

PROTECTION AGAINST FORCED SALE OF A DEBTOR'S HOME IN THE ROMAN CONTEXT

Lienne Steyn* **

Therefore am I called Janus; ...
... for my shape ... you know
That every door must have a double face;
One views the Lares, one the Populace;
And as your mortal Janitor, who sees
From threshold floor, exits and entrances,
So I, the Janitor celestial, view
Eoan and Hesperian regions too.
Hecat' you know is furnished with fronts three
That she may watch and ward her Trivise,
And I have twain, that, without movement, I
May view alike past and futurity.

Translated extract from Ovid *Fasti* Book 1***

1 Introduction

The home of a debtor has never enjoyed specific statutory protection in the form of exemption from forced sale in the individual debt enforcement and insolvency

* Associate Professor, School of Law (Howard College Campus), University of KwaZulu-Natal.

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*** JB Rose *The Fasti of Ovid* (London, 1866) at 5.



procedures in South Africa.¹ Only in the last decade has recognition by the courts of the impact of one of the socio-economic rights included in the Bill of Rights,² the right to have access to adequate housing, provided for in section 26 of the Constitution, profoundly affected developments in relation to execution against a debtor's home in the individual debt enforcement process.³ The combined effect of the Constitutional Court's decisions in *Jaftha v Schoeman*; *Van Rooyen v Stoltz*⁴ and *Gundwana v Steko Development CC*,⁵ is that it is acknowledged that execution against a debtor's home may constitute an unjustifiable infringement of the right to have access to adequate housing. Further, this may occur even where the home has been mortgaged in favour of the creditor. Therefore, in every case in which execution is sought against a person's home, judicial oversight is required to determine, after considering "all the relevant circumstances", whether execution is justifiable in terms of section 36 of the Constitution.

Given that before the decision in *Jaftha v Schoeman*, the right of a creditor, especially a mortgagee, to execution against the debtor's property had been largely regarded as unassailable, these were ground-breaking changes effected by the Constitutional Court in the course of carrying out constitutional imperatives. However, it should be borne in mind that the fact that judicial oversight is required will not necessarily have the outcome that a court will refuse to grant an order declaring a debtor's home specially executable. It will depend on the degree to which any specific circumstances are exceptional as well as whether judicial officers adopt a more debtor-friendly, as opposed to a creditor-friendly, approach in such matters.⁶

- 1 Although various statutory provisions regulating the individual debt enforcement and insolvency procedures (such as, eg, s 67 of the Magistrates' Courts Act 32 of 1944, s 39 of the Supreme Court Act 59 of 1959, s 23 and s 82(6) of the Insolvency Act 24 of 1936), and other statutes (such as the Pension Funds Act 24 of 1956, the General Pensions Act 29 of 1979, the Long-Term Insurance Act 52 of 1998 and the Land Reform (Labour Tenants) Act 3 of 1996) place certain assets beyond the reach of creditors, these do not include the debtor's home.
- 2 Contained in Chapter 2 of the Constitution of the Republic of South Africa, 1996 (hereafter referred to as the Constitution), which came into operation on 4 Feb 1997.
- 3 See, generally, Steyn (n**) *supra*, and authorities cited there.
- 4 *Jaftha v Schoeman*; *Van Rooyen v Stoltz* 2005 (2) SA 140 (CC) (hereafter referred to as *Jaftha v Schoeman*).
- 5 *Gundwana v Steko Development CC* 2011 (3) SA 608 (CC) (hereafter referred to as *Gundwana v Steko*).
- 6 *Jaftha v Schoeman* concerned unique circumstances in that the debtors were severely impoverished; suffered from poor health; had received minimal primary-level education; and had suffered their government-subsidised homes being sold in execution for non-payment of unsecured debts of minimal amounts of R250 and R190, respectively. Thereafter, cases in which the court refused orders declaring the debtor's home specially executable included *ABSA Bank Ltd v Ntsane* 2007 (3) SA 554 (T), where execution against the home was sought in respect of an arrears mortgage debt of R18.46, and *FirstRand Bank Ltd v Maleke and Three Similar Cases* 2010 (1) SA 143 (GSJ), which was decided at a time when there was a lack of clarity in relation to the application of the newly enacted National Credit Act 34 of 2005 (NCA), and in which the presiding judge

Further, thus far, there has been no equivalent development where the debtor's estate has been sequestrated in terms of the Insolvency Act 24 of 1936.⁷ The position is that all of the insolvent debtor's property, including immovable property that constitutes his or her home, vests in the trustee whose duty it is to liquidate the property of the insolvent estate for distribution of the proceeds amongst creditors.⁸ Therefore, although specific judicial evaluation of the circumstances is now required in the individual debt enforcement process, this does not necessarily result in prohibition or prevention of, or specific protection for the debtor and his or her family against, forced sale of the home.

Against the South African contextual background set out above, and keeping in mind recent developments in the European Union since the global economic recessions and mortgage crises towards forced sale of the home being permitted only as a last resort,⁹ this article explores the ways in which a debtor's home was likely to have been treated according to Roman law, a common source of contemporary legal systems. Initially, substantive and procedural rules relating to debt enforcement permitted execution only against a debtor's person. Thereafter, the law developed to provide for execution against a debtor's property. Rules and procedures regarding collective debt enforcement (or insolvency) evolved as did principles pertaining to mortgage and a creditor's real security rights. Certain types of assets came to be regarded as exempt from execution in the individual and collective debt enforcement processes but there was no formal exemption of the home of a debtor. However, scrutiny of the relevant legal principles and procedures, as applied in their historical and socio-economic context, reveals, it is submitted, the effect, albeit indirect and

distinguished the case from others in which execution had been permitted. *FirstRand Bank Ltd v Seyffert and Three Similar Cases* 2010 (6) SA 429 (GSJ) was also decided in the context of uncertainty relating to the application of the NCA; see pars 18-20 of the judgment. *Cf Standard Bank v Hales* 2009 (3) SA 315 (D); *FirstRand Bank Ltd v Meyer* ECPE Case No 3483/10 [2011] (17 Mar 2011); and, post-*Gundwana v Steko, Nedbank Ltd v Fraser and Four Similar Cases* 2011 (4) SA 363 (GSJ); *FirstRand Bank Ltd v Folscher and Similar Matters* 2011 (4) SA 314 (GNP); *Standard Bank of South Africa Ltd v Bekker and Four Similar Cases* 2011 (6) SA 111 (WCC); *Mkhize v Umvoti Municipality* 2010 (4) SA 509 (KZP) and, on appeal, 2012 (1) SA 1 (SCA); *ABSA Bank Ltd v Petersen* 2013 (1) SA 481 (WCC). For a more detailed discussion of the position, see Steyn (n**), *supra*, ch 15.

- 7 The only reported judgment involving the sale, at the instance of the trustee of the insolvent estate, of the home of insolvent spouses, is *ABSA Bank Ltd v Murray* 2004 (2) SA 15 (C), which dealt with their eviction from it and the application of the provisions of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998.
- 8 See, *inter alia*, ss 20, 69 and 82 of the Insolvency Act 24 of 1936; RD Sharrock *et al Hockly's Insolvency Law* 9 ed (Cape Town, 2012) ch15.
- 9 See Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on Credit Agreements for Consumers Relating to Residential Immovable Property ch 10, Art 28, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0017> (accessed 23 Apr 2014). In respect of requirements in England and Wales, Scotland and Ireland with which a mortgagee must comply in cases where it seeks to execute against a debtor's home, see Steyn (n**) ch 7.

subtle, of providing protection for an impecunious debtor against the loss of his home at the instance of a creditor.

2 Individual debt enforcement in Roman law

Debt enforcement in Rome initially occurred in the form of “self-help” against the person of the debtor.¹⁰ Written laws, the earliest of which were contained in Table 3 of the Twelve Tables,¹¹ as well as legal structures and procedural mechanisms came to regulate this.¹² Examples of procedural mechanisms are found in the three successive kinds, or stages in the development, of legal redress – *legis actiones*, the formulary procedure and the *cognitio* procedure – which coincided roughly with the main recognised historical periods of the Monarchy (753 to 510 BC), the Republican period (510 to 27 BC) and the Empire (from 27 BC onwards).¹³ Most significant for Roman law were the years from 367 BC onwards, with praetorian influences in the application and supplementation of the civil law,¹⁴ and the period when Justinian, as the Emperor of the Eastern Roman Empire from AD 527 to 565, carried out a comprehensive compilation of the laws and brought about a number of important reforms.

In the *legis actio* procedure, if a judgment debt had not been paid within thirty days, the creditor could arrest and bring the debtor before the praetor.¹⁵ If the debt remained unpaid,¹⁶ the praetor “addicted” the debtor to the creditor who could hold him in chains in a private prison¹⁷ for sixty days during which time they might reach

- 10 P van Warmelo *An Introduction to the Principles of Roman Civil Law* (Cape Town, 1976) at 271.
- 11 Promulgated c 450 BC; Table 3 dealt with execution of judgments.
- 12 M Kaser (tr by R Dannenbring) *Roman Private Law 2* ed (Durban, 1968) at 330 refers to the written laws as “state-restricted and supervised self-redress”.
- 13 See WA Hunter *A Systematic and Historical Exposition of Roman Law: In the Order of a Code 4* ed (London, 1903) at 122-142; 967ff; see, also, R van den Bergh “The *patronus* as representative in civil proceedings and his contribution towards the attainment of justice in Rome” (2009) 15 (2) *Fundamina* 159-173 at 160.
- 14 See J Thomas *Textbook of Roman Law* (Amsterdam, 1976) at 15.
- 15 This was called *manus iniectio*, the laying of hands on a person; see Hunter (n 13) at 1030-1031. See, also, AL Stander “Geschiedenis van die insolvensiereg” 1996 (21) TSAR 371-377 at 371; J Calitz “Historical overview of state regulation of South African insolvency law” (2010) 16 (2) *Fundamina* 1-27 at 5ff.
- 16 A debtor could arrange for a substitute, called a *vindex*, to answer for the debt. However, if the *vindex* lost the case, he was liable for double damages. See XII Tab 3 3; R Sohm *The Institutes: A Textbook of the System of Roman Private Law* (Oxford, 1907) at 235; WW Buckland & P Stein *Buckland’s Text-Book of Roman Law from Augustus to Justinian* (Cambridge, 1963) at 619 n 7; Thomas (n 14) at 79; R Lee *The Elements of Roman Law 4* ed (London, 1956) at 427. JA Crook *Law and Life of Rome* (London, 1967) at 92 states that this legal procedure “weighted the scales of litigation heavily in favour of the rich against the poor”. As to who might opt to come to the debtor’s rescue by paying the debt on his behalf or by acting as *vindex*, see par 6, *infra*.
- 17 XII Tab 3 3-4; Aulus Gellius *Noctes Atticae* (tr by JC Rolfe) (Oxford, 1968) at 20 1 46; Lee (n 16)

a compromise.¹⁸ At this stage the debtor was still free, as opposed to being a slave; he was still the owner of his property and capable of contracting.¹⁹ On the last three market days of these sixty days, the creditor was obliged to again bring the debtor before the praetor into the “meeting place” and the amount for which he had been judged liable was declared publicly. This was done in the hope that someone might come forward to pay the debt and release the debtor.²⁰

If the debt remained unpaid, the creditor was entitled to sell the judgment debtor as a foreign slave.²¹ It is uncertain whether, at this stage, the debtor’s property “went with his person to the creditor”²² although, according to Sohm²³

[w]hen the person of the debtor (whom execution placed in the position of a slave in regard to his creditor) passed into the power of the creditor, the same fate befell his whole estate and probably also his whole family, i.e., the aggregate of those who were subject to his potestas [sic]. Thus every personal execution involved necessarily – though only indirectly – an execution against the debtor’s property, because it went, in all cases, against the debtor’s entire person and estate, quite regardless of the actual amount due.

Where there was more than one creditor, they were entitled to “cut shares”.²⁴ Some commentators regard this as meaning cutting the debtor’s body into pieces²⁵ while others believe it meant that creditors shared the proceeds of the debtor’s sale into foreign slavery.²⁶ The primary purpose of this harsh procedure was to bring pressure

at 427-428; Kaser (n 12) at 338. Cf G Mousourakis *Historical and Institutional Context of Roman Law* (Farnham, 2003) at 137-138; H Jolowicz & B Nicholas *Historical Introduction to the Study of Roman Law* (Cambridge, 1972) at 188.

18 XII Tab 3 5; W Burdick *The Principles of Roman Law and their Relation to Modern Law* (Holmes Beach Fla, 1993) at 633, 671; Buckland & Stein (n 16) at 619.

19 See Buckland & Stein (n 16) at 619; Jolowicz & Nicholas (n 17) at 188, 190. Cf L Wenger *Institutes of the Roman Law of Civil Procedure* (New York, 1955) at 227; Kaser (n 12) at 338; Sohm (n 16) at 235. The latter sources refer to such a debtor as being a “debt-slave” or “*ipso iure* in the position of a slave”.

20 XII Tab 3 5. See Buckland & Stein (n 16) at 619; Thomas (n 14) at 79. Cf Gellius *Noctes Atticae* 20 1 48.

21 XII Tab 3 5; see Buckland & Stein (n 16) at 620; Wenger (n 19) at 225.

22 Jolowicz & Nicholas (n 17) at 190.

23 Sohm (n 16) at 287.

24 XII Tab 3 6.

25 Thomas (n 14) at 79. Cf A Borkowski *Textbook on Roman Law* (London, 1994) at 65; Kaser (n 12) at 338.

26 Gellius *Noctes Atticae* 20 1 47 and 20 1 48; Wenger (n 19) at 224-225; Buckland & Stein (n 16) at 620; Burdick (n 18) at 633-634, 671; D Johnston *Roman Law in Context* (Cambridge, 1999) at 108-109; Thomas (n 14) at 79; JW Wessels *History of the Roman-Dutch Law* (Grahamstown, 1908) at 661. WW Buckland *The Roman Law of Slavery* (Cambridge, 1908) at 402 states, with reference to Gellius *Noctes Atticae* 20 1 47, that, while a judgment debtor might ultimately be sold into slavery, his position in early law is to some extent obscure and the provisions were, very early on, obsolete.

to bear on the debtor to pay.²⁷ A debtor who had no assets, who was without access to credit and who did not have anyone to pay the debt on his behalf, would, in most cases, save his “life and freedom” by entering into a transaction of *nexum* in terms of which he would submit to working off his obligation to the creditor.²⁸

In the formulary process, if a judgment debt was not paid within thirty days, the creditor could take the debtor before the praetor again and, if the debtor challenged the claim but lost, he would be liable for double the original amount of the debt.²⁹ The *lex Poetelia*,³⁰ introduced to improve the judgment debtor’s position, prohibited his sale into slavery and his being put to death.³¹ However, the creditor could still, with the praetor’s permission, take the debtor into confinement³² to work off the debt³³ in which case the debtor retained rights of property and disposition, as would

27 Van Warmelo (n 10) at 274; Wenger (n 19) at 230. Cf Wessels (n 26) at 661 who states that there is “[s]ome doubt whether the debtor was sold as a slave ... [and h]e may have been held as a pledge compellable to redeem the debt by the services of himself and his family”.

28 Wenger (n 19) at 222, 226 n 12; Kaser (n 12) at 338; Jolowicz & Nicholas (n 17) at 164-166, 189-190. Although reference is often made to a debtor who surrendered himself to his creditor in *nexum* as a “debt-slave”, he did not lose his status as a free person: see Thomas (n 14) at 217. In relation to *nexum*, see Calitz (n 15) at 5; JH Dalhuisen *Dalhuisen on International Insolvency and Bankruptcy* (Deventer, 1986) vol 1 par 1 02[1] 1-4-1-5. Also, on slavery and debt servitude, see H Rajak “The culture of bankruptcy” in P Omar (ed) *International Insolvency Law: Reforms and Challenges* (Farnham, 2008) ch 1 8-11.

29 G 4 9. See Hunter (n 13) at 1031ff; Thomas (n 14) at 109; Buckland & Stein (n 16) at 642; Burdick (n 18) at 671; P Garnsey *Social Status and Legal Privilege in the Roman Empire* (Oxford, 1970) at 204 n 1. Garnsey at 138 points out how it was the poorer section of the population who suffered considerable hardship, being “forced through debt to sell their meagre possessions, take out credit at unfavourable rates, and ultimately fall victim to the savage debt laws and forfeit their freedom”.

30 Also referred to as the *lex Poetilia*. It was promulgated in 325 or 326 BC or, according to Sohm (n 16) at 287, in 313 BC.

31 Controversy surrounds its exact provisions. See Hunter (n 13) at 1035; Burdick (n 18) at 634; Jolowicz & Nicholas (n 17) at 164, 190; Sohm (n 16) at 287; Wenger (n 19) at 225, 230-231; Buckland & Stein (n 16) at 620; Van Warmelo (n 10) at 274; Thomas (n 14) at 79. *Mars The Law of Insolvency in South Africa* 9 ed by E Bertelsmann *et al* (Cape Town, 2008) at 6 refer to W Kunkel *An Introduction to Roman Legal and Constitutional History* 2 ed (tr by J Kelly) (Oxford, 1973) at 31 and the contrary view expressed in M Kaser *Das römische Privatrecht* (München, 1971) vol 1 at 154 n 36.

32 During the later Republic, slavery had been replaced by imprisonment in a public prison for debtors who were unable to pay their debts: see C 7 71 1 and D 42 1 34; Hunter (n 13) at 1035-1036; Buckland & Stein (n 16) at 622.

33 Thomas (n 14) at 109; Lee (n 16) at 454; Wenger (n 19) at 230-231. Buckland & Stein (n 16) at 643 states that “[t]he confinement put pressure on the debtor: perhaps it was used mainly for solvent debtors”. Kaser (n 12) at 338 submits that the *lex Poetelia* “regulated in detail rather than introduced” the debtor being able to work off his debt as a debt-slave of the pursuer. See also Johnston (n 26) at 109; Crook (n 16) at 173; AA Schiller *Roman Law Mechanisms of Development* (New York, 1978) at 209.

a person who had pledged himself in a transaction of *nexum*.³⁴ Wenger explains the position as follows:³⁵

Then it would be comprehensible, if a person, in order to save his little home for himself and his family, incurred a *manus iniectio* in order to wipe out the debt with the work of his hands ... Indeed this *manus iniectio* now meant temporary quasi-slavery ... and in truth even beyond the sixty days, especially when the danger of death no longer threatened. Since personal execution also ... befell just the poor man who had no property, we understand its continued existence until far beyond the formulary procedure.

In AD 320, Constantine abolished imprisonment for debt unless the debtor “contumaciously refused to pay”.³⁶ Nevertheless, persons often sold themselves into, or stayed in, slavery as an easier alternative.³⁷ Others hired out themselves or their children as a way of working off a debt, often in transactions which were apparently service contracts in terms of which the servant was bound for life or for a number of years.³⁸ In Justinian’s time, a defaulting debtor could be put to work for four months.³⁹

Execution against a debtor’s property was a praetorian innovation in the formulary process.⁴⁰ The praetor could grant to a creditor *missio in bona* which was an order giving a claimant possession of the entire property of a debtor who was in hiding or who had left the country to evade arrest, imprisonment or slavery.⁴¹ Thereafter, the creditor could sell the debtor’s property and apply the proceeds to satisfy his claims.⁴²

In terms of the *cognitio* procedure execution could occur against the person⁴³ or the property of the debtor, the latter being the norm.⁴⁴ A later development allowed a court officer to proceed with the execution where judgment was for payment of a sum of money, by seizing part of the judgment debtor’s property to be kept as a

34 Wenger (n 19) at 230.

35 *Ibid.* See, also, Jolowicz & Nicholas (n 17) at 190.

36 C 10 19 2; Mars (n 31) at 6; Hunter (n 13). *Cf* C Th 9 11 1 and C 9 5 2 (Justinian) with reference to which Mousourakis (n 17) at 373 states that in practice powerful landowners continued to confine their debtors in private prisons.

37 Crook (n 16) at 59.

38 JE Grubbs *Law and Family in Late Antiquity: The Emperor Constantine’s Marriage Legislation* (New York, 1995) at 270; Crook (n 16) at 61.

39 Kaser (n 12) at 366.

40 Wenger (n 19) at 233; Kaser (n 12) at 339, 342.

41 Mousourakis (n 17) at 219; Garnsey (n 29) at 193; Hunter (n 13) at 1037; Buckland & Stein (n 16) at 631, 644; Thomas (n 14) at 110.

42 Kaser (n 12) at 355; Crook (n 16) at 172.

43 As in the formulary process it was initiated by the *actio iudicati*. Buckland & Stein (n 16) at 672 and Thomas (n 14) 122 state that a judgment debtor could be confined in a public prison. Lee (n 16) at 458 states that private imprisonment continued in spite of attempts to suppress it.

44 RG Evans *A Critical Analysis of Problem Areas in Respect of Assets of Insolvent Estates of Individuals* (LLD thesis, University of Pretoria, 2008) at 30.

pledge.⁴⁵ If the debtor did not pay within two months after judgment, the property could be sold by auction.⁴⁶ If the sale yielded insufficient proceeds to satisfy the claim more property could be seized for the same purpose.⁴⁷ Slaves, oxen and agricultural implements were exempt from seizure and sale⁴⁸ and movable property was to be exhausted before land could be seized.⁴⁹ This became the norm, during the later Empire, where the debtor was not suspected of being insolvent. This state of affairs has been regarded as an indication of the balancing of the interests of the creditor and the judgment debtor.⁵⁰

3 Collective debt enforcement in Roman law

As mentioned above, where there was more than one creditor, they could “cut shares” or at least share in the proceeds of the debtor’s sale into foreign slavery.⁵¹ A praetorian innovation, in the late second century BC,⁵² permitted creditors, alternatively or in addition to personal execution, to levy execution directly against a debtor’s property.⁵³ Through this process, the debtor was rendered *infamis* and

45 The *pignus ex iudicati causa captum*. See B Nicholas *An Introduction to Roman Law* (Oxford, 1962) at xiv; Lee (n 16) at 458; Wenger (n 19) at 313-314; Buckland & Stein (n 16) at 672; Mousourakis (n 17) at 373.

46 D 42 1 31. In Justinian’s time, this had been extended to four months: see C 7 54 2. See, also, Thomas (n 14) at 121; Borkowski (n 25) at 74-75.

47 Buckland & Stein (n 16) at 672; Thomas (n 14) at 122.

48 C 8 17 7. See Hunter (n 13) at 1043; Burdick (n 18) at 672.

49 D 42 1 15 8. See Wenger (n 19) at 314; Hunter (n 13) at 1043; Burdick (n 18) at 672; Mousourakis (n 17) at 373.

50 D 42 1 31; D 46 1 6 2. See Burdick (n 18) at 672; Hunter (n 13) at 1043; Buckland & Stein (n 16) at 608; Thomas (n 14) at 122; Sohm (n 16) at 289. Wenger (n 19) at 239-240 and at 314 where he states that it “threaten[ed] ... the existence of the debtor no more than ... [was] necessary in the interest of the creditor”. Crook (n 16) at 178 refers to it as “the intelligent solution”.

51 See the text to footnotes 24 and 25 *supra*.

52 The *actio Rutiliana*. See Mars (n 31) at 6; M Roestoff “‘n Kritiese Evaluasie van Skuldverligtingsmaatreëls vir Individue in die Suid-Afrikaanse Insolvensiereg” (hereafter “‘n Kritiese Evaluasie” (LLD thesis, University of Pretoria, 2002) at 16ff; M Roestoff “Skuldverligtingsmaatreëls vir individue in die Suid Afrikaanse insolvensiereg: ‘n Historiese ondersoek” (hereafter “‘n Historiese ondersoek” (Deel 1) (2004) 10 *Fundamina* 113-136 at 118ff; Calitz (n 15) at 7-8.

53 This entailed the issue of three decrees, namely the *missio in possessionem*; *proscriptio bonorum*; and *venditio bonorum* (also referred to as *emptio bonorum*; see G 3 78-79). See, also, G 4 35, specifically referred to by Thomas (n 14) at 109; Hunter (n 13) at 1037; Buckland & Stein (n 16) at 643ff; Kaser (n 12) at 356-357; and Sohm (n 16) at 287ff. A *missio in possessionem* was an authorisation by the praetor to take possession either of a particular thing or the whole of a person’s property: see Jolowicz & Nicholas (n 17) at 228. Wenger (n 19) at 236 refers to this as *missio in bona* which was an order giving a claimant possession of the whole of a person’s property: see Mousourakis (n 17) at 219. Apparently, there was some overlap between these two concepts.

was deemed bankrupt. His property was sold *en masse* to the highest bidder, that is, the person who offered the creditors the highest dividend on their claims.⁵⁴ The purchaser succeeded to the entire estate and the proceeds were divided amongst creditors according to a fixed order of preference.⁵⁵ This was in effect the Roman equivalent of bankruptcy proceedings.⁵⁶

This process was rarely resorted to against members of the upper class with the result that it probably affected only debtors of lower social standing.⁵⁷ Where the proceeds of the sale did not satisfy the creditors' claims in full they could bring proceedings to execute against any assets which the debtor acquired subsequently.⁵⁸ However, this was subject to the *beneficium competentiae* which afforded the debtor a period of recovery of one year after the sale during which time he was rendered safe from execution against his person and "articles of necessity", including necessary food, clothing, and movables necessary for agriculture and trade, were exempt from execution.⁵⁹ This has been regarded as signifying a shift in policy, to some extent, towards a more humanitarian conception or recognition of a debtor's rights.⁶⁰

A *senatusconsultum*⁶¹ provided that where debtors were *clarae personae*, particularly those of senatorial rank, a curator⁶² could be appointed who, subject to the praetor's sanction, sold the debtor's assets, not *en masse*, but in lots. This was known as *distractio bonorum*.⁶³ This process did not render the debtor *infamis* nor dispossess him of all of his assets. Only assets sufficient to satisfy the creditors' claims were sold and the debtor retained the rest of his estate.⁶⁴ With the passing of time, and certainly by the *cognitio* period, *distractio bonorum* became the general mode for realisation of a debtor's assets.⁶⁵

A significant development, presumably in the interests of severely over-indebted nobles, was the introduction of *cessio bonorum*⁶⁶ which allowed a debtor,

54 Wenger (n 19) at 237; Buckland & Stein (n 16) at 644; Johnston (n 26) at 109.

55 CH Smith *The Law of Insolvency* (Durban, 1988) at 5; Mars (n 31) at 6-7.

56 Wenger (n 19) at 233; Sohm (n 16) at 288; Johnston (n 26) at 109.

57 Crook (n 16) at 174.

58 Buckland & Stein (n 16) at 403, 644; Wenger (n 19) at 237; Crook (n 16) at 174.

59 Buckland & Stein (n 16) at 693-694; Kaser (n 12) at 357.

60 See Wenger (n 19) at 238 n 39.

61 The date of which is unknown: see Buckland & Stein (n 16) at 645. Garnsey (n 29) at 186 states that this occurred during the early Empire.

62 Instead of a *magister*.

63 Buckland & Stein (n 16) at 645; Johnston (n 26) at 110; Kaser (n 12) at 355, 357; Wenger (n 19) at 238-239; Crook (n 16) at 177-178; Roestoff "n Kritiese Evaluasie" (n 52) at 29; Calitz (n 15) at 9.

64 Buckland & Stein (n 16) at 645; Thomas (n 14) at 110; Wenger (n 19) at 239; Mars (n 31) at 7.

65 Buckland & Stein (n 16) at 672-673; Thomas (n 14) at 122; Mars (n 31) at 7.

66 With the passing of the *lex Julia*, possibly in 17 BC. See Hunter (n 13) at 1039; Burdick (n 18) at 671; Sohm (n 16) at 288. See, also, Garnsey (n 29) at 186-187; MW Frederiksen "Caesar, Cicero and the problem of debt" 1966 (56) *J of Roman Studies* at 128-141.

probably where insolvency was due to no fault of his own,⁶⁷ voluntarily to surrender his property. Transfer of his property to his creditors would exempt a debtor from *infamia*⁶⁸ and personal seizure for any debts which remained unpaid.⁶⁹ After *cessio bonorum*, *venditio bonorum* took place and the debtor could rely on the *beneficium competentiae* for all time and not merely for a year.⁷⁰

In the *cognitio* procedure execution against all of the property of the debtor occurred only where the debtor was insolvent.⁷¹ On application by the creditors, the judge appointed a *curator bonorum* to manage the bankrupt property.⁷² Creditors had to join the proceedings within two to four years.⁷³ In all instances, *distractio bonorum* took place.⁷⁴ The claim of a creditor who was a pledgee was first paid out of the proceeds of the thing pledged to him. Any surplus would then go to the other creditors, with certain claims receiving preference, after which other creditors would receive their respective percentages of the proceeds.⁷⁵

By the time of Justinian, a majority vote by creditors could result in a moratorium being granted to the debtor.⁷⁶ It was also possible for the debtor to approach the Emperor for a moratorium “in the face of an impending execution”.⁷⁷

4 Debt relief measures available in Roman law

Apart from *cessio bonorum*, and the benefits which it offered, the Roman law of contract presented alternative options for a debtor unable to meet his obligations

67 Buckland & Stein (n 16) at 645; Johnston (n 26) at 110; Crook (n 16) at 174; Kaser (n 12) at 357.

68 C 2 11 11. See Sohm (n 16) at 289.

69 Thus excluding the creditor’s choice between executing against the debtor’s person, at civil law, or against the debtor’s property under praetorian law. See Sohm (n 16) at 288; Wenger (n 19) at 235; Buckland & Stein (n 16) at 645.

70 There is some dispute about this. See Smith (n 55) at 5; Buckland & Stein (n 16) at 645, 693-694; Sohm (n 16) at 289; Thomas (n 14) at 110; Lee (n 16) at 455; Mars (n 31) at 7. Cf Wessels (n 26) at 663; Burdick (n 18) at 671-672; Wenger (n 19) at 235, 237-238, 316.

71 Wenger (n 19) at 314; Kaser (n 12) at 366.

72 Wenger (n 19) at 315.

73 Two years if they lived in the same province and four years if they lived in a different province; see Wenger (n 19) at 315. Otherwise, creditors could not share in the proceeds of the seized property and they would be left with only a claim against the debtor.

74 Wenger (n 19) at 315; Kaser (n 12) at 366. See Roestoff “n Kritiese Evaluasie” (n 52) at 29, who agrees with the submission made by B Swart *Die Rol van ‘n Concurfus Creditorum in die Suid-Afrikaanse Insolvensiereg* (LLD thesis, University of Pretoria, 1990) 55 that *distractio bonorum* was the origin of the South African insolvency regime.

75 Wenger (n 19) at 315-316.

76 C 7 71 8; Wenger (n 19) at 316, n 23.

77 C 1 19 4. See Wessels (n 26) at 663. See also Wenger (n 19) at 316-317 n 23a who states, with reference to C 1 19 4, that the law at the time of Justinian was that this would only occur if sufficient security was furnished by the debtor. He also mentions that Egyptian provincial law likewise allowed a moratorium for a period of five years. See, further, Roestoff “n Kritiese Evaluasie” (n 52) at 31.

timeously. These included *solutio per aes et libram* and *acceptilatio*, by which a creditor formally released the debtor from liability; *pactum de non petendo*, an agreement not to sue or take action; and *transactio*, or compromise, which brought an obligation to an end. In Justinian's time, *datio in solutionem* entitled a debtor, who could not meet his obligation to the creditor, and who owned immovable property for which he could not find a buyer, instead of payment to transfer the immovable property to the creditor, even without the latter's consent.⁷⁸ Parties could also resort to *remissio*,⁷⁹ a partial release, and *dilatatio*,⁸⁰ by which a moratorium was created if the majority of the creditors were in favour of it.

5 Real security in Roman law

5 1 Forms of real security

Roman law recognised three forms of real security:⁸¹ *fiducia* and, under praetorian law, *pignus* and *hypotheca*.⁸²

Fiducia entailed the transfer of ownership⁸³ of the debtor's property to the creditor who agreed to re-transfer the property to the debtor as soon as the debt was paid.⁸⁴ Parties usually also agreed, in a *pactum de vendendo*, on the circumstances in which the creditor could sell the property.⁸⁵ Where the seller sold the property either before the debt was due or contrary to their agreement, the sale was nevertheless valid and the purchaser received good title. This meant that the debtor could not

78 Nov 4 3 and 120 6 2. See Roestoff "n Kritiese Evaluasie" (n 52) at 35-37.

79 D 2 14 7 17; D 2 14 7 18; D 2 14 7 19; D 2 14 8; D 2 14 10; D 17 1 58 1 and D 42 9 23.

80 See Roestoff "n Kritiese Evaluasie" (n 52) at 31.

81 Real security entails the giving of a real right to a creditor as security for the performance of a debt, the effect being that the creditor has, in addition to the right to claim satisfaction of the debt from the debtor personally, a right to obtain satisfaction of his claim by selling the thing given as security. See Buckland & Stein (n 16) at 473; Sohm (n 16) at 351-352.

82 Hunter (n 13) at 436ff refers to *pignus* as pledge and *hypotheca* as mortgage. Burdick (n 18) at 382 explains that, in Roman law, both *pignus* and *hypotheca* were used for movables and immovables. These three forms co-existed until the time of Constantine. See, also, Buckland & Stein (n 16) at 478; Thomas (n 14) at 330-333; DH van Zyl *History and Principles of Roman Private Law* (Durban, 1983) at 197-198, particularly n 293.

83 Either by *mancipatio* or *in iure cessio*.

84 The agreement to re-transfer was known as *pactum fiduciae*. See Sohm (n 16) at 352; Thomas (n 14) at 329; Jolowicz & Nicholas (n 17) at 301ff; Kaser (n 12) at 127ff; Van Warmelo (n 10) at 113-114.

85 This was required to release the creditor from his fiduciary obligation, arising from the *pactum fiduciae*, to re-transfer the property to the debtor, so that he could obtain satisfaction of his claim by selling the thing; see Sohm (n 16) at 352; Buckland & Stein (n 16) at 474.

recover the property from the purchaser although he had a claim against the creditor for breach of the fiduciary obligation.⁸⁶

*Pignus*⁸⁷ developed out of the praetorian protection of possession.⁸⁸ The debtor retained ownership but gave possession of the thing to the creditor who had to restore it to the debtor once the debt was paid.⁸⁹ The creditor did not have the right to dispose of the pledged property and, if he did sell it, the debtor as owner could recover it from anyone who had obtained possession of it. From the creditor's perspective, this was unsatisfactory, especially where the debtor was in default, and so the parties usually agreed, in a *pactum de vendendo*, that the creditor could sell the property if the debt was not paid by a certain date.⁹⁰

Hypotheca, also referred to as "mortgage", occurred when the property remained with the debtor but, if the debtor failed to pay the debt, the creditor had a real right to obtain possession of the hypothecated property and, in terms of a *pactum de vendendo*, the right to sell the property in order to satisfy his claim. The debtor as owner could recover his property if a third party obtained possession of it. He could also enter into successive transactions of *hypotheca* with various creditors.⁹¹ Thus *hypotheca* catered for both the debtor's and the creditor's interests and was "more in keeping with the capitalistic character of the time".⁹²

5 2 The creditor's rights

Essentially, the effect of the creation of real security was that the creditor acquired the right:

- to obtain (if not already in) possession of the pledged or hypothecated property;

86 Sohm (n 16) at 353; Buckland & Stein (n 16) at 474. In the case of land provided as security, the creditor often left it in the hands of the debtor as a *precarium*; see Thomas (n 14) at 143, 329.

87 Referred to as pledge; see Hunter (n 13) at 436.

88 A *pignus praetorium* granted a creditor "*missio in possessionem*" of the debtor's property by which the creditor gained control of a thing as security for his claim. A *pignus judiciale* arose in the seizure of a debtor's property in the course of a judicial execution; see Sohm (n 16) at 287, 353-356. See, also, Buckland & Stein (n 16) at 475; Thomas (n 14) at 330; Jolowicz & Nicholas (n 17) at 302; Van Warmelo (n 10) at 115-116. In relation to the order in which developments occurred, cf Kaser (n 12) at 129.

89 Transfer of possession occurred by *traditio*. The debtor could not use the thing unless by specific agreement with the creditor, that is, by *precario*. See Buckland & Stein (n 16) at 476.

90 Sohm (n 16) at 353-354; Thomas (n 14) at 331; Hunter (n 13) at 437; Jolowicz & Nicholas (n 17) at 302.

91 Sohm (n 16) at 354, 356; Hunter (n 13) at 436ff; Buckland & Stein (n 16) at 475; Thomas (n 14) at 332-333; Van Zyl (n 82) at 198; Kaser (n 12) at 129; Jolowicz & Nicholas (n 17) at 303; Van Warmelo (n 10) at 116-119.

92 Sohm (n 16) at 354-355.

- to sell the property once the secured debt had become due and, in spite of notice or judgment against him, the debt had not been paid; and
- of foreclosure, in which case the property was forfeited to the creditor.⁹³

In later classical law, in the absence of a *pactum de vendendo*, the creditor's right to sell the property when the debt became due was implied unless it was expressly excluded.⁹⁴ In such a case, three successive notices to the debtor were required.⁹⁵ If the proceeds of the sale exceeded the amount of the debt, the surplus had to be paid to the debtor.⁹⁶ Although the creditor could not sell the property to himself,⁹⁷ the debtor could sell it to him.⁹⁸

Justinian modified the position so that, even where the agreement expressly provided that the creditor could not sell the property, he could do so as long as he gave three successive notices to the debtor.⁹⁹ Another significant modification by Justinian was that, where parties agreed that the creditor could sell the property on the debtor's failure to pay the debt by a certain date, no sale could take place until two years after formal notice of his intention to the debtor.¹⁰⁰ If the creditor was not in possession of the property, he had first to obtain a judicial decree authorising it.¹⁰¹

Parties could also agree in a *lex commissoria*, or "forfeiture clause", that if the debt was not paid by a certain date the creditor would become the owner of the property.¹⁰² This was known as foreclosure. However, this was disadvantageous to the debtor in circumstances where the value of the property exceeded the amount of the debt. In AD 230, a new kind of foreclosure, called *impetratio dominii*,¹⁰³ was introduced whereby the creditor could apply to the court to have ownership granted

93 Sohm (n 16) at 356; Hunter (n 13) at 436-437, where the author describes *fiducia* as "essentially a self-acting foreclosure".

94 Hunter (n 13) at 437; Thomas (n 14) at 331; Kaser (n 12) at 132; Buckland & Stein (n 16) at 476-477.

95 See Buckland & Stein (n 16) at 477 n 1 and Thomas (n 14) at 331. Cf G 2 64; PS 2 5 1; and C 8 27 14. See, also, Kaser (n 12) at 132. Buckland & Stein (n 16) at 477 states that the creditor did not have to obtain possession before the sale.

96 Sohm (n 16) at 356; Hunter (n 13) at 439.

97 See, also, Kaser (n 12) at 132-133.

98 Buckland & Stein (n 16) at 477; Kaser (n 12) at 132-133; Hunter (n 13) at 438.

99 D 13 7 4. Buckland & Stein (n 16) at 477 state that it might have been some later authority who brought about this modification.

100 If the creditor was in possession of the pledged property; see Hunter (n 13) at 437. See, also, Voet *Commentarius ad Pandectas* (tr P Gane *The Selective Voet Being the Commentary on the Pandects* vol 3, London, 1955) 20 5 1.

101 C 8 14 10; C 8 28 5; C 8 34 3 1; Inst 4 7 1; D 13 7 4; D 13 7 5; D 47 2 73. See Buckland & Stein (n 16) at 477; Thomas (n 14) at 331; Hunter (n 13) at 437; Burdick (n 18) at 381-382.

102 Buckland & Stein (n 16) at 477; Sohm (n 16) at 353-354 n 2; Thomas (n 14) at 331; Hunter (n 13) at 438.

103 C 8 33 1. See Kaser (n 12) at 133; Buckland & Stein (n 16) at 477; Thomas (n 14) at 331; Van Warmelo (n 10) at 116; Hunter (n 13) at 438.

to him. The property was valued and, upon notice to the debtor¹⁰⁴ and after the lapse of one year, the creditor became bonitary owner¹⁰⁵ of the pledged property. If the property was worth less than the amount of the debt, the debtor was discharged from liability but, if it was worth more, the creditor had to pay the difference to the debtor.¹⁰⁶ However, the debtor could pay the debt and the interest due and “redeem the pledge”¹⁰⁷ at any time before the creditor’s *usucapio* became complete,¹⁰⁸ that is, within two years of uninterrupted possession, in respect of land and houses, and one year, in respect of movables.¹⁰⁹ After Constantine abolished the *lex commissoria*, in AD 320,¹¹⁰ *impetratio dominii* became the only means of foreclosure available to the creditor.¹¹¹

Justinian permitted foreclosure only where no purchaser, for an adequate price, could be found.¹¹² If the debtor and creditor lived in the same province, the creditor was obliged to give formal notice to the debtor once two years had elapsed since the debt became due. If they lived in different provinces, the creditor had to apply to the provincial judge who would serve a notice on the debtor, setting a date for payment to occur.¹¹³ Once that date passed without the debt having been paid, the creditor could obtain ownership on petition to the Emperor.¹¹⁴ A debtor who, within a subsequent period of two years, paid in full, including interest and costs, could nevertheless redeem the property. Failing this, the ownership of the creditor became irrevocable.¹¹⁵ Further, if the property was sold the creditor had to transfer to the debtor any amount of the proceeds which exceeded that which the debtor had owed.¹¹⁶ If the proceeds were less than the amount due the creditor could still claim the balance from the debtor.¹¹⁷

104 Hunter (n 13) at 438 states that the public had to be notified of the *hypotheca* and there had to be a delay of a year.

105 Buckland & Stein (n 16) at 477 calls bonitary ownership “praetorian ownership”. In relation to bonitary ownership, see Sohm (n 16) at 81ff, 311; Buckland & Stein (n 16) at 191ff; Hunter (n 13) at 263ff.

106 Buckland & Stein (n 16) at 477; Sohm (n 16) at 356.

107 Thomas (n 14) at 331. Cf Borkowski (n 25) at 290 who does not mention the required initial lapse of a year before approaching the court.

108 In relation to *usucapio*, the acquisition of ownership by uninterrupted possession, see Sohm (n 16) at 318ff; Buckland & Stein (n 16) at 241ff.

109 Cf G 2 42. See Thomas (n 14) at 159; Hunter (n 13) at 265.

110 C 8 34 1. See Hunter (n 13) at 438; Kaser (n 12) at 132-133; Sohm (n 16) at 356; Van Warmelo (n 10) at 115.

111 Cf C 8 34 3. See Buckland & Stein (n 16) at 477; Thomas (n 14) at 331. See, further Sohm (n 16) at 356.

112 Hunter (n 13) at 438; Buckland & Stein (n 16) at 477; Sohm (n 16) at 356; Kaser (n 12) at 133.

113 Hunter (n 13) at 438. If the debtor could not be found, the court would order the debt to be paid by a certain date.

114 Cf C 8 34 1.

115 Cf C 8 34 3 3. See Buckland & Stein (n 16) at 477; Thomas (n 14) at 331-332.

116 C 8 33 3.

117 *Ibid.*

Thus significant measures were put in place which, through delaying foreclosure and requiring a judicial decree where the creditor was not in possession of the hypothecated property, effectively protected a defaulting debtor against loss of his immovable property and even enabled him to redeem it within a period of two years after foreclosure had occurred.

6 Significance of the family home in the Roman social and historical context

Understanding the significance of family and the family home in the Roman social and historical context, provides additional insights into the implications for homeowners of the debt enforcement laws. A *familia*, controlled by the *paterfamilias*,¹¹⁸ was at “the centre of the Roman community”.¹¹⁹ A number of *familiae*¹²⁰ formed a gens.¹²¹ The word “*familia*” initially meant “dwelling-place or house”; later it came to mean “the house-community” and, “in a legal sense, the house-property”.¹²² The family home held great religious significance: it housed the spirits of deceased family members and the obligatory hereditary altar and ancestral tomb.¹²³ Dupont states that “family and house really were indissoluble” with the house consisting of a family and a single patriarchal head “joined together in veneration of the *lar familiaris*”.¹²⁴ Generally, during all periods and in every social class, members of the *familia*

118 FM Heichelheim, CA Yeo & AM Ward *A History of Roman People* 2 ed (New Jersey, 1984) at 35. *Familia* included every member of the household who was subject to the power of the *paterfamilias*: The children who were subject to his *potestas*; the wife who was in the position of a child if she had been married *in manus*; adopted members; slaves over whom he had *dominium* and former slaves who had been freed. See, also, F Dupont *Daily Life in Ancient Rome* (London, 1989) at 103.

119 Van Zyl (n 82) at 9; Thomas (n 14) at 410ff.

120 “... with a common progenitor (even if he was a legendary figure)”, as stated by O Tellegen-Couperus *A Short History of Roman Law* (London, 1993) at 6.

121 A clan.

122 Heichelheim, Yeo & Ward (n 118) at 35.

123 Dupont (n 118) at 103.

124 *Ibid.* The household gods which played a fundamental role in the family’s religious life included the *lares* and the *penates* (spirits who inhabited the pantry), Janus (the “spirit of the door”, with whom family life began), and Vesta (the “spirit of the hearth” who was “the centre of family life and worship”). See Heichelheim, Yeo & Ward (n 118) at 42; C Scott Littleton *Gods, Goddesses and Mythology* (New York, 2005) at 1100-1101; and WM Short *Sermo, Sanguis, Semem: An Anthropology of Language in Roman Culture* (PhD thesis, University of California, 2007) ch 5, available at http://books.google.co.za/books?id=f2Jp5y4_TsMC&pg=PA120&dq=lares+penatesque&hl=en&sa=X&ei=AqLYU9bZEqOQ7AbwjYHwAQ&ved=0CEAQ6AEwAw#v=onepage&q=lares%20penatesque&f=false (accessed 23 Nov 2013).

all lived under the same roof¹²⁵ until the death of the *paterfamilias*.¹²⁶ All family property, movable and immovable, fell into the estate of the *paterfamilias*.¹²⁷ Roman marriages¹²⁸ were mostly strategically arranged in order to forge important ties and alliances between families. Slaves were important assets¹²⁹ who, if they were freed, continued to constitute invaluable support for their former master in a patron-client relationship.¹³⁰

“Patronage” (*clientela*)¹³¹ was an important institution for economic, political, and social reasons and was fortified by the religious significance of the concept of *fides*.¹³² In early Roman times, persons became clients¹³³ of the *gens*, as a whole, in a symbiotic relationship: the *gens* granted them land, political and financial support, protection in the courts and permission to share in its religion; clients pledged, *inter alia*, loyalty, military service and field work. Later, as the *gens* became less important, clients submitted to the patronage, and became the dependants, of rich and influential families who also established amongst themselves alliances based largely on the concept of *amicitia*.¹³⁴ Crook explains the position as follows:¹³⁵

The wheels of Roman society were oiled – even driven, perhaps – by two notions: mutual services of status-equals (I help you in your affairs; I then have a moral claim on your help

125 Although, sometimes, members of the younger generations might take up lodgings elsewhere or even build or purchase other houses in which to reside. See Dupont (n 118) at 103, 105; Heichelheim, Yeo & Ward (n 118) at 36; Thomas (n 14) at 414; RW Moore *The Roman Commonwealth* (London, 1942) at 93.

126 Upon this event, “the family would split into as many new families as there were men of the subsequent generation”, according to Dupont (n 118) at 103.

127 Neither wives married *in manus* nor children could own property, subject to the legal principles regarding *peculium*: Thomas (n 14) at 416-417.

128 Including marriages without *manus*: Wives married without *manus* to the men in the family also lived in the house, but were regarded as merely “passing through” in order to provide their husband with children” and remained subject to the power of their oldest agnatic relative and part of the latter’s *familia*: see Dupont (n 118) at 105.

129 See Dupont (n 118) at 58, 105.

130 G Forsythe *A Critical History of Early Rome* (Berkeley, 2005) at 221; Mousourakis (n 17) at 272; Thomas (n 14) at 404; R van den Bergh “Who was dependent upon whom?” (2005) 11 (1) *Fundamina* at 347-361.

131 The relationship between patron and client. On patronage, see Van den Bergh “The *patronus* as representative” (n 13) at 162-163.

132 Heichelheim, Yeo & Ward (n 118) at 38. Referred to as the “foundation of justice”, *fides* embraced “being true to one’s word, the paying of one’s debts, the keeping of sworn oaths, and the performance of obligations assumed by agreement”; see Heichelheim, Yeo & Ward (n 118) at 46; Van den Bergh (n 13) at 163, esp nn 27 and 28.

133 In early times, clients included foreigners, either from conquered territories or who wished to live in Roman territory and become Roman citizens, freed slaves and Romans who were unable to make a living or protect themselves and their property. See Heichelheim, Yeo & Ward (n 118) at 38-39.

134 Loosely meaning “friendship”. See Crook (n 16) at 93-94; Van den Bergh (n 13) at 165.

135 Crook (n 16) at 93.

in mine) and patronage of higher status to lower ... It was the patron who came to the legal rescue of his client, paid his money down for litigation, paid his debt to prevent him being haled off, stood as his representative; you might hesitate to 'lay the hand' on a humble plebeian with his patron standing by.

The significance of patronage may also be understood in the context of the two social and political classes of Roman citizens, namely the patricians and the plebeians.¹³⁶ The patricians were mostly wealthy aristocrats and noblemen,¹³⁷ while the plebeians were mostly poor urban and rural persons.¹³⁸ Initially, wealthy persons had sumptuous homes in town and villas on country estates.¹³⁹ while subsistence farmers and pastoralists, with modest needs, lived comfortably in straw and mud huts on small plots.¹⁴⁰ However, with the expansion of the Roman Empire, continual war took its toll on the economy. In time, many of the wealthy, with their lavish lifestyles, became severely over-indebted.¹⁴¹ Poor farmers who had been forced to join the army often returned from war to find that their farms had been looted by the enemy or badly managed or even stolen by dishonest neighbours.¹⁴² Those who borrowed money to pay taxes or to buy seed or implements suffered under the harsh debt enforcement laws, emerging as "the landless poor".¹⁴³ As a result, many returned to the army, sold or hired themselves out as gladiators or sold or hired out their children or moved to the city.¹⁴⁴

The influx of the poor to the cities caused high-rise tenement blocks, called *insulae*, designed for letting, to be hastily constructed. Living conditions were overcrowded, unsanitary, and sometimes hazardous due to poor construction. Rentals, food prices and the rate of unemployment were high.¹⁴⁵ These tenants lived an unsettled existence, using the *insulae* as temporary accommodation without a household shrine and gods.¹⁴⁶ At the same time, overseas conquests created new markets which resulted in agricultural operations becoming large-scale and capital-intensive, with some of the wealthy generating even more wealth for themselves.¹⁴⁷ Poverty-stricken Roman citizens and foreigners became the clients of wealthy Roman

136 Differentiation and conflict between these two classes continued from about 500 BC until 287 BC, with the passing of the *lex Hortensia*. See Heichelheim, Yeo & Ward (n 118) at 39; Forsythe (n 130) at 157; Tellegen-Couperus (n 120) at 7; Van den Bergh (n 13) at 162.

137 Who monopolised the senate, held high positions and, as pontiffs, were the custodians and interpreters of the sacred laws in the early Republic: Heichelheim, Yeo & Ward (n 118) at 55.

138 Although some became wealthy and powerful.

139 Moore (n 125) at 86, 87, 93; Dupont (n 118) at 41ff.

140 Heichelheim, Yeo & Ward (n 118) at 131-132; Dupont (n 118) at 32ff; Moore (n 125) at 93.

141 Heichelheim, Yeo & Ward (n 118) at 54; Dupont (n 118) at 41 refers to it as "opulent poverty".

142 Heichelheim, Yeo & Ward (n 118) at 56.

143 Dupont (n 118) at 44-45; Heichelheim, Yeo & Ward (n 118) at 56.

144 Crook (n 16) at 61; Heichelheim, Yeo & Ward (n 118) at 65.

145 Moore (n 125) at 144-145, 150; Heichelheim, Yeo & Ward (n 118) at 134.

146 Moore (n 125) at 150.

147 Heichelheim, Yeo & Ward (n 118) at 132-133.

patrons. Urban clients were at their patrons' "beck and call" and were expected to give them political support in return for food, money, or clothes; rural clients, mostly peasants, were exploited in "humiliating servitude".¹⁴⁸

Widespread discontent amongst the urban poor in the latter part of the second-century BC caused political upheaval and conflict with access to land being a main issue.¹⁴⁹ As Dupont explains:¹⁵⁰

[for a peasant,] loss of his land spelled the loss of his house, his family, his household gods, the tombs of his ancestors, and his dignity ... Tiberius Gracchus ... spoke on their behalf as follows:

The wild beasts that roam over Italy have, every one of them, a cave or lair to shelter in; but the men who fight and die for Italy enjoy only the light and air that is common to all above their heads; having neither house nor any kind of home they must wander about with their wives and children ... for not a man of them has a hereditary altar; not one of all these many Romans has an ancestral tomb ... Though they are styled masters of the world, they have not a single clod of earth to call their own.

This speech portrays the stark realities of poverty and homelessness and the socio-economic necessities of access to land, security of tenure and access to adequate housing and their direct connection with upholding human dignity. It is submitted that it is also strikingly reminiscent in a number of respects of issues which are relevant in the current South African socio-economic context.¹⁵¹

7 Comment and conclusion

The harsh Roman debt enforcement laws originally provided for imprisonment, slavery and possibly even death as consequences for defaulting debtors. The developed law permitted execution against assets. Although some types of assets came to be exempted from execution, these never included the home.¹⁵² However, a Roman person's home held not only socio-economic but, more importantly, religious significance for it housed not only the living residents but also the spirits of the ancestors as well as the household gods and it included the mandatory hereditary

148 Mousourakis (n 17) at 271.

149 See Heichelheim, Yeo & Ward (n 118) at 134-135, 155 (for an account of the contributing factors).

150 Dupont (n 118) at 45. Cf Plutarch *Tiberius and Gaius Gracchus* 9.

151 See, eg, the facts and circumstances in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC); *Schubart Park Residents' Association v City of Tshwane Metropolitan Municipality* 2013 (1) SA 323 (CC). See, also, the comments expressed by D Bilchitz & D Mackintosh "Opinion: Judges sidestep the law and fail to protect the vulnerable" available at <http://www.bdlive.co.za/opinion/2013/03/08/judges-sidestep-the-law-and-fail-to-protect-the-vulnerable> (accessed at 23 Apr 2014).

152 See 2, *supra*.

altar.¹⁵³ For these reasons, Roman debtors would very likely have avoided the loss of their home at all costs.

It is evident that, in terms of Roman law, a debtor could avoid the harsh personal and proprietary consequences of the debt enforcement laws and save his home by “working off the debt”, often surrendering himself in *nexum*, or contractual bondage, to the creditor.¹⁵⁴ Patron-client relationships often formed between a creditor and his debtors. It was also common for patronage to develop between third parties and debtors to whose aid the former came by paying their debts on their behalf to creditors and thus forming an obligation, in a broader sense, between them. The concept of *amicitia*, between persons of equal status, might also have formed the basis of a third party paying the debt or intervening on the debtor’s behalf. These relationships not only arose out of, but also contributed to, the complex but cohesive and, in a large measure, mutually supportive fabric of Roman society.¹⁵⁵

Debt relief measures which became available to Roman debtors included *cessio bonorum*, the surrender of assets which brought with it the *beneficium competentiae* and which effectively provided immunity from action by creditors for unpaid debts.¹⁵⁶ In the time of Justinian, a majority vote by creditors could bring about the granting of a moratorium to a debtor and it was possible for a debtor to approach the Emperor for a moratorium.¹⁵⁷ Further, forming part of the law of contract, *dilatio* provided a means by which the majority of creditors could grant a moratorium to a debtor.¹⁵⁸ With the development of the legal concept of mortgage, Justinian put protective mechanisms in place to allow for the delay of foreclosure by a creditor for at least two years after judgment had been granted and, in appropriate cases, for foreclosure to occur only by judicial decree and, later, only by imperial decree. Further, a debtor could redeem the property within the two year-period succeeding the creditor having become owner of it, by paying the outstanding debt and other charges.¹⁵⁹ These developments, it is submitted, must have impacted on a debtor’s ability to retain or to redeem his home.

Two observations may be made regarding the position in the Roman, relative to the contemporary South African, context. First, submission in a servile relationship to one’s creditor to escape the consequences of default, including execution against one’s home, is not an option according to the modern South African law. It would be regarded as *contra bonos mores*, as was indicated by the Appellate Division (as it was then called) in *Sasfin (Pty) Ltd v Beukes*,¹⁶⁰ in relation to the illegality of requiring

153 See 6, *supra*.

154 See 2, *supra*.

155 See 6, *supra*.

156 See 3, *supra*.

157 See 3, *supra*.

158 See 4, *supra*.

159 See 5, *supra*.

160 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) (hereafter referred to as *Sasfin v Beukes*).

a person to work solely to service his debt.¹⁶¹ Secondly, modern societal structures differ markedly from those which existed in Roman times and they lack the support mechanisms, based on familial, religious, cultural, social, economic and political beliefs, concepts and alliances, on which Roman debtors could commonly rely to avoid the forced sale of their homes. Therefore, despite the harsh debt enforcement laws, considering the context within which the laws operated, and not simply the provisions of the laws themselves, may lead one to regard the position in Roman times as tending more towards protection of a debtor's home against forced sale than is the case in terms of current South African law.

However, it is submitted that there are discernible parallels which may be drawn between, on the one hand, aspects of communality and mutual interdependence and support in the concepts of patronage and *amicitia* and, on the other hand, the concept of *ubuntu*, which forms part of the fabric of South African law and society, as acknowledged in this post-Bill of Rights era. Section 39(1)(a) of the Constitution requires a court when interpreting the Bill of Rights “to promote the values that underlie an open and democratic society based on human dignity, equality and freedom”.¹⁶² The duty to *promote* emphasises that “transformative constitutionalism” and “a socially interconnected and embodied concept of humanity” are envisaged.¹⁶³ Significant, in this context, is the concept of *ubuntu* which is recognised as being one of the values that section 39(1) requires to be promoted.¹⁶⁴

161 *Sasfin v Beukes* (n 160) at 13H-I. See, also, references to peonage, in K Gross “The debtor as modern day peon: A problem of unconstitutional conditions” (1990) 66 *Notre Dame L Rev* at 165-205.

162 In terms of s 39(1)(a) and (b), a court must also consider international law and it may consider foreign law. In terms of s 39(3), “[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill”. On interpretation of the Bill of Rights, see IM Rautenbach “Introduction to the Bill of Rights” in *Bill of Rights Compendium* (Durban, 1997-) in par 1A9.

163 S Liebenberg *Socio-Economic Rights Adjudication under a Transformative Constitution* (Cape Town, 2010) at 98-99.

164 See L du Plessis “Interpretation of the Bill of Rights” in S Woolman & M Bishop (eds) *Constitutional Law of South Africa 2 ed* (Cape Town, 2002-) at 32-130; TW Bennett “Ubuntu: An African equity” (2011) 14 *PELJ* at 30-61; *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) in pars 23 and 61. On *ubuntu*, see, also, R English “Ubuntu: The quest for an indigenous jurisprudence” (1996) 12 *SAJHR* at 641-648; Y Mokgoro “Ubuntu and the law in South Africa” (1998) 1 *PELJ* at 15-26; I Kroeze “Doing things with values II: The case of Ubuntu” (2002) 13 *Stell LR* at 252-264; D Cornell “A call for a nuanced jurisprudence: Ubuntu, dignity and reconciliation: Post-apartheid fragments: Law, politics and critique” (2004) 19 *SAPL* at 666-675; and M Pieterse “Traditional African jurisprudence” in CM Roederer & D Moellendorf (eds) *Jurisprudence* (Cape Town, 2004) at 438-462.

In *S v Makwanyane*¹⁶⁵ Mokgoro J associated *ubuntu* with concepts such as “humanity” and “menswaardigheid” (“human dignity”)¹⁶⁶ and Langa J described *ubuntu* as capturing, conceptually¹⁶⁷

a culture which places some emphasis on communality and on the interdependence of the members of a community. It recognises a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.

In *Port Elizabeth Municipality v Various Occupiers*, in a judgment espousing the correct approach to be adopted in relation to eviction of unlawful occupiers from their homes, Sachs J stated:¹⁶⁸

The spirit of *ubuntu*, part of the deep cultural heritage of the majority of the population, suffuses the whole constitutional order. It combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalised and operational declaration in our evolving new society of the need for human interdependence, respect and concern.

It is submitted that similar considerations, if applied in the context of forced sale of debtors’ homes (given the emphasis placed by South African courts in such matters on the debtor’s right to have access to adequate housing as provided by section 26 of the Constitution), would reflect similar societal support to that evident in the Roman context.

This article highlights certain aspects of Roman law and societal values and structures which may be regarded as factors which effectively caused a debtor and his family to remain in their home or at least to continue to have access to one. It is consequently submitted that these aspects of Roman law, which effectively protected the debtor’s home from forced sale, have not only historical value as sources of South African law but also significant comparative value. They were aspects of a legal system and procedures that operated in another time, and in a society which, although markedly different, nevertheless reflects at least some similar needs and priorities as those of ours today.

165 *S v Makwanyane* 1995 (3) SA 391 (CC) in pars 130-131, 223-227, 237, 307-313, 516.

166 *S v Makwanyane* (n 165) in par 308. See, also, Rautenbach in par 1A11.

167 *S v Makwanyane* (n 165) in par 224. Mahomed DP also refers to *ubuntu* in his judgment in *S v Makwanyane* (n 165) in par 263.

168 *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (hereafter referred to as *Port Elizabeth Municipality*), in par 37 (footnotes omitted), cited by Liebenberg (n 163) at 99. See also IM Rautenbach “Fundamental Rights” (revised by L Stone) in *The Law of South Africa* vol 10 (Durban, 2008) in par 286.

Janus, the Roman spirit of the door, is traditionally depicted as having two faces in order that he might simultaneously guard the home against intrusion from without and watch over and protect members of the household within.¹⁶⁹ Casting our eyes abroad, we note that the European Commission Services proposed, with regard to forced sale of a debtor's home, that¹⁷⁰

common sense and humanity should always prevail at all levels ... and throughout the whole procedure. In particular, the full economic and social situation of the defaulting borrower should be taken into account, and the implications of a given repossession should be carefully assessed, notably when a primary residence is at stake. For example, losing the family home after having lost one's job has intolerable social and human implications for both borrowers and their families. In these critical economic times our society must put the human dimension at its very heart.

As we return our gaze homewards, we are reminded of the constitutional imperative to "infuse elements of grace and compassion into the formal structures of the law"¹⁷¹ and the spirit of *ubuntu* is brought home to us as a vital key to the building of our nation.

ABSTRACT

In the last decade, the Constitutional Court has recognised that the sale in execution of a debtor's home potentially infringes the debtor's right to have access to adequate housing in terms of section 26 of the Constitution. The position is now that, in every case in which execution is sought against a debtor's home, judicial oversight is required to determine whether execution is justifiable, taking into account "all the relevant circumstances" in terms of section 36 of the Constitution. Last year, the European Union issued a directive to its member states requiring forbearance in matters concerning foreclosure against residential property. Against this contextual background, this article explores the ways in which execution against a debtor's home was dealt with according to Roman law, a common source of many contemporary legal systems. Initially, substantive and procedural rules relating to debt enforcement permitted execution only against a debtor's person. Subsequently, the law developed to provide for execution against a debtor's property. Collective debt enforcement (or insolvency) rules and procedures evolved, as did principles pertaining to mortgage and a creditor's rights of real security. Certain types of assets came to be regarded as exempt from execution in the individual and collective debt enforcement processes,

169 See Rose (n ***) *supra*.

170 See *Commission Staff Working Paper National Measures and Practices to Avoid Foreclosure Procedures for Residential Mortgage Loans* SEC(2011) 357 final available at http://ec.europa.eu/internal_market/finances-retail/docs/credit/mortgage/sec_2011_357_en.pdf. (accessed 31 Mar 2011) at 11. This working paper led to the proposal which culminated in the EU Directive referred to in (n 9) *supra*.

171 See *Port Elizabeth Municipality* (n 168) in par 37.

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but there was no formal exemption of the debtor's home. However, it is submitted, a study of the relevant legal principles and procedures as applied in their historical and socio-economic context – especially in light of the revered status of the familia, including the ancestors, the household gods and the requisite hereditary altar as well as the complex societal relationships – reveals the discernible, albeit indirect and subtle, consequence of providing protection for an impecunious debtor against the loss of his home at the instance of a creditor.