

FEATURE

Are the Courts Nuanced Enough in Protecting the Right to Housing against Sales in Execution?

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Tenuous access to housing is a problem worldwide and in South Africa in particular. In this jurisdiction, more than 3.3 million people either live in abject poverty in informal settlements and backyards, or are simply homeless (Housing Development Agency 2013).

Despite the country's transformative constitution, poverty – and, with it, inequality – looms large for the overwhelming majority of people, who still yearn to be dignified with access to basic housing 25 years into constitutional democracy. Security of tenure is highly compromised.

Those few people that have managed to brave the odds and purchased a primary home, such hard-earned homes enjoy protection under the Constitution in terms of property and housing rights. As such, caution should be exercised when primary residences that are mortgaged to banks come under sale in execution. Judicial oversight is key in orders for such executions because these sales often lead to homes being sold at a fraction of what is owed to the bank. This situation leaves the debt defaulter liable for the cost of an asset that he or she no longer possesses. Every year this action leaves scores of impoverished families dispossessed of ownership, with insecurity of tenure, and still owing the bank the shortfall.

A major reason for this situation is that the jurisprudence on court oversight is far from settled in regard to how the court should balance housing rights and (mortgage) contractual rights. This uncertainty results in infringements of the right to housing and property.

Healing the ills of the past

Contemporary South Africa has evolved from a past where the majority of people were routinely deprived of owning immovable property. Therefore the preamble to the Constitution 'promises to heal the division of the past, improve the quality of life and free the potential of each person'. The Constitution articulates the vision of dismantling the systemic discrimination that resulted in the social and economic deprivation

of the majority of the people. Accordingly, it ushers in a modern-day social contract with a Bill of Rights that enshrines the rights to property and housing:

- According to section 25(1), 'No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.'
- Section 25(3)(c) recognises 'the market value of the property'.

- Section 26(1) recognises '[e]veryone[']s ... right to have access to adequate housing'.
- Section 26(2) obligates the state to 'take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right'.
- In terms of section 26(3), 'No one may be evicted from their home ... without an order of court made after considering all the relevant circumstances.'

Promotion of substantive equality

According to *Government of the Republic of South Africa and Others v Grootboom and Others* (2000), the equality clause in the Constitution promotes the concept of equality in its social and historical context. Substantive equality requires an inquiry into the historical past of the individual and how that past has affected his or her life. The historical lack of adequate housing, together with stunted economic growth, must inform the court today on how these deprivations have affected security of tenure.

When engaging the social contract, there has to be a move towards balanced property rights, which are indispensable to a well-ordered society (Rousseau 1762). However, private property has been unjustly instituted due to the illegitimate manner in which property came to be protected in society (Siroky and Sigwart 2014: 391). The ownership of private property is the ultimate basis on which the ever-growing inequality between people is perpetuated. For this reason, historical deprivation of property in South Africa should be considered when balancing (mortgage) contractual rights and constitutional, property and housing rights. In doing so, the courts should be alert to the Constitution's recognition that property has a market value.

Furthermore, inequality and economic exclusion remain deeply entrenched: the poor still mirror apartheid's exclusions in that they are black and languishing on the fringes of the economy. This should compel the court to adopt a social-justice approach that achieves the constitutional demands of restoration and prosperity. In this endeavour, the judiciary should protect persons disadvantaged by unfair mortgage agreements insofar as the right to housing and property is concerned.

A gender-nuanced approach to legislation

The transformation project should be seen as a remodelling of the country's socio-economic deliverables (Beukes 2017: 120). This is the social change that has been promised through adult suffrage, and the judiciary must ensure that these socio-economic deliverables are improved on in every court decision. This means that court decisions, which are based on theories of interpretation, should be redirected to arguments that resonates with the natural-law approach of the Constitution.

In this regard, the judiciary cannot ignore that the social and economic standing of the poor has not improved. In order to change this, the courts are urged to have a more activist approach in orders for forced sales to create certainty in its endeavours to progressive realisation. The conservative rule-bound approach of the judiciary should be energised by a judiciary that is also mindful of how the imbalances of the past affect the present.

As it is, the lower courts are known to not sufficiently push the transformation envelope to bring about a more equitable society. The history of sales in execution of primary homes bears out this trend. Access to credit is important in acquiring private property serving as a home. However, *Absa Bank Limited v Lekuku* (2014) confirmed that, notoriously, mortgage bond agreements resonate with a 'take it or leave it' stance. Therefore, when faced with a sale-in-execution order, the court should be mindful in ensuring that the defaulting debtor does not end up losing the primary home without proper justification.

Diverse views of the courts on execution sales

The law is far from settled on sales in execution and how they affect the right to housing. A plethora of recent sales-in-execution cases demonstrate how varied court interpretations are. This inconsistency was highlighted in *Standard Bank of South Africa Ltd v Bekker* (2011). The case deals with five applications for



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default judgments on mortgage agreements involving homes. The court confirmed that these matters were being heard because of the divergent views that judges had taken as to what is required in terms of court rule 46 before a court authorises a writ of execution against immovable property. The court emphasised that this divergence of views had arisen in the main from inconsistent conclusions in the cases discussed below.

Between 2005 and 2011, there was no court oversight over orders for sales in execution of primary homes because the registrar and the clerk of the court held these powers. In the landmark case *Jaftha v Schoeman and Others* and *Van Rooyen v Stoltz and Others* (2005), the government-sponsored social homes of the applicants were executed to satisfy trifling debts. The Constitutional Court held that ‘any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in section 26(1)’. Therefore, the Court held that the magistrate’s court, and not the clerk, should have oversight over execution sales to have due regard for ‘all the relevant circumstances’. This court decision did not change the fact that the registrar could still issue execution orders in the High Court.

In the wake of *Nedbank Limited v Mortinson* (2005), the registrar was obliged to refer all cases wherein a mortgaged property is sought to be declared executable, to the High Court to be heard in the open court. Thus, since 2005, the High Court was also obliged to have oversight over orders for forced sales of primary residences.

In *Standard Bank of South Africa Ltd v Saunderson* (2006), the registrar granted an order for the forced sale of primary home. This order was brought into question, but the court in this case held that the registrar was duly empowered to grant the order. What is noteworthy is that although the court rules empowered the registrar as such, those powers did not take cognisance of the limitation on housing rights. The SCA in *Saunderson* found it unlikely that housing rights could ever defeat a creditor’s claim against a mortgaged property. The Court said the decision must be seen in the light of the ordinary legal process of recovering debt.

Thus, the Court took little notice of the fact that, when the registrar grants the application for direct enforcement of a creditor’s private law rights, this could result in an unjustified limitation of a debtor’s constitutional rights. What was problematic is that the registrar issued orders of execution resulting from a default judgment in which, at best, the debtor did not participate – consequently, not all the relevant circumstances were considered, as would be necessary for a just and equitable decision.

Hence, judicial complacency left housing rights at risk in the High Court between 2005 and 2011, until *Gundwana v Steko Development and Others* (2011) settled this. In this case, the Constitutional Court held that all mortgage cases that involve a home would require that a judge exercise discretion before an execution order is granted.

Notwithstanding *Gundwana*, in *Nkata v FirstRand Bank Ltd* (2016), the registrar issued default and execution orders. This action caused an unjustified public auction of a primary home. The Constitutional Court ordered the reinstatement of title deed and urged credit providers to join the courts in recognising the imbalance in the negotiating power between the parties by noting the values of the Constitution at stake.

In *FirstRand Bank Ltd v Folscher* (2011), the Court confirmed the importance of ‘whether the mortgaged property is the debtor’s primary residence and the proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer if execution went ahead and he lost his home’. In contrast, in *Nedbank*

Ltd v Fraser & Four other Cases (2011), the Court held that the creditor would enjoy relative primacy above the debtor's housing interests because legitimate claims for repayments of debts would not be defeated by the debtor's reliance on his right to housing.

The case *ABSA Bank Ltd v Ntsane* (2007) saw 'gross unfairness' in allowing a sale that would obtain a lower price than the market value. The Court held that the right to adequate housing would be violated by enforcing the bank's right to execute against the home. The Court recognised that a private sale could obtain a price that might leave the debtor with some money after the bank's claim is settled. The Court showed that, when necessary, such as in the event of losing one's home, there should be a deviation from formalistic adherence, particularly where abuse of power occurs. In *FirstRand Bank Ltd v Maleke and Others* (2010), the Court also took cognizance of the increased market value of the properties and the fact that the debtors expected to benefit from the capital growth.

In *Nkwane v Nkwane and Others* (2018), the Court had to answer whether the forced sale of a primary home with a market value worth R492,470 for R40,000, to settle a debt of R370,000, was substantially and procedurally unconstitutional. The Court also had to consider whether selling without a reserve price was arbitrary. The Court is empowered by court rule 46 to set a reserve price but it maintained it had no authority to order a mandatory reserve price as this was best left for policy consideration.

Basically, the Court held that the bank was justified in selling a primary home at a fraction of its value and that this was not arbitrary and did not amount to an unjustified infringement of the rights to housing or property. Notwithstanding that the Constitution, *Ntsane* and *Maleke* took cognizance of the increased market value of a private property and that debtors expected to benefit from the capital growth. Noteworthy is that, a few months later, *ABSA v Makube and Others* (2018) found in favour of setting a reserve price.

Most importantly, *Sebola and Another v Standard Bank of South Africa Ltd and Another* (2012) held that selling a primary home at a fraction of its value fails to resonate with promoting a 'fair market place', as is called for in the preamble of the National Credit Act. Moreover, in *Lekuku*, the Court recognised the

sanctity of contracts, but held that, although crucial, it is not sacrosanct and may be departed from if other constitutional values require prominence for justice to prevail. Therefore, the application of the Bill of Rights in mortgage contracts is necessary.

The human-rights-based home interest of the debtor

It is commonly accepted that the right to housing is a component of the right to an adequate standard of living as set out in the Universal Declaration of Human Rights. As such, a primary home is more than a commodity: it is the basis on which dignity rests because it brings stability, security, safety, and happiness to people (Special Rapporteur: 2017). Rousseau (1762: 263) describes the right to immovable private property as 'the most sacred of all the rights of citizens and even more important in some respects than liberty itself'. Moreover, within the political economy, access to private property is the cornerstone of social justice because immovable private property constitutes and strengthens the bonds between state, society, and citizen.

The exercise of a legal right to possession of an individual's home (as in mortgage agreements) is a serious interference regarding the home. In sales of execution, the court should move away from the stance that 'the creditor must win' to a rights-based approach that progressively realises access to housing. This should not be seen as a human rights challenge to possession but as a human rights challenge to a primary home which provides shelter and security of tenure.

Balancing the rights of creditor banks and defaulting debtors

Although it is rational to enforce payment of validly registered mortgage bonds, a proportionality test requires that this be balanced in a justifiable manner.

Selling a mortgaged primary residence at a fraction of its market value is an ‘abuse of the execution process and negates social interests’, as warned by the *Fraser* court. If there is no alternative but to sell the beleaguered primary home, this cost should satisfy the full debt. Anything less cannot pass the constitutional limitation clause in justifying the debtor’s being deprived of his or her home.

In balancing interests, the Constitutional Court in *Jaftha* was thus at pains to state that while the creditor’s interests should not be ignored, an unjustifiable sale that advantages the creditor outweighs the immense prejudice and hardship caused to the debtor. The Court juxtaposed the debtor’s vulnerable situation in losing the security of tenure against the financial interests of the creditor.

Similarly, in *Nkata*, the Constitutional Court recognised the unequal financial power dynamics at play between the creditor bank and debtor. If a mortgaged primary residence faces execution due to debt defaulting, in balancing the rights the court should justify the invasion of housing rights only if the execution satisfies the full debt. In this way the debtor dispenses of the debt and the bank is satisfied. Anything less would not be justifiable.

The International Covenant on Economic, Social and Cultural Rights (ICESCR) sets out obligations that recognise the importance of protecting housing. South Africa is, accordingly, obliged to ensure that it takes reasonable measures to provide adequately for the progressive realisation of the right to housing.

In this regard, the Committee on Economic Social and Cultural Rights (CESCR) responded to a complaint from Spain about a situation in which the courts failed to take all reasonable measures to notify a woman that the lending institution had filed a mortgage foreclosure claim against her (UN High Commission on Human Rights 2015). As a result, she was deprived of the opportunity to defend her right to housing adequately in judicial proceedings. The CESCR found Spain to be in breach of the progressive realisation of housing as prescribed in article 2(1) of the ICESCR. The Committee concluded that Spain violated the ICESCR and its Optional Protocol because the country’s courts failed to take all reasonable measures to adequately notify the homeowner.

The CESCR requested that Spain adopt legislative measures ensuring that the rules concerning mortgage enforcements contain appropriate requirements and procedures to be followed before the auctioning of a dwelling, in accordance with the Covenant. The courts in South Africa compromised the Covenant’s progressive realisation of housing by not recognising the obligations under its own court rule 46, which gives judges the discretion in setting a reserve price on the sale of a house in execution.

The value of judicial oversight

In *Fraser*, the Constitutional Court held that the purpose of judicial oversight is to ‘act as a filter or check on execution that does not serve social interests and which is an abuse of the execution processes’. Although this Court recognised the contractual entitlement of the creditor, it held that the right to execute debts is not absolute and has limitations.

The value of judicial oversight was compromised when, in *Nkwane*, the court found it rational for the bank to sell a primary home at a fraction of its price in order to recover the debt – in taking this stance, the court did not consider the constitutionally recognised market value of the home and, as such, it (the court) allowed an unjustifiable infringement of the right.

The essence of court oversight over a sale in execution of a home is to consider all the relevant circumstances and seek to balance the rights of the parties. The protection the defaulting debtor enjoys in this regard is that the circumstances are assessed fairly in relation to the constitutional prescripts. Accordingly, the court would prevent the sale of a primary residence at less than the cost owed to the bank. This would be in keeping with the Constitution’s vision of reducing inequality through the progressive realisation of housing.

Court oversight should thus bring about advancement in access to housing, not lead to insecurity of tenure. In other words, court oversight is lost where

it overlooks market value and agrees to deprive the debtor of a hard-earned home at a fraction of its value. This action by the court is not benign: here, financial interests trump housing rights.

Conclusion

For the many who are vulnerable to insecurity of tenure, the promise of a better life in South Africa remains just that: merely a promise. Progressive realisation of housing entails that there is continuous advancement in access to housing. However, the foundational concepts of reasonableness, justice and fairness, which accord with good faith in contracts, do not resonate with the forced sale of a primary home at a fraction of its value that does not satisfy the debt.

This is at odd with the key reason for the court's intervention, namely, to ensure the protection of housing rights: the sale of a primary home below its market value, under the watch of the court, is tantamount to a retrogression of these rights because such a sale renders the debtor homeless and in debt. A more progressive approach is to allow the sale at market value so that the debtor can satisfy the debt and have a surplus with which to again enjoy access to housing.

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