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Mortgage bonds and the right of access to adequate housing in South Africa: *Gundwana v Stoke Development & Others* 2011 (3) SA 608 (CC)

Summary

This article offers a critique of *Gundwana v Stoke Development & Others* 2011 (3) SA 608 (CC), a case in which the Constitutional Court of South Africa found it to be unconstitutional for the registrar of a high court to declare immovable properties specially executable when ordering a default judgement, to the extent that such an order “permitted the sale and execution of a home of a person”. The Court interpreted the property clause in section 25, access to right to housing in section 26 of the Constitution, as mandating “further judicial oversight” in all cases where execution is levied against residential property. The article raises some of the shortcomings of this interpretive scheme and suggests that constitutional values, when used to curtail or enlarge obligations of parties to a mortgage bond, must take into account the general rights and duties which the parties assumed at the signing of the agreement; the circumstances of each of the parties at the time of execution and ascertained through a careful evaluation based on a clearly articulated set of principles, and the nature of constitutional rights themselves. The article argues that, whereas there may be circumstances in which a debtor may need protection, rather than impose a blanket abrogation of procedures allowing for expedient disposal of uncontested claims, the court should instead have considered the establishment of further procedural safeguards.

Verbande en die reg op toegang tot geskikte behuising in Suid-Afrika: *Gundwana v Stoke Development & Others* 2011 (3) SA 608 (CC)

Hierdie artikel kritiseer *Gundwana v Stoke Development & Others* 2011 (3) SA 608 (CC), 'n saak waarin die Konstitusionele Hof van Suid-Afrika bevind het dat dit ongrondwetlik is vir die griffier van 'n hoë hof om die roerende eiendom spesiaal uitvoerbaar te verklaar wanneer 'n verstekbevel gemaak word, in die mate waartoe so 'n bevel toelaat dat die huis van 'n persoon in eksekusie verkoop kan word. Die Hof het die eiendomsklousule in artikel 25, en die reg op toegang tot geskikte behuising in artikel 26, van die Grondwet interpreteer om verdere geregtelike oorsig te vereis in alle gevalle waar die eksekusie verkope van residensiële eiendom ter sprake is. Hierdie artikel spreek sommige van die tekortkominge van bogenoemde

interpretasieskema aan en stel voor dat wanneer grondwetlike waardes gebruik word om die verpligtinge van partye tot 'n verband in te kort of uit te brei, die algemene regte en verpligtinge wat die partye aangeneem het toe hulle die ooreenkoms aangegaan het, die omstandighede van die partye ten tye van die eksekusie soos bepaal deur 'n sorgvuldige evaluasie van duidelik geformuleerde beginsels, en die aard van die grondwetlike regte self in rekening gehou moet word. Die artikel voer verder aan dat terwyl daar omstandighede mag wees waar 'n skuldenaar meer beskerming moet geniet, eerder as om 'n algemene afskaffing van prosedures wat die spoedige afhandeling van onbetwiste eise moontlik maak voor te skryf, die hof dit moes oorweeg het om verdere prosedurele beskermings in plek te stel.

1. Introduction

A mortgage bond is a product of an agreement between the mortgagor and the mortgagee, where the former avails his/her property to secure a valid debt in favour of the latter. Thus it is, for all intents and purposes, an instrument of security that binds not only the lender and the borrower, but also the third parties.¹ Under South African law, security rights which inure in a bond fall in the category of “limited real rights” (*iura in re aliena*) and can only be created by registration.² Thus, while the agreement between the parties comes into effect immediately upon the parties signing the contract, security rights that emanate from it only become available upon registration of the mortgage bond at the registrar of deeds office.³ Obviously, the security rights which flow from the mortgage bond are important, because they underwrite the mortgagee's entitlement to immediate execution in the event that the mortgagor fails to perform his/her part of the bargain.⁴ In some cases, however, the mortgagor shall have unconditionally acknowledged his/her indebtedness in the mortgage bond with specificity as to the nature and amount of the debt, which then enables the mortgagee to use the bond as an instrument of debt besides being an instrument of hypothecation.⁵

A mortgagee who wishes to activate these rights and levy execution against the mortgaged property has at his/her disposal the procedures set out in section 27A of the *Supreme Court Act*,⁶ rules 31(5) and 45(1) of the *Uniform Rules of Court*,⁷ and sections 66 and 67 of the *Magistrates' Courts*

1 Kritzinger 1999:1.

2 Badenhorst *et al.* 2006:47-48. The procedures for registration are set out in sections 13, 50(1) and 50 of the *Deeds Registries Act* 47 of 1937.

3 See Badenhorst *et al.* 2006: 357.

4 *Rodepoort United Main Reef GM Co Ltd & Another v Du Toit* NO 1928 AD 66 at 71; *Nedcor Bank Ltd v Kindo* 2002 (3) SA 185 (C); *Nedbank v Mortison* 2005 (6) SA 462.

5 See Mostert *et al.* 2010:308.

6 Act 59/1959. Section 27A was inserted in the Act by section 5 of Act 4 of 1991 and substituted by section 29 of Act 139 of 1992.

7 Government Notice R2365 of 10 January 1994, amended by GN 417 of 14 March 1997. These rules should be read together with sections 165, 166(c), 169 and schedule 6(16) of the Constitution as well as *Renaming of High Court Act* 30/2008.

Act.⁸ Section 27A gives power to the registrar to grant default judgments, but in accordance with the High Court rules. The rules in question are 31(5) and 45(1). Rule 31(5) lays down the procedures to be followed in the event that a party wishes to obtain judgment by default for a debt or a liquidated demand.⁹ In this regard, a party may apply to the registrar whereupon the registrar may grant judgment as requested, grant only part of the claim, refuse judgment wholly, or request to receive oral or written submissions, or order that the matter be set down for hearing in open court.¹⁰ Rule 45(1) deals with execution upon judgment by the High Court and provides that parties who have obtained judgment may approach the registrar for writs of execution: "Provided that, except where immovable property has been specially declared executable by the court or, in judgment granted in terms of rule 31(5), by the registrar, no such process shall issue against any person until a return shall have been made ...". Under sections 66(1) and 67 of the *Magistrates' Courts Act*, the clerk to the magistrate's court may enter judgment in favour of the plaintiff in the same way that a registrar does in respect of High Court cases.¹¹ In summary, therefore, these procedures confer upon the registrar the competence to issue a writ of execution against immovable property belonging to a debtor and to declare mortgaged property specially executable. The rationale, especially of rule 31(5), was articulated in *Standard Bank of SA Ltd v Ngobeni*¹² as follows:

The purpose ... was clearly to relieve the burden resting on the Judges of the Supreme Court by delegating to the Registrar the right (and duty) to grant or refuse judgment in uncomplicated default matters where he simply checks that all administrative and formal steps have been taken to justify a judgment. He is not expected to decide extraordinary or obscure points of law or fact. The golden rule is: If the Registrar has any legitimate doubt whether judgment should be granted or not, it is his duty to refer the matter for hearing in terms of Rule 31(5)(b)(vi).¹³

8 Act 32/1944.

9 A declaration that immovable property be declared executable has been held to constitute "liquidated demand". See *Sunnyside (Edms) Bpk v Die Chipi BK* 1995 (3) SA 659 (T); *Entabenin Hospital Ltd Van der Linde*; *First National Bank of SA Ltd V Puckriah* 1994 (2) SA 422.

10 Rule 31(5)(b).

11 See rule 12(1) which provides: "If a defendant has failed to enter appearance to defend within the time limited therefor by the summons ... the plaintiff may lodge with the clerk of the court a written request ...for judgment against such defendants...".

12 1995 (3) SA 234 (V).

13 Paragraph 235 C, above. Rule 31(5) of UCR provides "... (w)henever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the Registrar a written application for judgment against such defendant' and that the Registrar may then 'grant judgment as requested'" (emphasis added).

The question that has arisen is whether executions conducted under these procedures infringe the debtor's constitutional rights of access to adequate housing. This article attempts to answer this question by focusing on the recent decision of the Constitutional Court in *Gundwana v Steko Development CC & Others*.¹⁴ This case adds to the long line of cases debating the paradoxical approach of saving the freedom to contract by limiting it.¹⁵ Its conclusion was that, to the extent that the procedures allowed the registrar to grant orders declaring immovable property that is a person's home executable, they were constitutionally invalid. And further, that all execution processes involving such properties must be subject to judicial oversight, whereupon the court shall consider "all relevant circumstances". This finding necessitates an enquiry on the extent to which section 26 of the Constitution impinges on the rights and duties of the parties to a mortgage bond. In undertaking this enquiry, the article begins by appraising the nature of protection that section 26 of the Constitution provides and how it relates to processes of execution against immovable properties. Then it examines the approaches adopted by courts prior to 2011 and isolates the conflicting position of the decisions before *Gundwana*. The judgment in *Gundwana* is then analysed in this light, focusing on the issues that should ordinarily inform the discussion on the limitations that the impugned procedural rules allegedly pose, and the gaps that became apparent as the court attempted to merge legal principles with the constitutional imperatives of rights protection. The article concludes that *Gundwana* was a lost opportunity since it failed to balance the interests of parties against constitutional values that section 26 portends.

2. Constitutional imperatives

To put some context in the analysis in this instance, let us begin by identifying the areas of constitutional impermissibility that have been attributed to the procedures for levying execution against mortgaged property. Three sets of rights are implicated: the rights of access to courts enshrined in section 34 of the Constitution; the rights of access to adequate housing contained in section 26(1) and a prohibition of eviction in section 26(3). Obviously, the nature of these rights and how they affect or are affected by execution needs some explication. Section 34 is the embodiment of the constitutional rule against "ouster clauses" in any contract or law.¹⁶ What it provides is the right "to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court ...".¹⁷ Thus, courts will view with circumspection any procedures that do not recognize the rights of parties to seek judicial settlement of their dispute, or those that simply

14 2011 (3) SA 608 (CC).

15 See e.g. *Van der Merwe v Meades* 1991 (2) SA 1 (A); *Transport and Crane Hire Ltd v Hubert Davies & Co (pvt) Ltd* 1991 (4) SA 150 (ZS); *Brisley v Drotzky* 2002 (4) SA 1 (SCA); *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

16 Currie & De Waal 2005:708.

17 Currie & De Waal 2005:708.

usurp the powers of the court. In *Chief Lesapo v North West Agricultural Bank*,¹⁸ for example, the court rejected the idea that the bank could arrogate to itself the power to attach and sell property of a debtor without a court order. It held that “any constraint upon a person or property shall be exercised by another only after recourse to court recognized in terms of the law of the land”.¹⁹ The constitutional right of access to adequate housing is contained in section 26(1) and (2). It not only guarantees the right to adequate housing for everyone, but also imposes on the state the obligation to take reasonable legislative measures to ensure that the right is realized. The right of access to adequate housing was affirmed in *Grootboom*²⁰ (despite the court failing to give substantive content to the right) and has recently been interpreted in *Joe Slovo*²¹ to infer a negative obligation not to evict in circumstances that are impermissible. A full discussion of the legislative measures that are currently in place and their effect on contemporary jurisprudence may not be necessary in this instance. However, it may be useful to mention that the *Prevention of Illegal Eviction and Unlawful Occupation of Land Act*²² (*PIE*), which overrides the common law remedy of *rei vindicatio* and creates a completely new procedure for eviction from residential property, was held in *Ndlovu v Ngcobo; Bekker v Jika*²³ to apply to mortgaged properties.²⁴ Section 26(3) prohibits eviction from homes “without an order of court made after considering all relevant circumstances”. Its effect is triggered only when the property in question is a residential property, in which case a constitutional imperative is brought to bear upon the contract which subjects the right of immediate execution to judicial oversight in the interest of public policy. This provision requires that eviction orders be issued by the court and only after it has considered all relevant circumstances.

3. Judicial approaches prior to *Gundwana*

Before I examine how courts have dealt with the issue outlined above, two observations may be warranted. First, it should be noted that the practice around these rules has departed from the common law position where execution upon a money judgment could only occur, in the first instance, against movable property. It was only in situations where movables were insufficient to satisfy the judgment that immovable property could

18 2000 (1) SA 409 (CC).

19 Paragraph 16.

20 *Government of Republic of South Africa v Grootboom & Others* 2001 (1) SA 46 (CC).

21 *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2011 (7) BCLR 723 (CC). See also Ray, *Residents of Joe Slovo Community v Thubelisha Homes & Others: Two faces of engagement* 2011 10 (2) HRLR 360.

22 Act 19/1998.

23 2002 (4) All SA 384 (SCA); 2003 (1) SA 113 (SCA).

24 The operative requirements of *PIE* that were in issue are contained in section 4. See also *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 30 (Pty) Ltd & Another* 2011 (4) SA 337 (SCA).

be declared executable.²⁵ This practice has since changed to allow for immediate execution against immovable property that has been specially hypothecated. In view of what might be perceived to be the shortcomings of these procedures and the unconstitutionality of the functions that registrars perform in that regard, the question arises as to whether the common law position can be defended on the ground that it offered more protection to those who fall victim of the process? I posit this question, because the whole notion of unconstitutionality of these procedures has been based on the protection of the vulnerable debtor. Secondly, these instruments neither grant exclusive powers to the registrar nor completely oust the review jurisdiction of the court. Moreover, the notion that execution was an “executive matter” was never really the driving force behind the formulation and development of these procedures.²⁶ Clearly, the procedures establishing a role for the registrar were creatures of practical expediency rather than of the desire to limit judicial oversight. Therefore, the registrar’s function in this regard cannot be aptly described as an executive process with no judicial content.

3.1 The requirement of judicial oversight

Prior to *Gundwana*, several decisions had debated the extent to which immediate execution against a residential property may infringe the constitutional right of access to adequate housing. Most of them arose in the context of eviction — where the new owners who had acquired the properties during sale in execution sought to assert their ownership rights. In addition, constitutional challenge of the rules of procedure occurred naturally to debtors who did not dispute their indebtedness, but wanted to protect ownership of their property nevertheless. But the trends do reveal that the basis of all judicial approaches to these issues has been the protection against infringement of rights, which has necessarily implicated the claims for judicial oversight, justifiable and equitable treatment, and the general protection from abuse of process.

In *Japhta v Schoeman; Van Rooyen v Stolz*,²⁷ the parties contested the constitutionality of section 66(1)(a) of the *Magistrates’ Courts Act*²⁸ which allowed for writs of execution to be issued on their residential properties. In view of the primacy of the constitutional right of access to housing and the limitation placed on eviction from residential properties, the Constitutional Court held that section 66 was too broad, thus allowing for possible infringement of the rights protected in sections 26(1) and 26(3) of the Constitution.²⁹ The appellants had not executed a mortgage bond on the properties in question, but faced eviction from their residential property in the same way that a mortgagee who has defaulted on his/her loan would.

25 *Gerber v Stolze* 1951 (2) SA 166 (T).

26 *RW Jooste* 1902 TS 245; *Harrison & Co v Reyneke* 1903 TH 316.

27 2005 2 SA 140 (CC)

28 *Act 32/1944*.

29 *Japhta*: paragraph 44.

Therefore, the holding by the Court that all evictions from residential properties would henceforth be subject to judicial oversight was indeed instructive. Obviously, the Court intended that this requirement should provide an opportunity for it to consider “all relevant circumstances” prior to issuing an eviction order.³⁰ The justification for judicial oversight was stated thus:

Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act.³¹

Although the debts against which the homes were attached to be sold in execution were unrelated to the acquisition of the homes, this decision amounted to a strong affirmation that execution on residential properties was subject to section 26 of the Constitution. Therefore, any legislative scheme that allowed for execution on such properties without judicial oversight was a limitation of the rights in section 26 of the Constitution. In addition, execution in all cases was not prohibited, but the courts retained the powers to consider the circumstances of parties and determine whether execution in a particular case would not infringe constitutional rights. Whether the order of unconstitutionality in this case should be limited to residential properties only was contested in *Mkize v Umvoti Municipality*.³² Here too, the court was faced with an application to annul a prior section 66 execution based on lack of judicial oversight. Unlike in *Japhta*, the applicant was not living on the property in question and did not even claim an infringement of his section 26(3) rights. Relying on a restricted interpretation of *Japhta*, the court found that judicial oversight is required only when the “immovable property in respect of which execution is sought is the debtor’s home”.³³

3.2 Justifiability and abuse of process

In *Nedbank v Mortison*,³⁴ where the constitutionality of rule 31(5) was challenged, the court followed *Japhta* and held that the rule amounted to a limitation on the right of access to adequate housing contained in section 26 of the Constitution. In this case, the debt was secured by a mortgage bond registered over an immovable property owned by the defendant. When the defendant defaulted in repayment, the plaintiff asked for an order declaring the property executable. Interestingly, the registrar, instead of entering a default judgment and issuing a writ of execution,

30 *Japhta*: paragraph 55.

31 *Japhta*: paragraph 55.

32 2010 (4) SA 509 (KZP).

33 Paragraph 41 (Wallis J).

34 2005 (6) SA 462 (W).

and acting within the confines of rule 31(5)(b)(vi), referred the matter for hearing in an open court. Despite agreeing with *Japhtha* that the procedure under rule 31(5) amounted to a limitation of rights, the court found such limitation to be justified. Thus, it rejected the argument that the registrar had no powers to issue execution orders and held instead that, “where a debtor specially hypothecated his or her immovable property and there is no abuse of the court procedure the limitation would be reasonable and justifiable as in compliance with s 36(1) of the Constitution”.³⁵ The court then proceeded to issue practice directions for future cases that would ensure that the procedure was reasonable and justifiable. One such directive was that an applicant for default judgment seeking an order for leave to levy execution would have to file a supporting affidavit setting out details of the debt, how the property in question was acquired, the nature of the property (whether residential or commercial), and the fact that the debtor’s attention has been drawn to the possibility of him/her applying for rescission of the judgment.

In *Standard Bank of SA Ltd v Saunderson & Others*,³⁶ the bank, who were the appellants in this case, asked for judgment against the respondents for the amount owing in respect of their mortgage bonds and the ancillary orders declaring their properties executable. The court *a quo* had granted judgment, but on the strength of *Japhtha* declined to issue an order declaring the mortgaged properties executable on the grounds that it was not shown that section 26(3) of the Constitution would not be compromised. The Supreme Court of Appeal rejected this reasoning, choosing to distinguish the circumstances of *Japhtha* from the present case. In *Japhtha* the properties in question were not subject to a mortgage bond, and the debtors were beneficiaries of a state housing scheme and had incurred unrelated debts of modest amounts. None of the debtors could be considered a “mortgagee with rights over property that derived from an agreement with the owner”.³⁷ When their houses were sold, they became completely destitute. Secondly, the decision therein was based on section 26(1) and not section 26(3), as the court *a quo* seemed to believe, and therefore the enquiry based on justifiability of the execution, contemplated in section 36 of the Constitution, was inappropriate. Thirdly, *Japhtha* did not declare that all executions related to mortgage bonds were subject to section 26(1), and could not have done so because not all executions do result in an infringement of the right of access to adequate housing. “None of the defendants”, the court held, “have alleged ... that an order for execution would infringe their right of access to adequate housing and no reason presently exists to believe that it would”.³⁸ On these grounds, the Supreme Court of Appeal held that the High Court’s reliance on *Japhtha* was misplaced and allowed the appeal. The court, nonetheless, as in *Nedbank v Mortison*³⁹, issued practice directions that would apply in the

35 *Mortison*: paragraph 33.

36 2006 (2) SA 264 (SCA).

37 *Saunderson*: paragraph 18.

38 *Saunderson*: paragraph 21.

39 2005(6) SA 462 (W).

event that execution was against a residential property and the process infringed the right to adequate housing: that the debtors attention must be drawn to section 26(1) of the Constitution in every summons by which any action or prayer is made that would result in execution. The decision in this case was challenged in *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd*,⁴⁰ but the Constitutional Court did not have a chance to pronounce on the matter since the application for direct access was refused.

3.3 Matters arising

There are two issues that arose from this judgment that are worthy of further elucidation. The first was the question as to whether the registrar should be authorised to grant an order declaring a property executable in view of section 26(1) of the Constitution. The court observed that the question as to whether the right of access to adequate housing was implicated in executions against hypothecated properties had not yet been explored by the courts, and for good reasons. In the first instance, such claims were rare. Even in this case the question was not directly before the court. But perhaps more profoundly, it was hard to conceive of a circumstance where section 26(1) would be used to block a mortgagee from reclaiming a debt owed to him by a mortgagor. In the court's view, the issue could only arise if the debtor contested the constitutionality of the execution process. But even then, the safeguard in rule 31(5) would be automatically triggered, compelling the registrar to refer the matter to a judge sitting in an open court. And where no such objection was raised, it could not be said still that, by simply performing a legislative mandated function, there was an intrusion of a function reserved for the judiciary. Moreover, what was expected of the registrar was "neither the exercise of a judicial discretion nor the mechanical grant of an order in circumstances where that would be constitutionally impermissible."⁴¹ The court, nonetheless, acknowledged that most debtors do not usually seek legal advice because they rarely dispute the debt. Therefore, they could not be expected to challenge the constitutionality of the process. For this reason, the court decreed that there should be a way of informing them of their right under section 26(1). In any event, since the Constitution in section 172 permitted courts to make an order that is just and equitable if deciding a constitutional issue, the court proceeded to establish some practice rules regarding summons in respect of which an order for execution is sought.

The second issue is that of "relativity" of section 26(1) and whether this should be factored into the circumstances that may persuade a court to grant extenuation against the order for execution, assuming that the matter came before open court anyway. Although mentioned quite briefly in this judgment, the court seemed to be of the view that the right envisaged in

40 2006 (6) SA 103 (CC).

41 *Saunderson*: paragraph 24.

this provision cannot be invoked as a one-size-fits-all right.⁴² The use of the phrase “adequate housing” implies that each case must be considered on its own merits. But whether this position is tenable or not may depend on careful considerations of how the notion of relativity implicates the public policy argument that I believe to be at the crux of any deliberations on constitutional invasion of private contracts.

So *Gundwana* arrived when there were clearly two conflicting positions adopted by courts on how to interpret the constitutionality of the procedures for execution against mortgaged properties that respect the competency of the registrar in this regard. On the one hand, there was the *Japhtha* position, which seemed to support the proposition that execution against residential properties that are carried out without judicial oversight are unconstitutional and, on the other hand, the *Nedbank v Mortison* and *Saunderson* positions which, although acknowledged that infringements on rights may occur in certain cases, found that not all executions against residential properties were unconstitutional. The latter position called for a more nuanced appreciation of the nature of the mortgage bond and for the courts to consider constitutional challenges against factors such as justifiability and abuse of process.

4. *Gundwana v Stoke Development & Others*

Briefly, the facts of the case were these: In 1995, the applicant bought two properties, Erf 457 and 458 in Thembalethu, George, in the Western Cape at a cost of R52 000. To finance the purchase, she borrowed R 25 000 from Nedcor Bank Ltd, the second respondent. The debt was secured by a mortgage bond on the property. After eight years, the applicant fell into arrears in her monthly repayment and a default judgment was entered for payment of R 33 543,06. An order was also made declaring the property executable for the same amount. However, the bank never took any further action for four years. In the meantime, the applicant remained in occupation and continued to make intermittent repayments. In August 2007, the property was sold in execution to Steko Development, the first respondent and the transfer took place immediately. Since the applicant continued to occupy the property, Steko Development brought an application for the eviction in the magistrate’s court, which was finally granted in 2008. The applicant then unsuccessfully appealed against the order in the High Court and Supreme Court of Appeal. After the eviction order was granted, the applicant sought rescission of the 2003 default judgment at the High Court. She also approached the Constitutional Court seeking for leave to appeal against the eviction order and also, direct access to the court on a substantive constitutional issue, which she contended could dispose of the issue of rescission and which, in any event, was still pending in the High Court.

42 *Saunderson*: paragraph 17.

The court was at first compelled to dispose of the procedural matters of condonation and access before dealing with the substantive issues.⁴³ The applicant's factual claim was that she was not aware of the default judgment and the subsequent execution until they were granted and that is why she did not apply for rescission earlier. Secondly, the applicant alleged that the constitutional question was not raised before the eviction court and, therefore, the court never had the opportunity to pronounce on it. The first issue was not difficult to dispose of and may not be of relevance in this instance. However, the second contention elicited some reaction from the court that may be instructive. In its response, the court affirmed its acceptance of the doctrine of "objective unconstitutionality", thus establishing some latitude for litigating issues which have constitutional implications beyond a litigant's case.⁴⁴ This, I venture to say, is the value of a liberal interpretative process — extending the benefit of a judicial opinion to future disputes. But this apart, the effect of this observation by the court was to raise expectations by affirming that it was aware of the conflicting positions of earlier decisions and that it would finally resolve the constitutional issues. This was not to be. In a relatively short judgment, the Court found in the applicant's favour; set aside the orders for eviction granted by the Magistrates Court and remitted the matter back to the High Court for the determination of the rescission application. Although the court was unequivocal in affirming the need for judicial oversight in all execution matters involving residential properties, its reasoning did not canvass the more sophisticated question of what the role of courts should be in assisting parties to realise the terms of their bargain. The court shied away from delving into the rather delicate act of balancing the autonomy of contract, on the one hand, and the protection of individual rights, on the other. Therefore, it may be difficult to gauge the court's sensitivity to the injunction by the Supreme Court of Appeal in an earlier decision, that courts should employ constitutional values "to achieve a balance that strikes down the unacceptable excesses of the freedom of contract, while seeking to permit individuals the dignity and autonomy of regulating their own lives".⁴⁵

It may be worthwhile to examine, albeit briefly, some of the issues that emerge from this judgment that are likely to be of concern as we go forward. In my view, the most crucial issue would be whether the Constitutional imperatives discussed in this instance also constitute a veritable province of public policy that would demand that execution procedures arising from mortgages and in respect of residential properties be dealt with in an open court and not in any other way. This then puts under spotlight questions concerning the extent of the constitutional protection that the mortgagor should be afforded, and whether these should have bearing on the rights of the mortgagee. This is connected to the second issue, which is the general discussion on what constitutes "all relevant circumstances" mentioned in

43 *Gundwana* paragraph 17-21.

44 *Gundwana* paragraph 26.

45 As per Cameroon JA in *Napier v Barkhuizen* 2006 (4) SA 1 (SCA): paragraph 13.

section 26(3) of the Constitution. If the argument is that judicial oversight is necessary so as to bring to light all necessary circumstances, the implication would be that, in the event that such circumstances are of such a compelling nature, then the mortgage agreement has to be revisited. If that is indeed the case, the court will be telling the parties that “your agreement is not good enough and therefore we shall rewrite it for you”. One has to imagine the implication of this and ask whether this is the effect that the Constitution intended that the section should have on all contracts. It should also be remembered that, just before the judgment, rule 46(1) of the *Uniform Rules* had been amended to provide that a court or registrar can only declare property, which is a judgment debtor’s primary residence, especially executable if the court, having considered all relevant circumstances, orders execution against such property. The amendment was published in GN R981 of November 2010 and came into effect on 24 December 2010.⁴⁶ The effect of this amendment is to entrench the role of courts in reconstructing the obligation of parties to a mortgage bond. If this trend continues, then a regime safeguarding the interest of the mortgagee must equally be established.

Lastly, does the fact alone that a property is residential justify the conclusion that section 26(1) of the Constitution will be infringed? In other words, does section 26(1) impute a negative obligation on a bond-holder to inform the debtor of the execution process and, in the absence of such information, entitle the debtor to “... invoke circumstances that may persuade the court to grant extenuation in the execution order”?⁴⁷ How should the information be conveyed to the debtor? The court in *Saunderson* was of the view that it was important to draw the debtor’s attention to the protection in section 26(1), but once this was done, the burden shifted to the debtor to raise any objection she might have if she believed that the execution was infringing her right. And for that reason, it laid down a rule requiring that all summonses in which an order for execution was sought in respect of immovable property must carry the information that the right under section 26 of the Constitution may be implicated.⁴⁸ *Gundwana*, on

46 The full text of the amendment of Rule 46(1) is as follows:
“(1)(a) No writ of execution against the immovable property of any judgment debtor shall issue until —
(i) a return shall have been made of any process which may have been issued against the movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or
(ii) such immovable property shall have been declared to be specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property.
(b) A writ of execution against immovable property shall contain a full description of the nature and situation (including the address) of the immovable property to enable it to be traced and identified by the sheriff; and shall be accompanied by sufficient information to enable him or her to give effect to subrule (3) hereof.”

47 *Saunderson*: paragraph 25.

48 *Saunderson*: paragraph 25.

the other hand, completely departed from this position, opting instead to invalidate the process involving residential properties that occur without judicial oversight. *Gundwana* should have validated its position by showing how the balancing of interests in *Saunderson* fell short of the constitutional standards required by section 26(1).

4.1 Response to *Gundwana: First Rand Bank v Folscher*⁴⁹

The judgment handed down by the Gauteng High Court Division on 24 May 2011 in the case of *First Rand Bank v Folscher* was the first judicial reaction to the Constitutional Court's finding in *Gundwana*. The High Court was constituted in terms of section 13(1)(a) of the *Supreme Court Act* to consider the "interpretational and practical questions of the amended Rule 46 to give directions to practitioners".⁵⁰ After analysing the history of the rule in question and the constitutional propriety of the rights of access to housing and prohibition against evictions, the court observed that an accurate stock-taking of the creditor's position is mandatory because her rights should not simply be abrogated on perceived notions of unjustness that do not respect the sanctity of contract. In the court's view, a mortgage bond constituted an agreement, "concluded voluntarily to enable the debtor to acquire the immovable property or gain access to capital against the security of the bond registered over the property".⁵¹ This apart, respecting mortgage bonds has an important socio-economic benefit to society. Although not explicitly stated, the court was keen to save the freedom of contract. In this regard, one can discern some similarity with the approach adopted in *Saunderson* and *Mortison*. Secondly, the court observed that, whereas dishonest or vexatious conduct on the part of the creditor may not necessarily amount to an abuse, the iniquitous consequences that arise from executions in cases where the debtor may lose his home while alternative modes of satisfying the creditor's demand might exist, should not be permitted. In paragraph 41 of the judgment, the court proceeds to list 19 factors which could guide the determination of whether execution against a home should be permitted. But as *Japhta* and *Gundwana* cautioned, the enquiry must be fact-bound, taking into account the particularity of the case. In effect, therefore, the court seems to suggest that, while *Gundwana* may have established a scheme in which judicial oversight is mandatory, the "rights" enquiry will not be complete until all factors, including the mortgagor's rights arising from the sanctity of contract, are considered.

5. Rationale for protecting the debtor (mortgagor)

When a mortgagor signs a mortgage agreement offering his property as a security for a debt, the mortgagor acknowledges the risk that the

49 2011 (4) SA 314 (GNP).

50 Paragraph 4.

51 *Folscher*: paragraph 38.

security object (the property) may be lost if the debt is not paid – this is what the court in *Gundwana* referred to as the “voluntary placing-at-risk argument”.⁵² The mortgage bond, which protects the security interest to be realised through execution, is thus a product of contractual bargain and should be protected in the same way. What then should be the rationale for protecting the mortgagor who has reneged in his/her commitment in the contract and faces the prospect of losing a home? To begin with, one could envision the mortgagor as a contractual party, and thus entitled to all the protection that the law has traditionally afforded to contracts. In this regard, three layers of protection may be mentioned. Like any other contract, the mortgage agreement will only be valid if all formalities are complied with.⁵³ These formalities, obviously, constitute the first layer of protection that the common law provides. The second layer of protection is the *requirement* that certain types of clauses be excluded from the mortgage agreement. The rules against *pactum commissorium* and *parate executie* are all well known.⁵⁴ Generally, these two layers of protection coincide with the broad principle of equality in contract by prohibiting certain types of clauses in mortgage agreements.⁵⁵ In effect, they guard against the possibility that the mortgagee may take the law into his/her hands and any other adverse consequence that may be suffered by the mortgagor as a result of the mortgagee mistakenly believing that the mortgagor is in default.⁵⁶ Apart from the protection offered by the common law, there is a third layer of protection which is offered by legislation such as the *National Credit Act*⁵⁷ and the *Consumer Protection Act*.⁵⁸ Although the protection regimes established by these statutes are important and do affect appropriation of rights, a more lengthy discussion may be warranted than can be offered in these few pages.

Apart from the foregoing, there is a layer of protection that is not necessarily dependent on voluntary arrangements between the parties. This layer of protection buttresses the entire contract and may be invoked at any time, even at the time of execution. This protection is provided by the Bill of Rights in the Constitution. This regime acknowledges that, given the nature of modern commercial transactions, which mostly rely on

52 *Gundwana*: paragraph 42.

53 See e.g. Hutchinson *et al.* 2009:6.

54 *Pactum commissorium* clauses are those that allow the mortgagee to keep the property as his/her own when the mortgagor defaults in repayment. See *National Bank of South Africa v Cohen's Trustee* 1911 AD 235; *Graf v Bauchel* 2003 (4) SA 378 (SCA); *Osry v Hirsch, Loubster and Co Ltd* 1922 CPD 531; *Bock v Duburoro Investments (Pty) Ltd* 2004 (2) SA 242 (SCA). See also the famous Namibian case of *Meyer v Hessling* (1991) NASC 8. *Parate executie* clauses, on the other hand, allow the mortgagee to sell the property in order to recover the debt. For a discussion of how the *parate executie* operates in pledges, see Cook & Quixley 2004:719; Schulze 2005:110.

55 See Mostert *et al.* 2010:308. See also *Mapenduka v Ashington* 1919 AD 343 at 353.

56 Scott & Scott 1987:123.

57 Act 34/2005.

58 Act 68/2008.

standard form contracts, the vulnerability of consumers of services and goods, limiting the freedom of contract may, in certain instances, serve a legitimate policy objective. It is this regime that now provides the most cognizable challenge to mortgage agreements in the manner that has attracted judicial response in *Gundwana* and other cases coming before it that I have discussed. In these cases, the protection of the mortgagor is often projected as falling within the narrow confines of the social responsibility mandate underwritten by the Constitution. In *Gundwana*, for example, section 26(1) was interpreted as prohibiting or restricting execution against homes of the indigent debtors, where those debtors would lose their security of tenure.⁵⁹ The court relied on *Japhta* to find that judicial oversight was warranted in situations where indigent debtors were at risk of losing their homes.⁶⁰ Accordingly, the risk of losing a home, coupled with lack of knowledge of the available avenues for judicial protection, indicated a level of vulnerability that was so compelling as to attract “further judicial oversight”. In *Japhta* this proposition was captured as follows:

[M]any debtors in the position of the appellants are unaware of the protection offered by this section. Even where there is awareness, it would generally be difficult for indigent people in the position of the appellants to approach a court to claim protection. They are a vulnerable group whose indigence and lack of knowledge prevents them from taking steps to stop the sales in execution.⁶¹

The imperatives of rights protection cast in these terms may diminish the force of an agreement between parties. Whether constitutionally mandated or not, a protection regime must not be unwieldy cast as to completely demur the role of personal agency in, not only concluding a contract, but also unequivocally expressing the willingness to live with its consequences. It seems to me, therefore, that the justification for protection of a mortgagor should ideally flow from two major considerations. The first, of course, is the public policy objectives that call for a more explicit articulation of the role of contracts. Secondly, given that the rights regime affirmed by *Gundwana* and the other cases is now the law, there is still a need for the elaboration of the components of those rights. It seems to me, therefore, that the justification for protection of a mortgagor should ideally flow from two major considerations. The first is the fulfilment of a public policy objective, and the second is that the mortgagor is saddled by circumstances that necessitate judicial intervention in terms of section 26(3) of the constitution. The latter invites a presumption that clear guidelines on what constitutes “all necessary circumstances” are available to the court. Clearly, had *Gundwana* seized the opportunity to seriously engage with these considerations, it could have rendered a more balanced and, perhaps, a better reasoned verdict.

59 *Gundwana*: paragraph 40.

60 *Gundwana*: paragraph 41.

61 *Japhta*: paragraph 47.

5.1 Public policy

Is a contract between two parties a matter of concern to those parties only or to the public at large? In other words, should the public be concerned about the contractual arrangement, its subject matter, the parties involved or even its consequences? These questions have long been answered in the affirmative. If one were to consider the evolution of the notion of the contract itself, from Maine's classical idea of "movement from status to contract",⁶² hallowed in the early nineteenth century, to the modern concerns for contractual justice, there can be no doubt that freedom of contract cannot exist in its pure form. Moreover, with the introduction of many consumer legislations, the province of contractual freedom has been further eroded.⁶³ Admittedly, issues of public policy,⁶⁴ non-linear and complex calibrations of consent based on the objective inference of terms, and the entrance into the fray of a Constitution that not only prescribes standards, but also demands that courts develop the common law, present a rather complex repertoire of interventionist paradigms that consistently call into question the power of parties to conclude an unassailable arrangement that is completely beyond judicial interference. Yet, contracts by their very nature are supposed to indicate a level of certainty, provide protection for the expectations of parties, and secure the bargain made by them. Thus, regardless of limitations, the sanctity of contract is still considered an important factor in sustaining and promoting commerce. The Supreme Court of Appeal in *Reddy v Siemens Telecommunications (Pty) Limited*⁶⁵ held that:

Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense freedom to contract is an integral part of the fundamental right referred to in s 22. Section 22 of the Constitution guarantees [e]very citizen the right to choose their trade, occupation or profession freely reflecting the closeness of the relationship between the freedom to choose a vocation and the nature of a society based on human dignity as contemplated by the Constitution. It is also an incident of the right to property to the extent that s 25 protects the acquisition, use, enjoyment and exploitation of property, and of the fundamental rights in respect of freedom of association (s 18), labour relations (s 23) and cultural, religious and linguistic communities (s 31).⁶⁶

62 See Maine 1861:140.

63 SALRC 1998: paragraph 1.44.

64 See e.g. *Eastwood v Shepstone* 1902 TS 294 at 302 (holding that a court has power to reject contracts that are against public policy or contrary to good morals); *Bafana Finance Mabopane v Makwaka & Another* 2006 (4) SA 581 (SCA) (holding that public policy is anchored on the constitutional values which include human dignity, equality and other freedoms).

65 2007 (2) SA 486 (SCA).

66 *Reddy v Siemens Telecommunications* 2007 (2) SA 486 (SCA): para. 15

And yet it is by the same Constitution that contractual freedom may be limited. This implies that there is an inherent tension between freedom of contract and the “counter principle of social control over private volition in the interest of public policy”,⁶⁷ and that this tension has been resolved, at least with regard to mortgage bonds affecting residential properties, in favour of the latter.

But the precise effect of the obligations which flow from the mortgage bond, as a matter of law, need to be interrogated further. As already stated at the beginning, it is generally accepted that “the purpose of a mortgage bond is to provide real security for the fulfilment of an obligation” — in this instance the obligation to repay the debt.⁶⁸ For this reason, even if the bond does not contain clauses that permit the property to be declared executable, recovery of debt through execution is still possible.⁶⁹ “A mortgage bond,” Cameroon J observed, “curtails the right of property at its roots, and penetrates the rights of ownership, for the bond-holder’s rights are fused into the title itself.”⁷⁰ Therefore, the generally accepted legal consequences of a mortgage agreement is that the mortgagor, who on his/her own volition puts her property forward as security, accepts that in the event that they do not make repayment as required, they may lose their property, whether the bond says so or not. Coming back to *Gundwana*, it is noteworthy that the court did not expressly object to this principle of law, but sought to circumvent it by invoking the debtor’s vulnerability and the constitutional protections under section 26(1) and (3). Unable to accept that the so-called “voluntary placing-at-risk argument” could materially annul the proposition that the execution procedure was immutable by reason of consent, the court advanced a view that imputed upon the applicant an apparent lack of consent to three matters: that the mortgage be enforced without court sanction; waiver of her rights under section 26(1) and (3) of the Constitution, and the mortgagee’s entitlement to enforce performance even when the same is done in bad faith.⁷¹ Unfortunately, this list could be endless! Obviously, the tenure of these considerations constitutes new and extraneous terms to the bond, and also imposes an additional burden on the mortgagee than was intended when the contract was negotiated. At a macro level, this approach by the court can only but have a negative effect on the possibilities of securing finance for new home buyers.

5.2 “All relevant circumstances”

If the rationale for insisting on “further judicial oversight” is to afford the vulnerable party, in this instance the indigent debtor, an opportunity to have his/her claim evaluated by a court, then obviously matters beyond the

67 As per Albie Sachs J in *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paragraph 170.

68 *Silberberg & Schoeman*’s:361.

69 See *Nedcor Bank v Kindo* 2002 (3) SA 185 (C).

70 As per Cameroon J in *Saunderson*: paragraph 2.

71 *Gundwana*: paragraph 44.

agreement upon which the bond was negotiated are called to the fore. While it is improbable that matters beyond or outside the purview of a mortgage agreement cannot be completely shut out, their content should necessarily meet the threshold set by section 26(3) of the Constitution. This means that they must constitute what is referred to as “all relevant circumstances”, the consideration of which is paramount before any execution that results in eviction can be levied against immovable property that is a home of the debtor. Thus, their invocation, which invariably happens in the face of an eviction, calls for interference with the ownership rights to property.⁷² For these reasons, the determination of whether a circumstance meets the threshold must involve the strictest of tests and evaluation. The court in *Gundwana*, having found that a mortgage agreement cannot in itself oust judicial oversight, held:

An evaluation of the facts of each case is necessary in order to determine whether a declaration, that hypothecated property constituting a person’s home is specially executable, may be made. It is the kind of evaluation that must be done by a court of law, not registrar. To the extent that the High Court Rules and practice allow the registrar to do so, they are unconstitutional.⁷³

The question, however, is: What is the nature of these circumstances and how do we demarcate the precise contours of the evaluation that the court must conduct? There does not seem to be any clear answers for these questions. It seems that each case must be determined independently. Moreover, as Mokgoro J observed in *Japhta*, “it would be unwise to set out all the facts that would be relevant to the exercise of judicial oversight”.⁷⁴ Despite the warning, the judge suggested that some of the circumstances that the court could consider are the circumstances in which the debt was incurred; any attempts made by the debtor to pay off the debt; the financial situation of the parties; the amount of debt; whether the debtor is employed or has a source of income to pay off the debt, and any other factor relevant to the particular facts of the case before the court.⁷⁵ In *Gundwana*, the court reiterated the *Japhta* position but added that the judicial interference with execution shall only occur where

72 Under common law, ownership rights were the most complete “real rights” that a legal subject could have on property. *Gien v Gien* 1979 (2) SA 1113 (T). “Complete”, in this instance, refers to the notion that “the owner has all proprietary rights in relation to the property” and that the owner enjoys “potentially limitless number of entitlements, each of which confers the power to do something in relation to the property”. Mostert *et al.* 2010:92. Ownership could also be described as bundle of rights, comprising *inter alia* the right to dispose (*ius disponendi*), the right to use (*ius utendi*), the right to draw fruits (*ius fruendi*), and the right to neglect (*ius abutendi*). In South Africa, interference with the common law rights of ownership is often justified on the basis of transformation. See Van der Walt 2008:325.

73 *Gundwana*: paragraph 49.

74 *Japhta*: paragraph 56.

75 *Japhta*: paragraph 58.

there is disproportionality between the means in the execution process to the exact payment of the judgment debt, compared to other available means to attain the same purpose, that alarm bells should start ringing. If there are no other appropriate means to attain the same end, execution may not be avoided.⁷⁶

In summary, both cases suggest that “all relevant circumstances” actually refer more to the circumstances of the debtor than to the equity and fairness of the execution process. But should disproportionality depend on the triviality of the debt and the economic status of the debtor? Would the circumstance be disproportionate if say, the bank levying execution has financial difficulties and needs to recover the money to stay afloat? Although the court in *Brisley* explicitly rejected the proposition that the circumstances of the debtor should constitute “relevant circumstances” within the meaning of section 26(3), the practice shows otherwise. The courts will almost invariably give much weight to the consequences that execution and subsequent eviction may have on the debtor when considering whether the property is especially executable. It might be argued that concerns on the circumstances of the debtor are legitimate, given that financial organizations that lend money are big businesses that do not need as much protection as the indigent debtors. Indeed, this may not be disputed, and that is the reason why legislation such as the *National Credit Act* and the *Consumer Protection Act* were passed. But, if the parties were bound in some contractual arrangement, should the propriety of a constitutional right depend on the subjectivity of the applicant’s circumstances, or on the objective evaluation of a tendency inherent in contractual arrangements of that kind?⁷⁷ If the former position were to be favoured, would the view that enforcing obligations arising from a valid contract violate rights in a particular case, thereby go against the grain of public policy mandating the legal protection of the autonomy resident in an individual’s private sphere? It seems to me that the approach adopted by the Supreme Court of Appeal, which favours the “objective evaluation” approach, may be preferable to that of the Constitutional Court, where greater emphasis is put on the subjective condition of the mortgagor, irrespective of the obligations that mortgagor may have assumed under the bond. And, as is evident in *Gundwana*, the Constitutional Court’s approach is problematic, not only because of its activist stance, but also because of the failure to articulate clear legal principles upon which the subjective conditions of the mortgagor may warrant constitutional intervention.

6. Conclusion

While it is conceded that there can be no template for evaluating a debtor’s circumstances so as to be able to invoke the protection under section 26 of the Constitution, the process must necessarily imbibe two considerations. The first is the acknowledgement of the power of contract

⁷⁶ *Gundwana*: paragraph 54.

⁷⁷ See the dissenting opinion of Sachs J in *Barkhuizen v Napier* 2007 (5) SA 323.

and the public policy objectives discussed above. The court must always bear in mind that the parties had a contract — a legally binding contract — the consequences of which they should have anticipated. Secondly, constitutional guarantees do not occur in a vacuum. As Cameron J affirmed in *Brisley*, the extent of our rights must be limited only by the excesses that diminish our dignity and self-respect.⁷⁸ Obviously, such excesses must be of a kind that would amount to an “abuse of the process”.⁷⁹ Thus, the values espoused by the Constitutional Court only become meaningful when they are carefully balanced against other freedoms and needs of society that are not necessarily burdensome or impermissible. These two imperatives resonate with *Folscher*.⁸⁰

Admittedly, there would be circumstances in which protection for the mortgagee is warranted. Consider for a moment a situation such as that in *ABSA Bank v Ntsane*,⁸¹ where execution on a residential property was levied, because the debtor was in arrears of R18.46 only, or in *Japhtha* where the women not only lost their homes because of what was described as a “trifling debt”, but also faced the prospect of never ever qualifying for state housing subsidy again in their lives. It may very well be that, since rights are subjective, a person’s subjective conditions will dictate the nature of his/her claim to protection. But even then, a blanket abrogation of procedures that have been in existence for over a century, because there may be subjective situations that warrant protection, does not necessarily develop the law in this area. Perhaps what *Gundwana* should have done is to take the *Saunderson* approach and fortify the procedural safeguards. Though it may be difficult to predict what the consequences of this approach are going to be, one thing seems clear: mortgage bonds will now have to succumb to greater scrutiny by courts when mortgagees seek to execute against hypothecated properties of debtors who default in repayment. Whether liberal legalism explicit in *Gundwana* is good or bad for the improvement of the housing situation in South Africa, only time will tell.

78 *Braisley*: paragraph 95.

79 *Beinash v Wigley* 1997 (3) SA 721 (SCA) at 734F.

80 2011 (4) SA 314.

81 2007 (3) SA 554 (T).

Bibliography

- BADENHORST P, PIENAAR J AND MOSTERT H (EDS)**
2006. *Silbergberg and Schoeman's The law of property*. 5th ed. Durban: LexisNexis Butterworths.
- COOK S AND QUIXLEY G**
2004. *Parate Executie* clause: Is the debate dead? *South African Law Journal* 121(4):719-730.
- CURRIE I AND DE WAAL J**
2005. *The Bill of Rights handbook*. 5th ed. Cape Town: Juta.
- HUTCHINSON D, PRETORIUS C, DU PLESSIS J, EISELEN S, FLOYD T AND HAWTHONE L**
2009. *The law of contract in South Africa*. Cape Town: Oxford University Press.
- KRITZINGER KM**
1999. *Principles of the law of mortgage, pledge and lien*. Cape Town: Juta
- MAINE H**
1861. *Ancient law: Its connection with early history of society and its relation to modern laws*. London: Routledge.
- MOSTERT H, POPE A, BADENHORST P, FREEDMAN W, PIENAAR J AND VAN WYK J**
2010. *The principles of the law of property in South Africa*. Cape Town: Oxford University Press.
- SOUTH AFRICAN LAW REFORM COMMISSION**
1998. *Unreasonable stipulations in contracts and the rectification of contracts*. Pretoria: SALRC.
- SCHULZE H**
2005. When may creditors help themselves? *Parate executie*, self-help by creditors and public policy. *Business Law* 13(3):110-114.
- SCOTT T AND SCOTT S**
1987. *Willies Law of mortgage and pledge in South Africa*. 3rd ed. Cape Town: Juta.
- VAN DER WALT AJ**
2008. Property, social justice and citizenship; property law in post-apartheid South Africa. *Stellenbosch Law Review* 19(3):325-346.