FirstRand Bank Ltd t/a First National Bank v Seyffert and three similar cases 2010 6 SA 429 (GSJ) *Seyffert & Seyffert v Firstrand Bank Ltd* 2012 ZASCA 81

*Bringing home the inadequacies of the National Credit Act 34 of 2005**

1 Introduction

The judgments in *FirstRand Bank Ltd t/a First National Bank v Seyffert and three similar cases* 2010 6 SA 429 (GSJ) (hereafter "*Seyffert* (GSJ)") and, on appeal, *Seyffert & Seyffert v Firstrand Bank Ltd* 2012 ZASCA 81 (2012-05-30) (hereafter "*Seyffert* (SCA)") (collectively referred to as "the *Seyffert* judgments"), expose the inability of the provisions of the National Credit Act 34 of 2005 (NCA) adequately to address important issues pertaining to execution against a debtor's mortgaged home. They also underscore the need for a debt relief mechanism, other than debt review and debt rearrangement under the NCA, to provide an alternative to execution against a debtor's mortgaged home that would be workable from the perspective not only of the debtor but also of the mortgagee and other creditors.

2 Background: Local and Comparative Developments

Recognition by the courts of the right to have access to adequate housing, provided for in section 26 of the Constitution of the Republic of South Africa, 1996 has had a profound effect on developments concerning execution against a debtor's home in the individual debt enforcement process. The combined effect of the Constitutional Court's decisions in *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) and *Gundwana v Steko Development CC* 2011 3 SA 608 (CC) is to acknowledge that execution against a debtor's home, including one that has been mortgaged in favour of the creditor, may constitute an unjustifiable infringement of the right to have access to adequate housing. (See *Jaftha* parr 34, 39, 40, 44) Therefore, in every case in which execution is sought against a person's home, judicial oversight is required to determine whether, in terms of section 36 of the Constitution, execution is justifiable in the circumstances. (See *Gundwana* parr 41, 49.) A court is required to undertake an evaluation in which it must consider "all the relevant circumstances" to determine whether execution against a person's home should be permitted.

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In *Jaftha*, the Constitutional Court stated that there was a need to find “creative alternatives” which allow for debt recovery but which use the sale in execution of a debtor's home “only as a last resort” (par 59). In *Gundwana*, the Constitutional Court held that, when execution is sought against a person’s home, including one that has been mortgaged in favour of the creditor, due consideration should be given to the impact that execution might have on judgment debtors who are poor and at risk of losing their homes. It stated that, “if the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences that alternative course should be judicially considered before granting execution orders” (par 53).

Similar policies are evident in various foreign jurisdictions where systems have been implemented to ensure that execution against a debtor’s home occurs only as a last resort. A formal statutory home exemption, limited in certain circumstances, has applied for more than a century in the United States of America and in Canada. (See s 522(b) read with (d)(1) Bankruptcy Reform Act of 1978, Title 11 USC; Ferriell & Janger *Understanding Bankruptcy* (2007) 102*ff*; in relation to Canada, see Davies “Federal Exemptions in Bankruptcy” Parliamentary Information and Research Service document PRB 02-28E http://www.parl.gc.ca/Content/LOP/ResearchPublications/prb0228-e.pdf (accessed on 2012-08-05); Boraine, Kruger & Evans “Policy Considerations Regarding Exempt Property” in *Annual Review of Insolvency Law* (ed Sarra) (2007) 637 681-682.) It may be noted, however, that generally it is the *equity* in the home, and not the home itself, that is exempted up to the applicable limit. Therefore, the exemption is not effective against the claim of a mortgagee of a home. Further, the exemption is often insufficient for the debtor to retain the home but the proceeds of the sale of the home, up to the exempted limit, are available to purchase other, more affordable, accommodation or to contribute towards payment of rent (Ferriell & Janger 430-431).

In England and Wales, a “low equity” home exemption has been introduced in insolvency (s 313A Insolvency Act 1986 inserted by s 261(3) Enterprise Act 2002). However, traditionally, a formal home exemption did not apply. Instead, a combination of legislative provisions grant family members occupation rights protecting them against each other, as well as against claims by creditors against the homeowner (see ss 30-36 Family Law Act 1996). Similar legislation applies in Scotland. (See the Bankruptcy and Diligence etc (Scotland) Act 2007 and the Home Owner and Debtor Protection (Scotland) Act 2010.)

Further, various statutory provisions allow a court to delay the sale of the home in certain circumstances. In England and Wales, in the individual debt enforcement process, a court is required to consider the debtor's ability to repay the arrears within a reasonable period and to fulfil the contractual obligations. (See s 36 Administration of Justice Act 1970.) In Scotland, legislation requires a court to take the personal circumstances of the debtor into account and the reasons for the default. (See s 24(7)(a)-(e) Conveyancing and Feudal Reform (Scotland) Act 1970 as amended by the Home Owner and Debtor Protection (Scotland) Act 2010.) In the insolvency process, the court has the discretion to delay, where appropriate, the realisation of the home by the trustee. In England and Wales, the court may postpone the realisation for up to a year, which it may subsequently extend in "exceptional circumstances" (see ss 335A, 336, 337 Insolvency Act 1986) and in Scotland, the applicable period is three years (see s 40 Bankruptcy (Scotland) Act 1985).

In a number of legal systems, modifications to the substantive and procedural requirements with which a mortgagee of a home must comply have been introduced to deal with the high rate of foreclosures or repossessions, as they are referred to in some jurisdictions, particularly as a result of the recent global recessions. In the United States of America, mandatory pre-action conferences have been introduced, for example, in some states. (For further detail, see Kulp "Foreclosure Mediation Program Models" compiled by the American Bar Association http://www.abanet.org/dispute/mediation/resources.html (accessed on 2012-08-05).) In England and Wales, the Mortgage Conduct of Business Rules (MCOB) were implemented in 2004 (see the *Mortgages and Home Finance: Conduct of Business sourcebook* http://fsahandbook.info/FSA/html/handbook/MCOB (accessed on 20120805)) and the *Pre-Action Protocol for Possession Claims based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property* (http://www.justice.gov.uk/guidance/courts-andtribunals/courts/procedure-rules /civil/contents/protocols/prot_mha.htm (accessed on 2012-08-05)) came into force on 19 November 2008 and has been amended on a number of occasions. (The most recent amendment is the Civil Procedure Rules 55th Update effective 20110406.) These require the creditor to make reasonable efforts to accommodate the debtor by negotiating alternative payment arrangements, in order to ensure that forced sale of the home occurs only as a last resort. Scotland has included similar pre-action requirements in legislation. (See s 24A of the Conveyancing and Feudal Reform (Scotland) Act 1970.) In Ireland, the mortgage arrears resolution process (MARP) must be followed before commencement of repossession proceedings by a creditor. Various member states of the European Union also require similar processes to be followed. (See the *Commission Staff Working Paper National measures and practices to avoid foreclosure procedures for residential mortgage loans* SEC(2011) 357 final (2011-03-31) http://ec.europa.eu/internal_market/finservices-retail/docs/credit/mortgage/sec_2011_357_en.pdf (accessed on 2012-08-05).)

Another common feature in systems abroad is that, where appropriate, a debtor is able to avert the forced sale of his or her home by means of a repayment plan for which provision is made in the applicable bankruptcy, or insolvency, legislation. The INSOL *International Consumer Debt Report II*, published in November 2011, describes such a repayment plan as a "rehabilitation procedure". Such repayment plans are commonly devised, specifically with the purpose of allowing the debtor to retain his or her home, in the course of Chapter 13 bankruptcy proceedings in the United States of America, a consumer proposal in Canada, an individual voluntary arrangement (IVA) in England and Wales and the granting of a protected trust deed in Scotland. (See, respectively, Chapter 13 US Bankruptcy Code; ss 66.11-66.40 Bankruptcy and Insolvency Act RSC 1985 c B-3; ss 257-258, 260 Insolvency Act 1986; s 73(1), par 5 sch 5 Bankruptcy (Scotland) Act 1985, as amended by par 60 Sch 1 Bankruptcy and Diligence etc (Scotland) Act 2007.)

Generally, a home mortgage obligation is not included in the repayment plan. While other obligations may be restructured and rearranged, with reduced monthly instalments being made payable, the home mortgage debt is not modified and, ideally, the repayment plan caters for payment in full of the required regular mortgage instalment. In American parlance, no "cram down modification" – court adjustment of the terms of the original agreement without the consent of the creditor – is permitted in relation to a mortgage over real estate which is the debtor's principal residence. (See s 1322(b)(2) Bankruptcy Code; Ferriell & Janger 654-657, 687-688.) Indeed, the success of the repayment plan depends on sufficient income being left with the debtor to meet his or her and their dependants' needs. (See Fletcher *Law of Insolvency* (2009) 75-76; Walters "Individual voluntary arrangements: A 'fresh start' for salaried consumer debtors in England and Wales" 2009 *Int Ins R* 5 34-35.) The fact that the mortgagee's security rights remain intact leaves the mortgagee satisfied while the debtor and his or her family are able to remain in their home.

Typically, the repayment plan runs over a period of up to five years after which the debtor will receive a measure of discharge from liability for debts in line with the policy of affording him a "fresh start". A typical repayment plan might oblige the debtor to refinance the home shortly before completion of the repayment plan, in order for the benefit of the equity, or at least some of it, accumulated during the period of the payment plan, to be transferred to the creditors in respect of whom obligations were modified. The aim is to balance the interests of the debtor and of all creditors.

Notably, all of the provisions for repayment plans, mentioned above, form part of the foreign jurisdictions' bankruptcy legislation and in effect they may be regarded as constituting debt relief mechanisms as alternatives to liquidation of the debtors' estates. A common feature is that while a debtor is complying with the terms of a repayment plan, a creditor whose claim has been modified in terms of it is not entitled to enforce the original obligation. Neither may the creditor apply for the liquidation of the debtor's estate. Specific provision is made for a court to permit an application for liquidation where appropriate, such as where the debtor fails to comply with the terms of the repayment plan. (See, for example, in relation to the position in the United States of America, Ferriell & Janger 644; Evans "A brief explanation of consumer bankruptcy and aspects of the bankruptcy estate in the United States of America" 2010 *CILSA* 337 349; in relation to England and Wales, see Pt

VIII ss 252-263G Insolvency Act 1986, as amended by provisions contained in the Insolvency Act 2000 and the Enterprise Act 2002; Fletcher 50*ff*, 69; Walters 2009 *Int Ins R* 5 17*ff*.)

It may also be noted that, in Scotland, another form of repayment plan, a Debt Arrangement Scheme (DAS), for which provision is made outside of the applicable bankruptcy legislation, potentially enables a financially distressed homeowner who has a reasonable income, but temporary cash flow difficulties, to avert the forced sale of his home. (See the Debt Arrangement and Attachment (Scotland) Act 2002 and the official DAS website http://dasscotland.gov.uk (accessed on 2012-08-05)). It provides debtors with a moratorium from creditor enforcement action through a debt arrangement scheme which allows interest and penalty charges to be frozen and, once the payment plan is completed, cancelled. Significantly, it does not affect the claim of a secured creditor. Recent improvements were made to simplify and streamline the system and debtors may make online applications. (See the *Accountant in Bankruptcy* website http://www.aib.gov.uk/Services/das (accessed on 2012-08-05)).

By contrast, in South Africa, the NCA debt review and debt rearrangement process, the closest equivalent to repayment plans applicable in other legal systems, allows a magistrate's court to modify the terms of a mortgage bond without the consent of the mortgagee (s 87 NCA). In line with the purpose of the NCA as stated in section 3, a debtor who resorts to debt review must satisfy all of his debts in full, over an extended period, with no discharge whatsoever. On the other hand, under the Insolvency Act 24 of 1936 (IA), an insolvent debtor whose estate is sequestrated ultimately receives discharge from liability for pre-sequestration debt. However, the NCA and the IA do not cater for one another and there is confusion about the interaction between their respective provisions.

Section 88(3) of the NCA prevents a credit provider from enforcing "by litigation or other judicial process any right or security" under the credit agreement in question until debt review has been completed. However, section 88(3) is expressly made subject to section 86(10) which provides that, after 60 business days have elapsed since a consumer's application for debt review, the credit provider may give notice in the prescribed manner to the consumer, the debt counsellor and the National Credit Regulator to terminate the review. Further, section 86(11) provides that if a credit provider, who has given notice to terminate a debt review as envisaged in section 86(10), proceeds to enforce that agreement, the magistrate's court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances.

Given the delays and backlogs experienced in the magistrates' courts, and particularly in the application of the NCA, in practical terms, the time lapse between the application for debt review and confirmation by the court of a debt rearrangement plan was, and is likely to be, in excess of

60 business days. (See *Wesbank, A Division of FirstRand Ltd v Papier* 2011 2 SA 395 (WCC) parr 26*ff*; *Mercedes Benz Financial Services South Africa (Pty) Limited* v *Dunga* 2011 1 SA 374 (WCC) par 26; see also Van Heerden & Coetzee "*Wesbank v Winston Papier* and the National Credit Regulator" 2011 *De Jure* 463.) A frequent occurrence has been that credit providers terminate the debt review after agreement has been reached on debt rearrangement plans and, sometimes, even though the consumer has been making payments in terms of the proposed plan awaiting confirmation by the magistrate's court on the date for which the matter has already been set down. Contention arose as to whether a credit provider was entitled to terminate a debt review in such circumstances and proceed to enforce a credit agreement. (In relation to conflicting high court judgments, see *Seyffert* (GSJ) parr 8, 9; Roestoff "Enforcement of a credit agreement" 2009 *Obiter* 430; Van Heerden & Coetzee "Perspectives on the termination of debt review" 2011 *PER* 37.) In *Seyffert* (GSJ), the court held that the credit provider *was* entitled to terminate the debt review. In *Collett v FirstRand Bank Ltd* 2011 4 SA 508 (SCA)), the Supreme Court of Appeal confirmed the correctness of this stance as long as the consumer is in default of his or her obligations under the credit agreement.

It may be noted that the courts have held that, for the purposes of section 88(3) of the NCA, an application for the sequestration of the estate of the consumer does *not* amount to enforcing "by litigation or other judicial process any right or security" under a credit agreement. (See *Investec Bank Ltd and Another v Mutemeri* 2010 1 SA 265 (GSJ); *Naidoo v ABSA Bank Ltd* 2010 4 SA 597 (SCA).) Therefore, even where a mortgagor has applied for debt review under section 86 of the NCA, the mortgagee may apply, in terms of the Insolvency Act, for an order for the sequestration of his estate which would result in liquidation of the assets of the insolvent estate including the mortgaged property. It has also been held that a mortgagee may obtain an order for the sequestration of the mortgagor's estate even after a magistrate's court has confirmed a debt rearrangement order in terms of the NCA to which the mortgage bond in question is subject and the mortgagor is complying with his "amended" obligations in terms of such debt rearrangement order. (See *FirstRand Bank Ltd v Evans* 2011 4 597 (KZD), currently pending appeal; *cf FirstRand Bank Ltd v Janse van Rensburg* 2012 2 All SA 186 (ECP).)

Thus, there are significant differences between statutory repayment plans available in foreign jurisdictions and debt review and debt rearrangement under the NCA in South Africa. The *Seyffert* judgments provide a good illustration of the NCA's lack of some of the features of repayment plans applicable abroad which are crucial to enabling a financially distressed homeowner to retain his or her home.

3 The *Seyffert* Judgments

3 1 Seyffert (GSJ)

Seyffert (GSJ) concerned four applications for summary judgment and for orders declaring the respondents' mortgaged property specially executable. In each matter, the respondents were spouses and the mortgaged property in question was their home, situated in a "comfortably affluent or 'middle-class' area" (par 2). Further, in each matter, the respondents claimed that they had consulted a debt counsellor and that the matter was subject to debt review in terms of the NCA. However, the applicant in each case had given notice to terminate the debt review in terms of section 86(10) of the NCA as more than 60 business days had elapsed since the debtors had applied for debt review. The court, *per* Willis J, held that section 86(10) of the NCA entitled the applicants to terminate the debt review (par 17). Therefore, it concluded, it could grant the application for summary judgment, dismiss it, or adjourn it on appropriate terms and conditions. The court stated: "Active endeavours to exchange serious, sensible and reasonable proposals to resolve a consumer's debt problems will be among the factors which will weigh heavily with a court in deciding which order to make" (par 17).

Willis J observed (par 3):

> The affidavits of the respondents have been cryptic to the extent of coyness. These affidavits are laconic, if not supine, with regard to the real possibility of extrication from financial difficulties which the respondents face. Even where the respondents presented some acceptable evidence as to the fact that they had referred the matter to a debt counsellor, and in some instances annexed that person's recommendations, in no such instance does the proposal make any economic sense at all. Indeed, the proposals are devoid of economic rationality.

Willis J expressed concern and frustration in relation to the difficulties experienced in the interpretation and application of the NCA, particularly the sections providing for termination of debt review by the credit provider (parr 4-18, particularly par 10). Having commented on the objects of the NCA and its effect on the South African economy, Willis J regarded the respondents as "clutching at straws" (par 18). The court granted summary judgment against each of them in the amounts, respectively, of R219,715.69, R731,217.72, R927,350.14 and R777,011.18 with interest (par 20).

However, significantly, taking into account section 26(1) of the Constitution, the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE), and the decisions in *Jaftha v Schoeman* and *Standard Bank of South Africa Ltd v Saunderson* 2006 2 SA 264 (SCA), Willis J concluded that it would be appropriate to exercise his discretion against declaring the mortgaged properties specially executable (par 18). The rationale was that a clear purpose of the NCA is to afford a debtor the opportunity to discharge a debt on less onerous terms. The court considered that although the credit providers, unable to execute against the mortgagors' homes, might have to wait longer to recover the debt, at least the respondents could try to settle their debt without losing their homes. Willis J stated that the "*Jaftha* and *Saunderson* cases are not … directly in point but they do indicate a wariness about persons losing their homes" (par 18).

3 2 Seyffert (SCA)

Two of the respondents in *Seyffert* (GSJ), Mr and Mrs Seyffert, appealed against the decision in which summary judgment had been granted against them in the amount of R219,715.69 with interest. There was no cross-appeal by FirstRand Bank (par 1).

The court of appeal set out a summary of pertinent facts which had not emerged from the judgment of the court *a quo*. These included that the appellants' agreed monthly instalment was R2,474 per month, payable over 142 months and that the debt counsellor had proposed that they would discharge the debt over 239 months by paying R474.97 per month. FirstRand Bank thereafter terminated the debt review on 21 April 2010. The debt counsellor subsequently revised the proposal to suggest 239 monthly instalments of R808.45 (parr 2-4).

It was argued on behalf of the appellants that the high court ought to have exercised its discretion in their favour by referring their matter to a debt counsellor in terms of either section 85 or 87 of the NCA, or declaring them over-indebted and rearranging their payment obligations. It was further contended that, by terminating the debt review in the circumstances, FirstRand Bank had not acted in good faith and that the effect of the proposed rearrangement would have been merely to extend the period of repayment for a short period without prejudice to the respondent (par 6). The appeal court rejected these arguments in a unanimous judgment per Malan JA.

Referring to its judgment, in *Collett*, delivered subsequently to that of the court *a quo* in *Seyffert* (GSJ), the Supreme Court of Appeal pointed out that the NCA envisaged, in section 86(5)(b), "responsible debt rearrangement", and in section 3, that the proposed debt restructuring should lead to the "satisfaction by the consumer of all responsible financial obligations" (par 7). It explained that where a credit provider on good grounds concludes that the proposed restructuring will not lead to the "satisfaction by the consumer of all responsible financial obligations", then the court may well refuse to sanction the resumption of the debt review in terms of section 86(11) of the NCA (par 7, with reference to *Collett* par 15).

The Supreme Court of Appeal explained that where, as in the case before it, debtors have applied for debt review, they and the credit provider are obliged not only to comply with any reasonable request by the debt counsellor to facilitate an evaluation of the debtor's indebtedness and the prospects of responsible debt restructuring, but also to participate in good faith in the review and negotiations (par 8). Further, it explained that the credit provider's right to terminate the debt review in respect of a particular credit agreement is balanced by section 86(11) which gives the "enforcing court" the power to order the resumption of the debt review (par 8, with reference to *Collett* par 17). It reiterated what it had stated in *Collett*, namely, that over-indebtedness is not a defence on the merits but that a court could exercise its discretion not to grant summary judgment and to order the resumption of the debt review, depending on the conduct of the parties (par 8, with reference to *Collett* par 18). The terms of a proposed rearrangement would also be relevant at that stage to assess whether it would be "likely to lead to the satisfaction of all responsible consumer obligations", if implemented. The court stated that a balance must be struck between the interests of the consumer and those of the credit provider (par 9).

Malan JA pointed out that the first proposal for debt rearrangement by the debt counsellor was "based on faulty arithmetic" and that the proposed monthly instalments would not even have covered the interest payable in terms of the mortgage bond. Further, even the unsigned, second proposal would not have led to satisfaction of the debt by the end of the proposed payment period: a balance of R193,968.90 would have remained in September 2029 (parr 10, 11). On the facts, in light of the appellants' failure to present any realistic proposal to repay the debt, the court found no basis on which to find that FirstRand Bank had failed to negotiate in good faith (par 12). It noted that the appellants had not applied for a resumption of the debt review in terms of section 86(11) and stated that the appellants' "restructuring proposals were simply, as the court below had found, 'devoid of economic rationality', and would have left a substantial part of the debt unpaid" (par 13).

The appeal court considered whether the court *a quo* had erred by not declaring the appellants over-indebted in terms of section 85 of the NCA, or by not making the appellants' proposal an order of court, alternatively, by not making an order as contemplated by section 87 (parr 14, 15). In view of the fact that the appellants' proposals, if accepted, would not lead to the discharge of their debt, the court found that the bank had been entitled to terminate the debt review and, on the facts, had done so justifiably (par 16). It concluded: "Neither of the proposals envisages the discharge of the debt within the agreed period or within any suggested, and feasible, extended time. This is not a case where debt review can usefully be employed" (par 16). The appeal was dismissed with costs (par 17).

4 Comment

FirstRand Bank did not enter a cross appeal in relation to the refusal by the court *a quo* to declare the appellants' mortgaged home specially executable. Therefore, it is unfortunate that no clarity emerged from the Supreme Court of Appeal's judgment in relation to the executability of a mortgaged home in circumstances where debt rearrangement under the NCA does not pose a feasible option for achieving satisfaction of the debt. Be that as it may, it is submitted that what *is* clear from the outcome of the *Seyffert* judgments is that the NCA mechanisms do not necessarily provide workable or satisfactory solutions for financially distressed homeowners or for mortgage lenders. Presumably, in the circumstances, either the mortgagee must bide its time in the hope that the debtor's financial position will improve, as the court *a quo* indicated, or it must bring an application for the sequestration of the debtor's estate for the mortgaged home to be realised in the process of liquidation of the insolvent estate by the trustee in terms of the IA.

However, two points should be borne in mind. First, a sequestration order may be obtained only if there is reason to believe that it will be to the advantage of the general body of creditors. (See ss 10, 12 IA; *Trust Wholesalers and Woollens (Pty) Ltd v Mackan* 1954 2 SA 109 (N).) Lack of sufficient proof of advantage to creditors may therefore further frustrate the mortgagor's bid to recover the debt through realisation of the property. Secondly, as things stand, there is no requirement in the IA, or by virtue of any established judicial precedent, for a court specifically to consider the housing needs or section 26 rights of the debtor or his or her dependants in the insolvency process. Upon realisation of the home by the trustee, the housing rights of the insolvent debtor and his or her dependants would be considered only if the insolvent debtor "holds over" and the trustee or a new owner of the property brings an application for eviction of the occupants of the home in terms of section 4 of PIE. (See *ABSA Bank Ltd v Murray* 2004 2 SA 15 (C).)

The effect of PIE is to delay the enforcement of the new owner's right to possession until a court has determined whether eviction of the previous owner would be just and equitable and, if so, a date on which he should vacate his home. Therefore, in effect, PIE offers a measure of protection to a debtor against being rendered homeless by the sale in execution of his home. However, it is submitted that such protection is unsatisfactory and insufficient, in the circumstances, as it will avail only those debtors who are aware of the provisions of PIE or who have sufficient knowledge of the legal process or access to sound legal advice. The reality is also that, in this context, a debtor's reliance on PIE triggers judicial evaluation of the position at a very late stage in the process, only *after* he has lost ownership of his home and when it might be too late to undo everything that has gone before. (See comparable reasoning in *Jaftha* parr 47, 49; *Gundwana* parr 50, 58.)

In *Seyffert* (SCA), the court pointed out how, in terms of the proposed debt rearrangement plan, the monthly instalments would not have covered even the interest payable in terms of the mortgage bond. It is submitted that, in the absence of reckless lending or any other objectionable conduct or practices on the part of the mortgagee, a repayment plan which has such an effect is undesirable, as it will yield an unworkable result. In such a situation, inevitably, a mortgagee, intent upon realising the property to satisfy its claim, will resort to an application for the sequestration of the estate of the debtor whose debt is proposed to be, or has been, rearranged in terms of the NCA. This was precisely the situation in *Evans*. It is submitted that, in addition to leaving the debtor vulnerable, it undermines the purpose and efficacy of the NCA debt rearrangement process, especially as a valuable mechanism for averting forced sale of debtors' homes. The need to resort to sequestration of a debtor's estate in the circumstances, in order essentially to obtain execution against the debtor's mortgaged property, also holds the potential of giving rise to abuse of process by the creditor, in order to avoid the requirements of the NCA.

An equally significant consideration is that to leave the mortgagee without a remedy might unjustifiably undermine the principle of sanctity of contract, expressed in the maxim *pacta sunt servanda*. It is submitted that this has the potential for unforeseen consequences leading to instability of the mortgage market, investment and the general economy. (See *Jaftha* par 58; *Saunderson* par 3; *Murray* par 46; *Seyffert* (GSJ) par 12; *Standard Bank of South Africa Ltd v Bekker* 2011 6 SA 111 (WCC) par 20.) In the circumstances, it is submitted that comparative analysis tends to suggest that legislative provision for a repayment plan, which leaves the claim of the mortgagee of the debtor's home unaffected, would better serve the needs of both mortgagees and over-indebted consumer debtors who wish to avert the forced sale of their homes.

It may be recalled that, in 2000, the South African Law Reform Commission, in its *Report on the Review of the Law of Insolvency*, proposed in Schedule 4 to the Draft Insolvency Bill the insertion of a new section 74X into the Magistrates' Courts Act 32 of 1944 to provide for a pre-liquidation composition process. Significantly, in terms of the proposed section 74X(11), a composition accepted by the requisite majority of creditors would not prejudice the right of a secured, or otherwise preferent, creditor unless such creditor consented to it in writing. Thus, "cram down" modification would not be permitted. The proposed section 74X was never enacted. However, a similar provision, modified to reflect subsequent recommendations for insolvency law reform, appears as section 118 of the unofficial working draft of a proposed Insolvency and Business Recovery Bill.

It is submitted that a legislative provision along the lines of the proposed section 118 could more effectively protect a debtor's home against forced sale, where appropriate, and at the same time respect the rights of a mortgagee. Such a pre-liquidation composition procedure, covering all types of debt, would provide an additional debt relief process, available as an alternative to administration in terms of section 74 of the Magistrates' Courts Act 32 of 1944, debt review in terms of the NCA and sequestration in terms of the IA. However, it is submitted that the provision would need to be refined before it is ever enacted. The envisaged relationship between the various debt relief processes available to consumers would need to be clarified. Further, concerns expressed in relation to the magistrates' courts not being able to cope with an additional consumer debt relief process, and suggestions that a less court-driven process, involving attorneys in the administration and co-ordination of the composition, would be more appropriate, would also need to be addressed. (See Coetzee "Personal bankruptcy and alternative measures" Paper delivered at the Eighth International Workshop on Commercial Law 2011-08-03 Sandton; Boraine "Some thoughts on the reform of administration orders" 2003 *De Jure* 230; Boraine "Reform of Administration Orders" in *The Future of Consumer Credit Regulation* (eds Kelly-Louw *et al*) (2008) 197).

For years, academic commentators have emphasised that the South African insolvency regime lacks provision for an effective, easily accessible, consumer debt relief mechanism as an alternative to the sequestration, or liquidation, process provided for by the IA. They have called for a mechanism which balances the interests of both debtors and creditors, and society generally, by *inter alia* permitting the rearrangement of obligations over a reasonable, limited period and, at the end of it, a measure of discharge from liability supporting a policy of providing an "honest" consumer debtor with a "fresh start". They have also expressed the desirability of a legislative and administrative framework that facilitates "single portal access" to the consumer debt relief system. (See, for example, Boraine & Roestoff "Vriendskaplike sekwestrasies" 1993 *De Jure* 229; Evans "Friendly sequestrations" 2001 *SA Merc LJ* 485; Boraine & Roestoff "Fresh start procedures" 2002 *Int Ins Rev* 1; Boraine 2003 *De Jure* 217; Calitz "Developments in the United States' consumer bankruptcy law" 2007 *Obiter* 414.) Cases such as *Mutemeri*, *Naidoo* and *Evans* tend to confirm such a need. It is submitted that an ideal alternative debt relief mechanism, as envisaged by commentators, may indeed take the form of a repayment plan that also provides a solution for over-indebted homeowners who wish to avert the forced sale of their homes. This could occur where a debtor has sufficient income to satisfy the full home mortgage instalment which is due, as well as to make reduced payments in respect of other obligations which are restructured. It is submitted that a prohibition on modification of a home mortgage obligation would counter the nature and level of opposition to debt rearrangement by a mortgagee of the debtor's home, as seen in the reported judgment in *Evans* and in the *Seyffert* judgments.

An advantage of a statutory provision similar to the proposed section 118 is that it would apply in respect of all types of debts and not only those arising from credit agreements, as is currently the position, in terms of the NCA. Further, the benefit of a measure of discharge from liability for a debtor who successfully completes the composition procedure would address criticisms of the current system and bring it more in line with internationally endorsed consumer debt relief recommendations and policies. (See INSOL *International Consumer Debt Report II* Nov 2011 1-24.) What is more, an appropriately modified provision could allow the court to determine, within the framework of a single insolvency statute, whether the composition process or the liquidation process would be more appropriate in the particular circumstances of the case. Provision could also be made for simple, streamlined conversion between the two processes, the need for which might arise, for instance, where the debtor fails to comply with the terms of the composition. Therefore, the interface between the repayment plan procedure and the liquidation procedure would be clear.

5 Conclusion

It is submitted that, as illustrated by the *Seyffert* judgments and their outcome, the debt review and debt rearrangement provisions of the NCA, as applied by the courts, do not necessarily pose a reasonable or feasible alternative to execution against a debtor's mortgaged home. It is submitted that, as in overseas jurisdictions, legislative provision ought to be made for a repayment plan in terms of which the claim of the mortgagee of the debtor's home remains unaffected. This would make it easier for a court to find "creative alternatives" to execution against the debtor's home, as required by the Constitutional Court in *Jaftha*, so that execution occurs only as a last resort. It would also pose "reasonable alternative means", as the Constitutional Court envisaged in *Gundwana*, by which a homeowner's mortgage obligation might be satisfied without the necessity of execution against the debtor's home.

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