we are of the view that the following statement must be incorporated in a document initiating the proceedings where a mortgaged property may be declared executable, such statement to be made in a reasonably prominent manner:

> 'The defendants' (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.'

[47] Having decided that piecemeal hearing of applications for foreclosure are undesirable and not cost effective, the issue of granting money judgments separately from the order of executability, does not arise.

[48] A final word needs to be said about s 129(4). Thus far we have discussed the right to reinstate an agreement with reference to the wording of s 129(3) and (4) in its unamended form. Subsection (3) and (4) 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 administrative 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 amendment of subsection (3) seems to recognize the difficulty with the terminology: How does a consumer reinstate something that has not been cancelled? Therefore the term 'remedy' may be more appropriate.

[49] The amendment of subsection (4) to replace a consumer with a credit provider is more perplexing. What follows may not be the last word on this issue but for purposes of this judgment, we accept that the right to reinstate or revive the agreement, remains with the consumer. We adopt the reasoning of Dr R. Brits[59] in his article in De Jure [2015]:

> 'The second option is to assume that the amendments made to section 129(4) should not be taken literally and, for all practical purposes, might have to be ignored. A strong indication of this possibility is the fact that the first draft amendment bill proposed no amendments to this subsection, and therefore the final version is probably the result of last-minute drafting confusion. Since the legislature also provided no explanation for the amendment, one must assume that it was never the intention to bring about the kind of substantive change that the literal wording of the modified subsection appears to indicate. It is regrettable that the legislature leaves one with little choice but to disregard the actual wording of the NCA on this point, because the alternative would simply be too nonsensical. The bizarre reality is that one is compelled to interpret section 129(4) as if it has not been amended at all. Therefore, one must simply read section 129(4) as still providing for the limitations upon the *consumer's right* of "reinstatement" (or to "remedy a default"), regardless of the fact that the subsection now literally refers to the limitations on the *credit provider's* ostensible ability to reinstate or revive the agreement. What the legislature probably intended to do with the amendments to section 129(4) was to

[59] The Reinstatement of Credit Agreements: Remarks in response to the 2014 amendment of section 129(3)-(4) of the National Credit Act (2015) 48(1) *De Jure* 75 at p89-90.

emphasise that the credit provider must *allow* reinstatement if the consumer remedies his default prior to any of the events listed in the subsection. After these events, the credit provider may (or must?) refuse to accept late payment. Not allowing reinstatement after property has been sold generally makes sense, because the alternative would create too much uncertainty for purchasers of property at sales in execution.'

Question 6(e)

[50] The attachment of movables after judgment and before the realisation of the sale in execution of the mortgaged property is of no consequence due to the interpretation of s 129(4)(b) of the NCA.[60]

Reserve price

[51] Judges' involvement or the duty of courts when dealing with certain matters serving before courts, are not novel.[61] The duty and the source of the duty are to prevent unjust or inequitable outcomes, which duty is based in the Constitution. Fisher J referred to this function as a 'rigorous investigation function'.[62] Navsa and Snyders JJA said in *Mkhize v Umvoti Municipality and Others*[63]:

'[24] We detect no ambiguity in the order in *Jaftha*. In that case and later in *Gundwana* the Constitutional Court made it clear that in all cases of execution against immovable property judicial oversight is required. Confusion was caused by a multitude of judgments seeking to come to terms with *Jaftha*. Determining whether s 26(1) rights are implicated is a fact-based enquiry. In *Gundwana* Froneman J said the following:

"Some preceding enquiry is necessary to determine whether the facts of a particular matter are of the *Jaftha*-kind."

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[60] *Supra* note 56.

[61] See *Occupiers, Berea v De Wet N.O.* and Others 2017 (5) SA 346 (CC) para 39-51; Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC); *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC).

[62] *Absa Bank Limited v Njolomba and Another* ZALCJHB 122 (5 March 2018); [2018] JDRO 372 (G-J) para 3.

[63] 2012 (1) SA 1 (SCA) paras 24-26.

Only once that enquiry has been undertaken can the question asked by Wallis J in the latter part of the quotation in para [23] above be answered. The principle as described in our opening paragraph has already clearly been established in *Jaftha*.

[25] It is clear from *Gundwana* that insisting on judicial scrutiny in every case should hold no terrors. The level of enquiry will vary from case to case and will always be dependent on the circumstances. As was pointed out in *Gundwana* the rule established in *Jaftha* 'caution[s] courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes'.

[26] The object of judicial oversight is to determine whether rights in terms of s 26(1) of the Constitution are implicated. In the main a number of cases grappling with *Jaftha* sought to arrive at that determination without accepting that judicial oversight was required in every case. How, it must be asked, can a determination be made as to whether s 26(1) rights are implicated, without the requisite judicial oversight? We are unable to understand the difficulty of applying the principle that it is necessary in every case to subject the intended execution to judicial scrutiny to see whether s 26(1) rights are implicated. To not undertake such an enquiry would in fact render the procedure unconstitutional. Following that simple principle would have avoided the confusion caused by a number of judgments.'

[52] Although it was argued that much of the inequities caused to home owners when properties are sold well below their values still exist, this question has, to some extent, been remedied by the requirement in this Division's Practice Manual[64] that proceedings against a defaulting home owner, where the action involves such a home owner's primary residence, must be served personally on such a home owner[65]. This requirement is now partially echoed in Rule 46A and is applicable countrywide. It should go some way to address the complaint that defaulting parties only discover that the judgment had been granted against them sometime thereafter.

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[64] See *Lekuku* note 10.

[65] See *De Paul Albert and Another v Standard Bank of South Africa Ltd* (21841/14 [2015] ZAGPPHC 727 (11 September 2015) para 12; *Adegbuyi v Firstrand Bank Limited and Others* (19958/2014) [2016] ZAGPPHC 703 (16 August 2016) para 19. The requirement does not exclude substituted service in appropriate cases – *Lekuku* at prayer 1 para 39.

[53] The determination of a reserve price is an issue which is provided for in the Rules of Court[66]. The sale of a property and in particular of a primary residence, for nominal amounts of money occurs to the detriment of the defaulting home owner. Such a person, whether the poorest of the poor[67] or otherwise, not only loses his or her home but remains indebted to a mortgagee for a substantial amount - even in cases where the on-sale of the property occurs to buyers at substantially higher prices than the prices realised during the sale in execution.

[54] The lender banks or mortgagees argued that by setting a reserve price the interest of prospective purchasers would be reduced and therefore make it less likely for them to find a buyer. The allegation appears to be without foundation, but even if it is so, we can see no reason why the court cannot be approached for a variation of an existing order making it more likely to find a buyer, should the perceived difficulties arise. According to the affidavit filed by the banks, the information is readily available. They employ external valuers to do an analysis of the sale price of a property, which valuation also takes into account the distressed property value. It will therefore not increase costs to place the facts so gathered before the court by way of affidavit.

[55] The banks argued that it is indeed applying a reserve price mechanism. The principle of a reserve price is therefore not in issue, at least not as far as the banks are concerned. The manner in which Standard Bank applies the principle is 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. Absa and all the other banks have set out its manner of dealing with defaulting home owners and the process of reaching execution as a last resort. It may be necessary to set out the complete process to understand why the information that is required when seeking a judgment for execution, is available. We utilise the summary contained in Absa's heads of argument:

> 'Absa's processes can be summarised as follows:

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[66] Uniform Rule 46A.

[67] See the cases referred to in para 59 below.

12.1 Before any default occurs, Absa attempts to prevent and pre-empt any defaults at various stages. First, it engages with its customers when the bond is originated to advise them of their rights under the National Credit Act and section 26 of the Constitution; then during the currency of the loan, when its monitoring system detects a danger or default, it once again reaches out to its customers to devise possible loan restructures or catch-up plans, or it refers the customer to debt counselling.

12.2 If a customer does default, the account will not be referred for legal recovery until it is in arrears in an amount equivalent to six months of instalments. During this time, Absa will engage with the customer in an attempt to reach an agreement on a repayment arrangement or debt restructuring.

12.3 In order to stave off sales in execution, which on average fetch a much lower sale price, Absa offers the Help U Sell programme that assists customers in selling their homes privately.

12.4 Absa has a committee of dedicated professionals that consider every case individually and the circumstances surrounding the default, before proceeding with a sale in execution. The committee checks that the bank has taken all reasonable measures to avoid a foreclosure and to treat the customer fairly. The committee will consider the personal circumstances of the customer, whether there are any factors that render the customer vulnerable and whether there may be some transient impediment to the repayment of their loan obligations. Absa sends a representative known as a Risk Mitigation officer to ascertain a customer's individual circumstances. This information will be used by the committee in making an informed decision to proceed with a sale in execution.

12.5 Once the legal recovery process has been instituted, Absa continues to engage with its customers and will entertain offers to settle the arrears right up until a sale in execution.

12.6 Absa's comprehensive engagement with its customers prior to approaching a court for default judgment is illustrated by the facts of the three cases that are before the Full Court in this matter. The three Absa customers had been defaulting on their home loans for 19 months; three years; and 10 months, respectively, before summons was issued. In each case, Absa's collections department had made many attempts to contact

the debtor telephonically. In the three cases, Absa's Risk mitigation Officer was deployed to investigate the customer's personal circumstances. In all three cases, the customers were offered the use of the Help U programme. Absa is persisting in pursuing judgment against only one of the debtors. The other two debtors reached a repayment agreement with Absa and settled their arrears.'

[56] We have had no argument from any party, as to why this process cannot be disclosed to a court which has to consider the order for it to grant executability, based on all available facts, including the evidence regarding the attempts to avoid a distressed sale, the latter, which is common cause does usually not fetch the same price that a private sale would realise. It is common cause that a bank's commercial interests are always better served by arranging for a sale on a voluntary basis. Legal Aid argued that due to the high costs of foreclosure proceedings it often results in no amount being left to the debtor after the sale in execution had taken place. Legal Aid submitted that a reasonable reserve price is to be set by judges so that debtors are not left with a debt after their homes have been sold in execution. The consequences foreseen by this argument may, in some circumstances, be unavoidable. It all depends on the size of the debt and in particular the amount in arrears or owing. Whatever mechanisms may be employed, judges cannot ensure that a debtor is not left with a debt after a sale in execution. Courts can ensure that the sale is at a just and equitable price by taking the factors of each specific matter into account.[68] Counsel for Lungelo Lethu submitted that the setting of a reserve price is a welfare enhancing rule which also protects the investment of the debtor that may have been built up over many years. There is much force in this argument.

[57] The courts' power and duty to impose a reserve price is founded, inter alia, in s 26(3) of the Constitution.[69] The process of granting judgment against the home owner is the first step that may lead to his or her eviction from the property. Thus a court is to

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[68] '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.' Per Moseneke DCJ in *Nkata v Firstrand Bank Ltd* 2016 (4) SA 257 (CC) at para 94.

[69] '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.'

consider all the relevant factors when declaring a property specially executable[70] at the behest of a bondholder. It is thus incumbent upon the bank or bondholder to place 'all relevant circumstances' before the court when it seeks an order for execution.[71] This, in

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[70] Uniform Rule 46(1)(a)(ii).

[71] See also Uniform Rule 46A: '**Execution against residential immovable property**
(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.
(2)(a) A court considering an application under this rule must—
(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.
(3) 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.
(4)(a) The applicant shall in the notice of application—
(i) state the date on which the application is to be heard;
(ii) inform every respondent cited therein that if the respondent intends to oppose the application or make submissions to the court, the respondent must do so on affidavit within 10 days of service of the application and appear in court on the date on which the application is to be heard;
(iii) appoint a physical address within 15 kilometres of the office of the registrar at which the applicant will accept service of all documents in these proceedings; and
(iv) state the applicant's postal, facsimile or electronic mail address where available.
(b) The application shall not be set down for hearing on a date less than five days after expiry of the period referred to in paragraph (a)(ii).
(5) Every application shall be supported by the following documents, where applicable, evidencing:
(a) the market value of the immovable property;
(b) the local authority valuation of the immovable property;
(c) the amounts owing on mortgage bonds registered over the immovable property;
(d) the amount owing to the local authority as rates and other dues;
(e) the amounts owing to a body corporate as levies; and
(f) any other factor which may be necessary to enable the court to give effect to subrule (8): Provided that the court may call for any other document which it considers necessary.
(6)(a) A respondent, upon service of an application referred to in subrule (3), may—
(i) oppose the application; or
(ii) oppose the application and make submissions which are relevant to the making of an appropriate order by the court; or
(iii) without opposing the application, make submissions which are relevant to the making of an appropriate order by the court.

(b) A respondent referred to in paragraph (a)(i) and (ii) shall—
(i) admit or deny the allegations made by the applicant in the applicant's founding affidavit; and (ii) set out the reasons for opposing the application and the grounds on which the application is opposed.
(c) Every opposition or submission referred to in paragraphs (a) and (b) shall be set out in an affidavit.
(d) A respondent opposing an application or making submissions shall, within 10 days of service of the application—
(i) deliver the affidavit referred to in paragraph (c);
(ii) appoint a physical address within 15 kilometres of the office of the registrar at which documents may be served upon such respondent; and
(iii) state the respondent's postal, facsimile or electronic mail address where available.
(7) The registrar shall place the matter on the roll for hearing by the court on the date stated in the Notice of Application.
(8) A court considering an application under this rule may—
(a) of its own accord or on the application of any affected party, order the inclusion in the conditions of sale, of any condition which it may consider appropriate;
(b) order the furnishing by—
(i) a municipality of rates due to it by the judgment debtor; or
(ii) a body corporate of levies due to it by the judgment debtor;
(c) on good cause shown, condone—
(i) failure to provide any document referred to in subrule (5); or
(ii) delivery of an affidavit outside the period prescribed in subrule (6)(d); (d) order execution against the primary residence of a judgment debtor if there is no other satisfactory means of satisfying the judgment debt;
(e) set a reserve price;
(f) postpone the application on such terms as it may consider appropriate;
(g) refuse the application if it has no merit;
(h) make an appropriate order as to costs, including a punitive order against a party who delays the finalisation of an application under this rule; or
(i) make any other appropriate order.
(9)(a) In an application under this rule, or upon submissions made by a respondent, the court must consider whether a reserve price is to be set.
(b) In deciding whether to set a reserve price and the amount at which the reserve is to be set, the court shall take into account—
(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.
(c) If the reserve price is not achieved at a sale in execution, the court must, on a reconsideration of the factors in paragraph (b) and its powers under this rule, order how execution is to proceed.
(d) Where the reserve price is not achieved at a sale in execution, the sheriff must submit a report to the court, within 5 days of the date of the auction, which report shall contain—
(i) the date, time and place at which the auction sale was conducted;
(ii) the names, identity numbers and contact details of the persons who participated in the auction;

our view, includes a proper valuation of the property (under oath)[72], the outstanding arrears, municipal accounts and the like information. This is not to thwart the mortgagee's right to execution, to which it may be entitled[73], but to secure a just and equitable outcome. It is not a prohibition to realise a bank's security as is suggested in the affidavit filed by Investec. The oversight duty is a far cry from such perceived prohibition. This is based on s 1 of the Constitution which places an obligation on all to promote the value of human dignity, the achievement of equality and the advancement of human rights and freedoms which would include the application of s 26 of the Constitution by a court, having regard to all the relevant circumstances, before sanctioning the process that may lead to the ultimate eviction from a home. This is not to hamper the ability of the mortgagee to execute but that very process requires oversight. Fisher J in her judgment in *ABSA Bank v Njolomba and Another*[74] referred to a dictum of Moseneke DCJ in the *Nkata* matter[75] as follows:

> '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

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(iii) the highest bid or offer made; and
(iv) Any other relevant factor which may assist the court in performing its function in paragraph (c).
(e) The court may, after considering the factors in paragraph (d) and any other relevant factor, order that the property be sold to the person who made the highest offer or bid.'

[72] There is an established industry for property valuations, witph well-established methodologies for valuing properties.

[73] *Gundwana* supra note 7.

[74] [2018] ZAGPJHC 94 para 5.

[75] *Nkata v Firstrand Bank Limited* 2016 (4) SA 257 (CC) para 94.

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.'

[58] Fisher J further said:

'There have, of late, been salutary moves in the statutes, case law, rules and practice directives to introduce a measure of flexibility into the execution process where it is sought to execute against the home of a debtor. These laws and rules emanate from an accepted need to promote the objects of our Bill of Rights and especially the requirement that all relevant circumstances be considered before depriving a person of his or her home. They include the requirement that immovable property not be executed against without judicial oversight being brought to bear thereon and the recent introduction of rule 46A into the Uniform Rules which requires that the court "consider alternative means of satisfying the judgment debt, other than execution against the judgment debtor's primary residence". The cases have required stringent adherence to notices and service requirement and the furnishing of details in relation to the steps taken to manage the indebtedness of the debtor. Recent amendments to Rule 46 of the Uniform Rules require the consideration by the court of alternative means of satisfying the judgment debt. These changes impose an even more rigorous investigative function on a court faced with an application for a declaration of executability and require still more information to be forthcoming in relation to the debtor' circumstances and the value of the property. This assists in setting appropriate reserve prices and other sale conditions in the event of execution against the property becoming necessary. However, the process has, as its main endeavour, to maintain the mortgage loan and the rehabilitate the debtor if at all possible.'

[59] What has been set out, thus far, results in a court being placed in a position to determine the imposition of a reserve price that would not necessarily result in the debtor being left with no debt, but rather in a position resulting from a just and equitable process, and the application of the law. That may leave a debtor with or without a debt or even a balance in his or her favour. The capital growth of an investment such as a

home, is a factor that should be weighed up with all the other facts. The Full Court held in *Firstrand Bank v Folscher: and Another, and similar matters*[76]

> '. . . Bond finance is an important socio-economic tool, enabling individuals to acquire their own home, to make the most important investment of their lives, to build up a nest egg, and to eventually enjoy the fruits of capital growth, quite apart from acquiring an asset that may provide security for further access to capital. . . .'

It is therefore necessary for a court to determine whether a reserve price should be set based on all the factors placed before it by both the creditor and the debtor when granting an order declaring the property to be specially executable. If a debtor fails to place facts before the court despite the opportunity to do so, the court is bound to determine the matter without the benefit of the debtor's input. We cannot stress enough that this matter concerns and applies only to those properties which are primary homes of debtors who are individual consumers and natural persons. Rule 46A(8)(e), in operation since December 2017, now empowers the court to set a reserve price for the property at the sale in execution.[77] 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,*[78] *Ntsane,*[79] *Maleka,*[80] *Gundwana,*[81] *Nxazonke*[82] and *Nkwane*[83]. The facts of a particularly 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,

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[76] 2011 (4) SA 314 (GNP) para 39; And see *Nedbank Ltd v Fraser and Another and Four Cases* 2011(4) SA 363 (GSJ) para 21. *Jaftha* at para 58 said that '. . . The need to ensure that homes may be used by people to raise capital is an important aspect of the value of a home which courts must be careful to acknowledge.'

[77] Uniform Rule 46A(8)(e) – '(8) A court considering an application under this rule may—
(a) . . .
(b) . . .
(c) . . .
(d) . . .
(e) set a reserve price. . . .'

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

[79] *Absa Bank v Ntsane and Another* 2007 (3) SA 554 (T).

[80] *Firstrand Bank Limited v Maleke; and three similar cases* 2010 (1) SA 143 (GSJ).

[81] Supra, note 7.

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

[83] *Nkwane v Nkwane and Others* 936700/2016) [2018] ZAGPPHC 153 (22 March 2018).

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.'[84]

[60] The banks submitted that the actual number of properties that are sold in execution is small compared to the total number of mortgage accounts. Without further evidence, it seems unlikely that such a small fraction of the total mortgage matters can threaten the stability of the entire home loan market. So much more the reason to ensure proper court oversight in these matters. The oversight is not to preclude sales in execution, but to regulate it. Arguments which perceive the oversight role as being aimed at hampering the rights of mortgagees to exercise their rights are misplaced. There is no reason to believe that courts will act in such a way or why an unreasonable delay will be caused by such oversight.

[61] The directive by the Judge President in terms of which this matter is heard requires of this court to consider under 'what circumstances should a court set a reserve price and how this is to be determined in terms of . . .Rule 46A . . . .'

[62] We are of the view that setting a reserve price would depend on the facts of each case. Some facts may indicate that the debt is so hopelessly in excess of the value of the property that the reserve price would be irrelevant compared to the value of the property but yet, if the debt is not satisfied by the proceeds of the sale of the property, a debtor still remains liable for any balance after realisation of the property. In all the circumstances, a reserve price should be set in all matters where facts indicate it. It will not be possible to set out a *numerus clausus* of factors to be considered in each case as the reserve price will depend on the facts of each individual matter. As was the case in *Jaftha*, it would be unwise to set out all the relevant factors for each matter. Mokgoro J said[85]:

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[84] Per Keightley J in *Mouton v Absa Bank Ltd* 17922/2014; *Haylock v Absa Bank Ltd* 24820/2015 (14 July 2017).
[85] At para 56.

'[56] It would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight. However, some guidance must be provided'.

[63] *Lekuku*[86] expressed, albeit for a different purpose, the factors that are taken into account as follows:

'[34] An important difficulty raised by the Bank was the issue of low arrears and the varying approaches by different judges as to what the benchmark is for arrears being too low to justify foreclosure. The difficulty with the differing approaches by the Bench results in the banks not knowing in advance whether foreclosure will be granted. A court will always have a discretion based on the facts before it as to what amount is proportional to the final effect and consequence of foreclosure. In carrying out this assessment, the court in each and every case carries out a unique enquiry in exercising its judicial oversight. To lay down a standard approach will be contrary to the constitutional imperative of judicial oversight in foreclosure matters.'

And:

'[36] It would be inappropriate to define when arrears are low for the purpose of Practice Directive 10.17.1.6 as this would unduly restrict a discretion which a judge must exercise in the particular circumstances of each case. This Full Bench cannot give guidance in this regard as the very purpose of the judicial oversight requires an enquiry and a strategic engagement with the parties. The amicus curiae submitted that the overriding question is whether execution is proportionate, having regard to all the relevant circumstances. The amicus curiae submitted that there is no definitive number or easy calculation. If there were, claims for execution against residential property would be liquidated claims. The underlying basis of the *Jaftha* and *Gundwana* decisions is that they are not.'

[64] It was argued that factors such as whether the defaulting party is a serial defaulter or an exceptional one, should play a role. We need not consider this now but it is difficult to foreshadow how such a factor can have a bearing on the value of a property, whether sold in the open market or at a forced sale.

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[86] At paras 34 and 36.

[65] It will be incumbent upon an applicant for execution to set out such facts relevant to a particular case with due regard to the provisions of Rule 46A[87] so that a court can exercise its discretion properly. After all, a court is obliged to consider whether to set a reserve price. It can only do so if all the facts are fully disclosed. A reserve price will balance the misalignment between the banks and the debtors where execution orders are granted. It ensures that the debtor is not worse off due to unrealistically low prices being obtained and accepted at sales in execution. This oversight regarding the imbalance between the parties, can only effectively be exercised if the matters are brought properly to court, setting out all relevant factors so that a court can decide whether to set a reserve price in a particular matter.

[66] We are aware that Rule 46A(8) provides that a court 'may' set a reserve price. In order to comply with the constitutional requirement of just and equitability, it would be an exception rather than a rule where a reserve price is not set by a court. In our view, question 7 should be answered as follows:

> '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.'

Case number 2017/35579 (Absa Bank v Dokkie Kenneth Mokebe)

[67] Absa only sought money judgment before Van der Linde J. Having set out the history of the matter, Absa has decided not to persist in its default judgment in this matter due to the defendants having made payment.

Case number 48091/2017 (Absa Bank v Reascar Lebogang Kobe)

[68] Absa Bank seeks the monetary judgment only. As a result of our conclusions herein, such cannot be granted without the order for executability.

Case number 1459/2018 (Absa Bank v Malibongwe Noel Vokwana)

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[87] Uniform Rule 46A(9)(a) (New Rule).

[69] Absa only sought a money judgment before Van der Linde J. Due to the defendant having brought up the arrears substantially, Absa no longer seeks a default judgment.

Case number 2017/35579 (Standard Bank v Illan Sampson Colombick and Another)

[70] Of the four matters referred to this Full Court the matter of Standard Bank must be distinguished. In this matter the judgment and execution sought is not in relation to a primary residence. The facts show that the respondents reside in New Zealand and that they are letting the property to third parties. They are not indigent, vulnerable debtors at risk of losing their home. Their constitutional right to access to adequate housing is not implicated. Indeed, they appear to be receiving a rental income from the property while evading their obligations. In such cases the ordinary commercial consequences should follow and Standard Bank should be entitled to judgment for the amounts owing and to have the property declared specially executable.

Order

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.

Case number 2017/35579 (Absa Bank v Dokkie Kenneth Mokebe)

5) No order is issued.

Case number 48091/2017 (Absa Bank v Reascar Lebogang Kobe)

6) No order is issued.

Case number 1459/2018 (Absa Bank v Malibongwe Noel Vokwana)

7) No order is issued.

Case number 2017/35579 (Standard Bank v Illan Sampson Colombick and Another

8) An order is granted in favour of Standard Bank for:

8.1) Payment of the amount of R771 494.43;

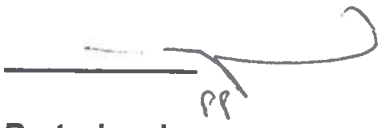
8.2) Interest on the amount referred to in para 2.1 above at the rate of 8.25% per annum, from 15 August 2017 to date of payment;

8.3) The immovable property described as PORTION 1 OF ERF 84 MELVILLE TOWNSHIP, REGISTRATION DIVISION IR PROVINCE OF GAUTENG MEASUIRNG 379 (THREE HUNDRED AND SEVENTY NINE) SQUARE METRES HELD BY DEED OF TRANSFER NO. T11534/2006 SUBJECT TO THE CONDITIONS THEREIN CONTAINED is declared to be specially executable.

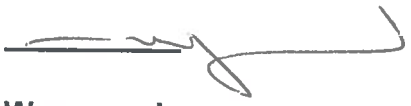
8.4) A writ of execution is hereby authorised;

8.5) Costs of suit (excluding the costs occasioned by the proceedings subsequent to the matter serving before Van der Linde J).

Tsoka J



Pretorius J



Wepener J

Counsel for Absa: W. Trengove SC with N. Luthuli and A. Armstrong

Attorneys for Absa: Webber Wentzel

Counsel for Standard Bank: J. Babamia with S. Budlender and M. Mbikwa

Attorneys for Standard Bank: Norton Rose Fulbright South Africa Inc.

Counsel for Investec Bank: J.E. Smit with P.G. Louw

Attorneys for Investec Bank: Werksmans Attorneys

Counsel for the National Credit Regulator: T.V. Norman SC with P. Jara

Attorneys for National Credit Regulator: Mafungo Attorneys

Counsel for Socio-Economic Rights Institute of South Africa: S. Wilson

Counsel for Legal Aid South Africa: L. Crouse with N. Skibi

Counsel for Law Society of South Africa: N. Matlala

Attorneys for Law Society of South Africa: Maluleke Seriti Mkume Matlala Inc.

Counsel Lungelo Lethu Human Rights Foundation: A. Cockrell SC with Z. Suliman

Attorneys for Lungelo Lethu Human Rights Foundation: Legal Resources Centre