

# Striking a constitutional balance between the rights of creditors and a judgment debtor

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**The right of access to housing is a fundamental human right entrenched in the South African Constitution. It is also important to social development and human security.**

In recent years, we have seen a severe lack of adequate housing and the despair it brings about throughout the country.

We have also seen how the execution of immovable property, in accordance with Rule 43 of the Magistrate's Court and Rule 46 of the Uniform Rules of Court, aggravates the social ills caused by homelessness instead of contributing to the actualisation of the South African Constitution.

The Rules Board of Courts of Law recently amended Rule 43 of the Magistrate Court Rules and Rule 46 of the Uniform Rules of Court. The new proviso states that there are factors the courts must consider before the execution of immovable property of the judgment debtor can be affected.

Rule 46 of the Uniform Rules has also been amended through the insertion of Rule 46A. It deals with the execution of immovable property where the property being sold is the primary residential immovable property of the judgment debtor.

SUB-SECTION 2 OF RULE 46A SPECIFICALLY STATES THAT:

(2) (a) A court considering an application under this rule must

(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and

(ii) consider alternative means by the judgment debtor of satisfying the judgment debt.

(b) A court shall not authorise execution against immovable property which is the primary residence of a judgment debtor unless the court, having considered all relevant factors, considers that execution against such property is warranted.

(c) The registrar shall not issue a writ of execution against the residential immovable property of any judgment debtor unless a court has ordered execution against such property.

Similar to Rule 46A, Rule 43A of the Rules of the Magistrate Court, which previously dealt with enforcement of foreign civil judgment, now provides that a court considering an execution against immovable property of the judgment debtor must establish whether such immovable property is the primary residence of the judgment debtor. If this is the case, it can not authorise execution unless it has considered all relevant factors.

For the practice of execution of property to be contiguous with the principle of an equal democratic society, a responsibility is vested in the court to create a constitutional balance between the right of the judgment creditor to obtain satisfaction of judgment, and the right to human dignity and security of the judgment debtor.

In *First National Bank of SA Ltd t/a Wesbank v Commissioner*, the Constitutional Court held that various factors need to be evaluated in order to provide reasons to deprive one of his or her immovable property, such as the relationship between the purpose of the deprivation and the nature of the property, as well as the extent of the deprivation. This principle relates to the new inserted rules, which support section 26(1) and (2) of the Constitution.

THESE CONSTITUTIONAL SECTIONS STATE THE FOLLOWING:

(1) Everyone has the right to access to adequate housing;

(2) The state must take reasonable legislative and other measures within its available resources to achieve progressive realisation of this right.

One may ask why the courts seem to protect the judgment debtor at the expense of creditors. However, it should be noted that sales in execution are forced sales that seldom take place in ideal circumstances: in the advancement of the rights of creditors, the property of the judgment debtor is sold for a lower price at the directive of the banks or creditors. The court should always strive to promote and advance the social and economic welfare of South Africans in its application of the law – accordingly, the curtailment of the rights of creditors may be well justified.

A mere rational connection (as proposed in the *First National*

*Bank of SA Ltd t/a Wesbank v Commissioner*) between the judgment debtor and the property does not produce a compelling argument against the sale in execution of the immovable property of the judgment debtor.

The argument of limiting the rights of creditors in terms of the general application of the law only becomes compelling when the limitation promotes the engineering of an open, democratic society based on human dignity, equality and freedom.

It is known that there is a high prevalence of poverty, unemployment, inequality and over-indebted people in South Africa who constantly face the grave consequences of failing to settle their debts.

If the Protection of Illegal Eviction and Unlawful Occupation of Land Act safeguards indignant illegal occupiers by stipulating that the state needs to provide alternative accommodation; the same protection needs to be provided to a judgment

debtor who loses his or her primary residential property pursuant to a mortgage bond agreement.

IN CONCLUSION

South African law has steadily advanced since the abolishment of the apartheid system, but we still need to address the social imbalance in our society, which prevents the actualisation of the Constitution. The right to access to housing is a fundamental human right indicating more than a mere bricks-and mortar-structure – it encompasses dignity, security and peace, as pointed out in *Government of the Republic of South Africa and Others v Grootboom and Others*.

**If the courts accept that the socio-economic right to housing is inherently related to the right to human dignity, legislative mechanisms need to be developed to better regulate the process of the sale in execution of immovable property and to further invite governmental ministrations to improve the status quo.**

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