

**MORTGAGE FORECLOSURES AND THE NATIONAL CREDIT ACT:
BALANCING THE RIGHTS OF THE CREDITOR AND THE RIGHTS OF THE
DEBTOR IN LIGHT OF *JAFTHA V SCHOEMAN***

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1 Introduction

The right of a creditor to foreclose a mortgage agreement, usually against the default of the debtor, and the subsequent sale in execution of the hypothecated immovable property is an important part of any modern credit-driven economy. A creditor, as mortgagee, may rely on the common law right to foreclose a mortgage agreement as a legally sanctioned means to ensure the enforcement of the mortgage debt. However, the foreclosure of a mortgage agreement will invariably implicate a number of constitutional rights and principles that are protected by the Constitution of the Republic of South Africa, 1996 (the “Constitution”).¹

The Constitutional Court (the “CC”) in *Jaftha v Schoeman; Van Rooyen v Stoltz and Others*² (“*Jaftha*”) held that a person’s right to have access to adequate housing in terms of section 26(1) of the Constitution may only be negatively affected if such a deprivation is in line with section 36 of the Constitution.³ The CC held that where a limitation of the right to have access to adequate housing comes about due to the enforcement of a debt it must be in accordance with section 36.

Although the CC in *Jaftha* confirmed that the foreclosure of a mortgage is legally acceptable, section 36 will require a court to strike a proportional balance between the rights of the debtor against those of the creditor to enforce the mortgage debt.⁴ In other words, a court is precluded from granting an execution order if it does not balance the rights of the debtor and those of the creditor where the debtor’s rights will be disproportionately affected by the sale in execution. Judicial oversight is therefore required to give effect to this balancing act.

¹ L Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* LLD thesis Pretoria University (2012) 2.

² 2005 2 SA 140 (CC).

³ R Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* LLD thesis Stellenbosch University (2012) 1.

⁴ 2.

The requirement of judicial oversight is an important development as many mortgagors in South Africa are indigent homeowners who often face the possibility of losing their home once an order for the sale in execution of the mortgaged property is granted.⁵ Apart from the proportionality test that has been developed against the backdrop of the Constitution, the National Credit Act 34 of 2005 (the “NCA”), which came into effect in 2007, contains a number of provisions that are applicable in the context of residential mortgage foreclosures.

One of the aims of the NCA is to ameliorate the problem of over-indebtedness by providing a debtor with a number of new debt-relief mechanisms. These remedies are important as they can, in some instances, prevent the mortgagee from foreclosing the mortgage agreement and enforcing the mortgage debt.⁶ The NCA therefore exerts a strong legislative influence over many aspects of the law regarding foreclosures and the enforcement of the mortgage debt.

The paper investigates whether the NCA, if applied correctly and effectively, can provide the courts, in the context of mortgage foreclosures, with the necessary means to give effect to the proportionality test laid down in *Jaftha*. Section 2 briefly discusses the general principles of mortgage foreclosures in light of the Constitution. Section 3 deals with the NCA by looking at a few of the new debt relief remedies afforded to credit consumers and how these impact on foreclosures. Section 4 discusses the English law in relation to mortgage foreclosures and compares it to South African mortgage law. Section 5 concludes.

2 Principles of mortgage law and mortgage foreclosures

Once an order for execution is granted by the court against the defaulting debtor, the sale of the mortgaged property may occur without the consent of the mortgagor.⁷ In other words, a mortgagor agrees, contractually, that if he or she does not fulfil the obligation to repay the loan, the creditor may enforce the mortgage debt by foreclosing the mortgage agreement, approaching the court for a default judgment and an execution order, and then selling the mortgaged property.⁸ Furthermore,

⁵ Steyn *Statutory Regulation of Forced Sale of the Home* 2.

⁶ Brits *Mortgage Foreclosure under the Constitution* 5.

⁷ 22.

⁸ AJ van der Walt “Property, Social Justice and Citizenship: Property Law in Post-Apartheid South Africa” (2008) 19 *Stell LR* 325 329.

upon the registration of the mortgage bond in the deeds office the mortgagee acquires a limited real right over the mortgaged property.⁹

This is important as the holder of the limited real right may in appropriate circumstances enforce the mortgage debt. For this reason mortgage agreements are an important part of a modern credit-driven economy.¹⁰ The net result of the aforementioned is that large creditors, like banks, will more readily extend credit to debtors as they have a means to enforce the debt when the debtor is in default. According to Steyn, our courts recognise that mortgage bonds are an “indispensable” mechanism whereby homeownership is promoted and that the mortgagee’s right is “fused into the title of the mortgaged property”.¹¹

2 1 Mortgage foreclosures and the Constitution

A mortgage agreement will often include a so-called acceleration clause which normally accompanies the foreclosure clause. An acceleration clause gives the mortgagor a contractual right to accelerate the outstanding mortgage debt once the mortgagor defaults on the obligation to repay the loan.¹² In practice this would usually entail the failure of the debtor to pay the agreed periodic instalments in a timely manner. Once a mortgagee forecloses the mortgage, and accelerates the debt, “the balance on the loan becomes due and payable”.¹³

Once the mortgage is foreclosed the mortgage agreement is cancelled. The mortgagee will then approach the court for an execution order against the mortgaged property. Although a mortgagee must act in accordance with the general rules of mortgage law and the procedural rules in relevant legislation, mortgage foreclosures, and the subsequent sale in execution of the property, can have an adverse impact on the constitutional rights of the debtor. This is illustrated by the facts in *Jaftha* where the sale in execution would have rendered the debtors without a home.¹⁴

The CC held in *Jaftha* that the sale in execution would limit the debtors’ section 26(1) right to have access to adequate housing and that such a limitation must be justifiable in light of section 36 of the Constitution. To ensure that the limitation is justifiable the CC held that an execution order must be subject to judicial oversight.

⁹ Brits *Mortgage Foreclosure under the Constitution* 23.

¹⁰ R Group, J Scholz & M White “Personal Bankruptcy and Credit Supply and Demand” (1997) 112 *The Quarterly Journal of Economics* 217 217-251.

¹¹ Steyn *Statutory Regulation of Forced Sale of the Home in South Africa* 6.

¹² Brits *Mortgage Foreclosure under the Constitution* 45.

¹³ 46.

¹⁴ Van der Walt (2008) *Stell LR* 329.

The aim of judicial oversight is to ensure that all the relevant circumstances are taken into account when the section 26(1) right to have access to adequate housing is limited by an order for execution. This is important as it ensures that any negative impact on the section 26(1) right of the mortgagor can only be justified if it accords with section 36, that is, the purpose of the limitation must be balanced “against the nature of the right and the nature and extent of the limitation”.¹⁵ Therefore, a court may not order the sale in execution of the mortgaged property without investigating all the relevant circumstances in order to maintain a constitutionally compliant proportional balance between the rights of the debtor and the rights of the creditor.

2 1 1 *Ntsane and Maleke: applying the proportionality test*

In *ABSA Bank Ltd v Ntsane and Another*¹⁶ (“*Ntsane*”) the creditor wanted to obtain an execution order against a debtor who was in arrears with R18,46.¹⁷ The creditor accelerated the mortgage debt and applied for a default judgment against the debtor for the principal sum of R62 042,043.¹⁸ The court confirmed that “there will be circumstances in which it will be unjustifiable to allow execution” despite the fact that the creditor could accelerate the mortgage debt and claim the outstanding balance.¹⁹

The court in *Ntsane* confirmed that it would be unjustifiable to grant the execution of mortgaged property of debtors where it would deprive those debtors of their section 26(1) right to have access to adequate housing.²⁰ Moreover, the court held that in light of *Jaftha* it was obliged to balance the rights of the debtors and the rights of the creditor by considering all the relevant interests of the parties involved.²¹ Judicial oversight demanded as much. The court, however, warned that this balancing act should not as a rule prevent the creditor from enforcing the outstanding mortgaged debt lest it create “uncertainty and distrust in commercial activities”.²² Based on this the court did not grant the default judgment as it would have deprived the debtors of their section 26(1) right.

In *Firstrand Bank Ltd v Maleke and Three Similar Cases*²³ (“*Maleke*”) the court touched on the fact that upon execution the creditor would be “afforded the benefit of

¹⁵ *Brits Mortgage Foreclosure under the Constitution* 73.

¹⁶ 2007 3 SA 554 (T).

¹⁷ Para 14.

¹⁸ Para 6.

¹⁹ Para 64.

²⁰ Para 63.

²¹ Para 71.

²² Para 72.

²³ 2010 1 SA 143 (GSJ).

the capital growth in an immovable property” whilst the value of the homes were “substantially in excess of the outstanding balances owed”.²⁴ The creditor would therefore, upon the execution of the property, gain a significant financial benefit at the expense of the debtors who would lose their homes and the growth in equity of the immovable property.

The court confirmed that it was compelled to consider the impact of the execution order on the debtors’ section 26(1) right to have access to adequate housing, and as a result, had to consider relevant factors such as “how the debt was incurred”, the “financial situation of the debtors”, the size of the debt and the “attempts made by the debtor to pay off the debt”.²⁵ Both the size of the debt and the financial situation of the debtors were relevant in *Maleke*. As stated above, the financial benefit the creditor stood to gain from the sale of the mortgaged property was in excess of the outstanding mortgage debt.

The debtors had paid their monthly instalments for more than a decade and would not be afforded the benefit of the capital growth in the immovable property if the creditor sold the property in execution. Furthermore, the debtors were poor and would be adversely affected by the loss of their homes. As a result, the sale in execution of the property would have had a disproportionate impact on the debtors. The court therefore declined to grant an execution order as it would have been unjustifiable to do so in light of *Jaftha* and the proportionality test.

Both *Ntsane* and *Maleke* illustrate the importance of judicial oversight in preventing the unjustifiable execution of mortgaged property by requiring the court to consider all the relevant information and balance the rights of all the parties involved.

2 1 2 *Creative alternatives and an abuse of process*

Two prominent factors that serve to indicate whether a sale in execution would be unjustifiable relates to the existence of alternatives and the presence of an abuse of process on the part of the creditor.²⁶ It is beyond contention that a court should not allow the execution of mortgaged property where there is an abuse of process.²⁷

Where there are intimations of an abuse of process, or the execution order could have a disproportionate impact on the debtor, courts must consider “creative alternatives” to ensure that the enforcement of a mortgage debt is constitutionally

²⁴ Para 8.

²⁵ Para 60.

²⁶ *Brits Mortgage Foreclosure under the Constitution* 120.

²⁷ 121.

complaint.²⁸ However, creditors under the common law are entitled to enforce their claims “directly against the hypothecated property”.²⁹ Creditors are, by operation of law, therefore not obliged to execute the mortgage debt against other assets which would limit the adverse impact of debt enforcement on debtors. Thus, creditors are not compelled to use less disruptive or onerous means to satisfy the mortgage debt.

The net result of the general principles of mortgage law is that the section 26(1) right of mortgagors could be limited despite the availability of other alternatives, like executing against other assets.³⁰ This limitation, in the presence of other alternatives, could be construed as an unjustifiable limitation of the right to have access to adequate housing in light of *Jaftha* and the Constitution.

2 1 3 Subsidiarity: the NCA and the common law

As the common law cannot give proper effect to the right in section 26(1) of the Constitution, or the decision in *Jaftha*, the common law appears to require development to bring it in line with the Constitution. However, in light of the principles of subsidiarity the development of the common law will be unwarranted. The principles of subsidiary were developed to determine which source of law will be the most appropriate to apply where there is an infringement of a right in the Bill of Rights (the “BOR”).

In an important article Du Plessis developed the principles of subsidiarity in light of a number of CC judgments.³¹ The principles of subsidiarity turn on whether Parliament has enacted legislation that gives effect to a particular right in the BOR. If there exists no such legislation, and the common law does not adequately give effect to the spirit, purport and objects of the Constitution,³² the common law must be developed. If legislation has been enacted to give effect to a right in the BOR, it will be inappropriate to develop the common law.

Accordingly, Van der Walt states that an applicant, who avers that his or her constitutional right has been infringed, should not rely on the common law if legislation has been enacted to give effect to that particular right.³³ Consequently, an applicant cannot rely directly on the BOR where legislation has been enacted to give

²⁸ *Jaftha v Schoeman; Van Rooyen v Stoltz and Others* 2005 2 SA 140 (CC) para 59.

²⁹ *Brits Mortgage Foreclosure under the Constitution* 124.

³⁰ 121.

³¹ L du Plessis “Subsidiarity’: What’s in the Name for Constitutional Interpretation and Adjudication?” (2006) 17 *Stell LR* 207 207-231.

³² S 39(2) of the Constitution of the Republic of South Africa, 1996.

³³ AJ van der Walt *Constitutional Property Law* 3ed (2011) 66.

effect to the right in question. However, an applicant may rely directly on the Constitution if he or she attacks the constitutionality of the legislation.³⁴

The applicant should therefore rely on the relevant legislation and not on the common law or on the Constitution to address the infringement of the constitutional right. This principle is confirmed by section 8(3)(a) of the Constitution which states that the common law should be developed to give effect to the Bill of Rights to the “extent that legislation does not give effect to that right”.

Moreover, the CC has held that there is only a single system of law that is subject to the Constitution.³⁵ Importantly, the principles of subsidiarity support and strengthen the aforementioned principle by developing a single stream of law which must at all times give effect to the spirit, purport and objects of the Constitution. By developing the common law where it is not appropriate to do so courts will undermine the single-system-of-law principle.

Although the NCA was not enacted to give express effect to section 26(1) of the Constitution, the NCA was enacted to regulate the consumer credit market in South Africa. Mortgage agreements are credit agreements and therefore fall within the ambit of the NCA. Therefore, courts should apply the NCA in the context of mortgage agreements instead of developing the common law in light of the principles of subsidiarity. This will ensure that a single system of law is developed that gives effect to the BOR and relevant constitutional principles.

3 The National Credit Act

The NCA aims to regulate the consumer credit market by creating a comprehensive legislative framework against which all credit agreements will be evaluated. The NCA, through several new remedies, impacts directly on mortgage agreements and mortgage foreclosures by providing a debtor with protection he or she did not enjoy under the common law. The NCA can be viewed as the legislative equivalent of the “creative alternatives” a court can use to balance the rights of the debtor against those of the creditor.

³⁴ 66.

³⁵ *Pharmaceutical Manufacturers Association of SA and Another: In re Ex Parte the President of the Republic of South Africa and Others* 2000 2 SA 672 (CC) para 44.

3 1 The NCA and new debt-relief remedies

The NCA confirms the right of the mortgagee to enforce the mortgage debt by way of foreclosure.³⁶ However, the right of the creditor to enforce the mortgage agreement is subject to section 129 and section 130 of the NCA which regulates the implementation of the debt enforcement agreement.

3 1 1 Section 129(1)(a): the Notice of Default

Section 129(1)(a) of the NCA sets out the required steps a litigant must take to enforce the credit agreement. It can be construed as a threshold requirement that must be satisfied before the machinery of debt enforcement may be set in motion. Section 129(1)(a) requires a creditor to send a written “notice of default” to the defaulting debtor. A creditor may not take any legal steps against the debtor before a notice of default is sent to the debtor. The purpose of the notice is to notify the debtor that he is in default as well as laying the groundwork upon which the parties can come to an agreement as to how the debtor will “bring the payments up to date”.³⁷

In the context of foreclosures the creditor will have to inform the debtor of the material consequences that flow from a foreclosure, like the acceleration of the repayment of the outstanding mortgage debt.³⁸ The effect of section 129(1)(a) is that it gives the mortgagor a chance to bring the amount in arrears up to date whilst preventing the mortgagee from foreclosing the mortgage and invoking the acceleration clause to accelerate the repayment of the outstanding debt.

Section 129(1)(a) is an important legislative development as it precludes the creditor from accelerating the repayment of the debt and applying for a default judgment if the debtor is not properly informed about the nature and the consequences of the debt enforcement proceedings. The *Ntsane* case is a clear example of a matter where section 129(1)(a) would have required the mortgagee to send a notice of default. The mortgagee would have been compelled to resolve the dispute, outside of court, by entering into talks with the mortgagor as to how he would bring the amount of R18, 46 in arrears up to date.

In terms of section 130(1)(b) it will only be permissible for a creditor to enforce the debt if the debtor does not accept the creditor’s proposals in the notice of default or the debtor does not respond to the notice. A court may only make a determination

³⁶ Brits *Mortgage Foreclosure under the Constitution* 138.

³⁷ 150.

³⁸ *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 para 28.

regarding the mortgage foreclosure once section 129(1)(a) has been complied with. Moreover, if the debtor and the creditor have come to an agreement about the way the credit dispute will be resolved, the creditor is precluded from enforcing the debt.³⁹

Thus, section 129(1)(a) gives the debtor an opportunity to make the necessary debt repayments to bring the mortgage debt up to speed. This section also prevents the creditor from enforcing the debt without first attempting to resolve the dispute with the co-operation of the debtor. Legal action against the debtor should thus only follow if the mechanism in section 129(1)(a) has failed to resolve the credit dispute.

3 1 2 Section 129(3)(a): the right of reinstatement

Under the common law a creditor may enforce the mortgage debt even though the amount with which the debtor was in arrears was small. If the mortgagee foreclosed the mortgage the debtor could only reinstate the mortgage agreement by paying the outstanding balance.⁴⁰ This is known as the debtor's right of redemption.

The facts in *Ntsane* can be used to illustrate the operation of the common law. If the mortgagor wanted to reinstate the mortgage agreement after the foreclosure by the bank, paying the R18,46 in arrears would not have sufficed. Only the repayment of the outstanding balance of R62 042,043 would have reinstated the mortgage agreement. In the case of most debtors the repayment of the outstanding mortgage debt is not a viable option. As a result many debtors will not be able to stop the sale in execution of their homes with their right of redemption.

Section 129(3)(a) of the NCA gives a debtor a new right which did not exist under the common law. It states that a credit consumer may reinstate the credit agreement, "before the credit-provider has cancelled the agreement", if he or she pays the "credit-provider all amounts that are overdue" along with other expenses like default charges.⁴¹ The mortgagor may reinstate the agreement unilaterally without notifying the mortgagee of his or her intention to do so.⁴² The right of reinstatement may not be waived by agreement or by a rule of the common law.⁴³ Brits argues that in the context of mortgage agreements the cancellation of the credit agreement "refers to

³⁹ S 130(3)(c)(ii)(cc) of the National Credit Act 34 of 2005.

⁴⁰ Brits *Mortgage Foreclosure under the Constitution* 48.

⁴¹ S 129(3)(a) of the National Credit Act 34 of 2005.

⁴² *Dwenga v First Rand Bank Ltd and Others* (EL 298/11, ECD 298/11) [2011] ZAECELLC 13 para 15.

⁴³ Brits *Mortgage Foreclosure under the Constitution* 157.

that point in the proceedings after the property had been sold in execution and transferred to the auction purchaser”.⁴⁴

Therefore, a mortgagor will be able to reinstate the mortgage agreement by getting the amount in arrears up to date at any stage prior to the sale in execution of the mortgaged property. This new remedy is important as it does not require of the mortgagor that he or she repay the outstanding balance of the mortgage debt. As a result the mortgagor is afforded greater protection in keeping his or her home. However, the right of reinstatement does not prevent the creditor from enforcing the mortgage debt through a sale in execution. If the mortgagee complies with all the procedural requirements of section 129, and the mortgagor chooses not to use his or her right of reinstatement, the mortgagee may enforce the debt through execution.

This is an example of a “creative alternative”, as referred to in *Jaftha*, that balances the rights of the creditor against those of the debtor in a proportional manner. The right of reinstatement was discussed by the court in *Nedbank Ltd v Fraser and Another and Four Others Cases*⁴⁵ (“*Fraser*”) where it held that a debtor can prevent his home from being sold in execution by reinstating the agreement. *Fraser* confirmed that the amount that is “overdue” for the purposes of reinstatement in terms of section 129(3)(a) is not the accelerated debt, but the amount with which the mortgagor is in arrears.⁴⁶ Thus, the right of reinstatement gives the mortgagor a financially viable mechanism whereby the sale in execution of the property, and the loss of his home, can be prevented by getting the amount in arrears up to date.

3 1 3 Over indebtedness and debt review

The concept of over-indebtedness is a novel one in the context of South African credit law. Section 79(1)(a) of the NCA states that a consumer is “over-indebted” if he or she “will be unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party”. As over indebtedness is one of the main causes of mortgage foreclosures, reducing the number of over-indebted homeowners can greatly stabilise the South African mortgage market.⁴⁷

In light of this the NCA has introduced alternative mechanisms whereby the debtor can reduce his or her over indebtedness and delay the enforcement of the debt. One of these mechanisms is debt review where a debtor is assisted by a debt counsellor.

⁴⁴ 157.

⁴⁵ 2007 3 SA 554 (T).

⁴⁶ Para 41.

⁴⁷ *Brits Mortgage Foreclosure under the Constitution* 173.

Once under review a debt counsellor will guide the debtor as to how he can optimally employ his income to satisfy his debt in a timely manner.

Debt counsellors will also attempt to rearrange the repayment of the credit consumer's debt in a way that would be acceptable to his or her creditors.⁴⁸ These mechanisms directly affect the operation of mortgage foreclosures. In terms of section 130(4)(c)(i) a court can adjourn the proceedings if the debtor is subject to a debt review. A court can also, in terms of section 130(4)(c)(ii), declare the particular debtor as over-indebted and make an order accordingly.

The order may require of the debt counsellor to report directly to the court or may require the debt counsellor to discontinue the debt review.⁴⁹ Moreover, section 130(3)(c)(i) gives the court a discretion not to enforce the mortgage debt if the court is of the opinion that the creditor approached the court whilst the dispute was subject to debt review. According to Van Heerden, the aforementioned scenario will most probably arise if the debtor approaches a debt counsellor after receiving a section 129(1)(a) notice of default from the creditor.⁵⁰

The effect of these provisions is to temporarily delay the enforcement of the mortgage debt by way of foreclosure where the debtor is over-indebted and has sought alternative mechanisms, such as debt review, to resolve the credit dispute. The NCA thus allows an over-indebted mortgagor to seek alternative means to repay the mortgage debt without the fear that the mortgagee will execute the property.

Although the debt review process appears to be debtor orientated, a creditor may through section 86(10) end the debt review process by sending a notice of termination. A creditor may only send the notice after 60 business days have lapsed since the day the debtor applied for a debt review. After sending the notice the creditor may enforce the debt if the court is satisfied that the debt review should not continue.⁵¹ Thus, section 86(10) balances the right of the creditor, to enforce the debt, against the right of the debtor to apply for debt review as the creditor can force the debt-counsellor to approach the debt review process in an expeditious manner. Debt-review is therefore another way to balance the rights of the parties involved.

⁴⁸ 175.

⁴⁹ 174.

⁵⁰ C van Heerden "Enforcement of Credit Agreements" in JW Scholtz, JM Otto, E van Zyl, CM van Heerden & N Campbell (eds) *Guide to the National Credit Act* (2009) 12-34 - 12-35.

⁵¹ S 86(11) of the National Credit Act 34 of 2005.

4 Mortgage foreclosures in English law

The enforcement of a mortgage debt in the English law is generally viewed as being creditor orientated, that is, the creditor will come up trumps in the majority of mortgage debt disputes.⁵² Comparing South African mortgage law with English mortgage law can be fruitful for a number of reasons. The most prominent reason relates to the fact that English courts have grappled with the question of how best to balance the rights of the creditor against the rights of the debtor whilst being sensitive to the plight of debtors who could lose their homes upon execution.

Furthermore, a number of English scholars, most notably Fox, have argued for a broader conception of the rights that are potentially affected once the creditor enforces the mortgage debt against the mortgaged property.⁵³ These rights include those of other occupiers, like children and the debtor's spouse, who were not a party to the mortgage agreement but who are still affected by the loss of their home. The emphasis on the effect mortgage debt enforcement has on other, non-commercial interests is of great relevance in light of *Jaftha* and the requirement that the rights of the debtor must be balanced against those of the creditor.

4 1 English Law: Enforcement Remedies

For the mortgagee to enforce the mortgage debt, he must take possession of the immovable property.⁵⁴ After taking possession he may sell the property to satisfy the mortgage debt. According to Brits, the right of the mortgagee to take possession of the property is equivalent to the "South African mortgagee's right to have the property attached prior to the sale".⁵⁵ A court may stay the possession of the property in order to give the mortgagor an opportunity to repay the debt in full.⁵⁶

Courts have a statutory discretion in terms of section 36 of the Administration of Justice Act 1970 ("AJA") to stay the possession of the property in order "to give a measure of relief to those people who find themselves in temporary financial difficulties, unable to meet their commitments under their mortgage and in danger of losing their homes". Importantly, section 36 affords the debtor an opportunity to get

⁵² L Fox *Conceptualising Home: Theories, Laws and Policies* (2007) 14.

⁵³ 80-130.

⁵⁴ K Gray & SF Gray *Land Law* 6ed (2009) 291.

⁵⁵ Brits *Mortgage Foreclosure under the Constitution* 258.

⁵⁶ Gray & Gray *Elements of Land Law* 772.

the amount in arrears up to date and thereby prevent the mortgagee from taking possession of the property.⁵⁷

The mortgagor, in terms of section 36, only has to pay the amount in arrears and not the balance of the outstanding debt. As Brits correctly points out, section 36 has a “similar effect as the ability of South African debtors to rectify default in terms of their right to reinstate the credit agreement” in terms of section 129 of the NCA.⁵⁸ However, the debtor must provide proof that he will be able to satisfy the debt in a reasonable time. In *Cheltenham and Gloucester Building Society v Norgan*,⁵⁹ the court held that a reasonable time will be determined against the remainder of the mortgage term. Thus, debtors are given a more accommodating time frame to get the amount in arrears up to date thereby promoting a more equitable outcome.

Fox argues that the abovementioned development protects the rights and interests of the debtor to some degree.⁶⁰ They are protected as the court is given a discretion to stay the possession of the mortgaged property, provided the debtor will be able to satisfy the debt, thereby preventing other occupiers like the debtor’s children and spouse from losing their home.

However, the court’s primary focus is still on the ability of the debtor to get the amount in arrears up to date rather than protecting the interests of the debtor and other occupiers. This approach was confirmed in *Bristol and West Building Society v Ellis*,⁶¹ where the court held that it could stay the possession of the property subject to the debtor’s ability to repay the amount in arrears within a reasonable period. In other words, the court will only stay possession of the property if the debtor can pay the amount in arrears. If a debtor cannot do so, the court will not stay the possession of the property simply to protect the interests of the debtor and non-debtor occupiers. Thus, English courts generally follow a formalistic and statute-bound approach when exercising its discretion to stay the possession of the property.

4 2 The mortgagee’s right to sell the property

The mortgagee will sell the mortgaged property after he has taken possession of thereof in order to enforce the debt. The right to sell the property is usually acquired through a standard term in the mortgage agreement which is based on section

⁵⁷ RJ Smith *Property Law* 6ed (2009) 575.

⁵⁸ Brits *Mortgage Foreclosure under the Constitution: Property, Housing and the National Credit Act* 263.

⁵⁹ [1996] 1 WLR 343.

⁶⁰ Fox *Conceptualising Home: Theories, Laws and Policies* 43.

⁶¹ (1996) 73 P&CR 158.

101(3) of the Law of Property Act 1925 (“LPA”).⁶² If the three requirements in the LPA are complied with, the mortgagee acquires a statutory right to sell the property without the interjection of a court. The three requirements are the following: the mortgage must have come into being through a mortgage deed, the debt must be due and the deed does not exclude the right of the mortgagee to sell the property.⁶³

This is in stark contrast to South African law where a mortgagee must obtain the leave of court to sell the mortgage property. The effect of the LPA can therefore be very harsh as the debtor, without the leave of court, will lose his or her home once the mortgagee sells the property. As a consequence an English court will only be able to determine whether the sale of the property should take place when the mortgagee applies to court to take possession of the property. This outcome appears to be iniquitous, if compared to South African law, as the mortgaged property in our law may only be sold subsequent to a court ordering the sale in execution thereof.

4 3 The concept of “home” in English law

According to Fox, the English courts routinely ignore the “home interests” of the mortgagor in favour of the commercial interests of the creditor in the context of mortgage debt enforcements.⁶⁴ Fox argues that the right of the debtor and other occupiers to a home should play a material role when the court seeks to balance the rights of the debtor against the rights of the creditor.⁶⁵

The right of the occupier to a home, and all the non-financial interests that are related thereto, must form part of a court’s balancing act when considering the enforcement of the mortgage debt. These rights are broadly referred to as “home interests”. Home interests include the value attached by debtor-occupiers to their “home” in a wider social, cultural and financial sense.⁶⁶ Although the right of a creditor to enforce the mortgage debt should not be compromised by the home interests of the debtor, such interests are relevant in the context of mortgage foreclosures. According to Fox these rights must form part of the balancing act a court should perform when it decides whether to stay the possession of the property.

There are a number of reasons why a court must take cognisance of the debtor’s and non-debtor occupiers’ home interests. Firstly, the effect of losing a home on

⁶² Brits *Mortgage Foreclosure under the Constitution* 268.

⁶³ 268.

⁶⁴ Fox *Conceptualising Home: Theories, Laws and Policies* 79.

⁶⁵ 80.

⁶⁶ 131-180.

other occupiers, like children, are significant and cannot simply as a matter of principle be trumped by the commercial interests of the creditor.⁶⁷ The “home interests” of non-debtor occupiers are interests worthy of legal protection. The court must therefore at least investigate the potential impact of the sale of the home on non-debtor occupiers when considering the enforcement of a mortgage debt.

Secondly, the argument that one should honour one’s contractual obligations is less persuasive in this context as non-debtor occupiers are not a party to the mortgage agreement.⁶⁸ As a consequence the argument that a debtor is bound by the mortgage contract, one he or she voluntarily agreed to enter into, carries less, if any, weight in relation to non-debtor occupiers. In other words, a court should be more critical of arguments based on the principle of *pacta sunt servanda* when considering the negative effects of the mortgage debt enforcement on the home interests of the non-debtor occupiers.

In light of the above Fox argues that courts should consider the effects of mortgaged debt enforcement on the home interests of the debtor and non-debtor occupiers. Courts should balance these interests against the commercial interests of the creditor to ensure that an equitable balance is maintained.⁶⁹

Despite these criticisms, English courts, much like South African ones, focus primarily on the enforcement of the mortgage agreement generally to the exclusion of other relevant considerations. One of the reasons advanced by Fox for this reluctance is the difficulty courts encounter in measuring the value of home interests.⁷⁰ In contrast, the commercial interests of the creditor can be readily measured or quantified which tips the balance in the creditor’s favour.

The creditor-orientated approach of English courts was evident in *Barclay’s Bank plc v O’Brien*⁷¹ and *Barclay’s Bank plc v Hendricks*⁷² where the court granted an order for the sale of the debtors’ family home even though their spouses were not a party to the agreement nor consented to the use of the home as security for the mortgage debt.⁷³ The court was visibly reluctant to consider the impact of the sale of the mortgaged property on the home interests of the non-debtor occupiers. In fact,

⁶⁷ 80-130.

⁶⁸ 80-130.

⁶⁹ 80-130.

⁷⁰ 79.

⁷¹ 1994 1 AC 180.

⁷² 1996 1 FLR 258.

⁷³ Fox *Conceptualising Home: Theories, Laws and Policies* 131.

the court in *Barclay's Bank plc v Hendricks*⁷⁴ expressly stated that the commercial interest of the creditor will only be trumped by the interests of the non-debtor occupiers in "exceptional circumstances".⁷⁵

In light of the above it is clear that the English law does not differ markedly from South African law. English courts generally tend to attach greater weight to the interests of the creditor when balancing the rights of the debtor against those of the creditor. However, considering the home interests of non-debtor occupiers can assist a court when it balances the rights of all the parties involved. This is especially true in the South African context where our courts may not grant an execution order where it would be unjustifiable to do so. South African courts should be sensitive to the home interests of non-debtor occupiers in order to maintain a constitutionally compliant balance between the rights of the debtor and the rights of the creditor.

5 Conclusion

The right of the mortgagee to enforce the mortgage debt upon the default of the mortgagor ensures that large creditors are willing to extend credit more readily to prospective homeowners. Our courts have in numerous occasions recognised this right as being indispensable to the functioning of the residential credit market. However, in *Jaftha* the CC held that although the mortgagee enjoys a contractual right to foreclose the mortgage and enforce the debt, a court will not grant an execution order if it unjustifiably limits the debtor's right to have access to adequate housing in terms of section 26(1) of the Constitution. A court must balance the right of the creditor against those of the debtor in a proportionate manner to prevent an unjustifiable infringement of the section 26(1) right of the debtor. The CC also emphasised that courts must find "creative alternatives" to do this balancing act.

Under the common law our courts did not grant an execution order where there was an abuse of process or evidence of procedural irregularities. In the absence of proof of these two exceptions, our courts would order the execution of the property. Furthermore, after the creditor cancelled the mortgage agreement, a mortgagor could only reinstate the agreement by paying the balance on the outstanding debt even though the amount in arrears was relatively small. As a result the common law cannot give effect to the proportionate balancing act as required by the CC in *Jaftha*.

⁷⁴ 1996 1 FLR 258.

⁷⁵ Fox *Conceptualising Home: Theories, Laws and Policies* 131.

However, the NCA contains a number of provisions that represent the legislative equivalent of the “creative alternatives” mentioned by the CC. Section 129(1)(a) compels a creditor to send a notice of default to the debtor before he may enforce the mortgage debt. Section 129(3)(a) grants the debtor a right of reinstatement if the creditor cancels the mortgage agreement. In terms of this right, the debtor can reinstate the agreement by getting the amount in arrears up to speed. Finally, an over-indebted debtor may approach a debt-counsellor and initiate debt-review proceedings in terms of the NCA. Once the debtor is under debt-review the creditor may not enforce the mortgage debt. This allows the debtor to rearrange his debt making debt repayments more manageable. However, the creditor may terminate the debt-review in appropriate circumstances. The NCA therefore balances the rights of the creditor against those of the debtor in an effective and proportional manner.

Furthermore, South African law compares favourably to English law. English courts tend to favour the commercial interests of the creditor over the interests of the debtor. English courts will only stay the possession of the property if they are convinced the debtor will be able to rectify the amount in arrears. In contrast, the NCA has given debtors and the courts a number of mechanisms whereby the rights of all the parties can be balance effectively and proportionally.

In conclusion, the abovementioned provisions in the NCA represent, if applied correctly, the creative alternatives whereby the rights of the creditor can be balanced proportionally against those of the debtor. The NCA creates a stable credit market environment wherein both the mortgagee and the mortgagor are certain, *ex ante*, about their rights and duties in the context of mortgage foreclosure.