Foreclosure of Primary Home Mortgages in Namibia: Towards Efficient Judicial Oversight

PC Nhekairo
LLB LLM
Candidate Legal Practitioner, University of Namibia
https://orcid.org/0009-0005-0049-5802

NV Asheela-Shikalepo
B Juris LLB LLM LLD
Senior Lecturer: School of Law, University of Namibia
Legal Practitioner of the High Court of Namibia (non-practising)
https://orcid.org/0000-0002-9369-8262

SUMMARY

Mortgage foreclosures represent a significant and contentious issue, particularly when they pertain to individuals' primary homes. Foreclosure inherently creates a conflict between two opposing interests: the mortgagee's entitlement to enforce their security and the imperative to alleviate the severe repercussions of displacing the mortgagor and their family, which could lead to homelessness. In Namibia, the relevance of mortgage foreclosure concerning primary homes is exacerbated by a persistent housing crisis; thus, displacing a mortgagor and their family contributes to the alarming statistic that about 25 per cent of the population lacks access to adequate housing. The interplay of interests among the mortgagor, the mortgagee and external entities such as the government necessitates a careful balancing exercise in the enforcement of mortgage foreclosures. The execution of foreclosures on primary homes in Namibia is primarily governed by rule 108 of the High Court Rules, which mandates judicial oversight prior to declaring primary homes specially executable. This article contends that the existing regulatory framework in Namibia does not adequately reconcile the competing interests associated with the foreclosure of primary homes. Based on the results of a comparative analysis, this article ultimately proposes the promulgation of a comprehensive foreclosure regulatory framework.

KEYWORDS: mortgage foreclosure, primary homes, rule 108(2), judicial oversight, comparative foreclosure law

https://doi.org/10.17159/vk539w15

1 INTRODUCTION

High costs associated with purchasing a house render it impossible for the average consumer to buy a residential home for cash, more especially in Namibia, which is reported to have the second-highest house price increase in the world after Dubai.[1] Mortgage financing provided by financial institutions presents a viable option for many, as it allows for the distribution of loan repayments over an extended period.[2] Such financing is governed by a mortgage agreement, wherein creditors, referred to as mortgagees, provide financial assistance to debtors (mortgagors) for property acquisitions, including residential homes, contingent upon the debtor offering a mortgage as security for the debt.[3] Despite the critical role of mortgage financing in both the Namibian housing market and globally, complexities arise when a debtor defaults and the creditor is prompted to exercise their right to foreclosure and initiate a sale of the secured property.[4] In such instances, the debtor and any other occupants are often faced with eviction, leading to the loss of their home and the potential risk of homelessness.[5] While the necessity of foreclosure to uphold a creditor's property and contractual rights is acknowledged, there remains pervasive discomfort with the implications of home loss from both the debtor's viewpoint and the broader public perspective.[6]

A primary home is defined as a dwelling that a person uses as their main place of residence, irrespective of whether that person occasionally resides at any other place of residence or owns another place of residence.[7] Foreclosure of mortgages registered against primary homes triggers tension between two competing interests – namely, a creditor's right to enforce their security, and the need to mitigate the grossly detrimental consequences of ousting a debtor and their family from the primary home.[8] Arguably, foreclosure has the potential to interfere with the right to housing under article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR)[9] and the right to property under article 16 of the Namibian

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1 First National Bank *House Price Index* 2014. See also Bank of Namibia *Financial Stability Report* (Apr 2024) 33–34.

2 Scanlon, Lunde and Whitehead "Responding to the Housing and Financial Crises: Mortgage Lending, Mortgage Products and Government Policies" 2011 11(1) *International Journal of Housing Policy* 25.

3 Brits *Mortgage Foreclosure Under the Constitution: Property, Housing and the National Credit Act* (doctoral thesis, Stellenbosch University) 2012 24. See also Kritzinger *Principles of Law of Mortgage, Pledge and Lien* (1999) 22.

4 Amoo *Property Law in Namibia* (2014) 40.

5 For a general exposition of the definition of a mortgage, scope and legal nature as a real security remedy, see Brits *Mortgage Foreclosure* 24–28, 39–47.

6 Brits "Protection for Homes During Mortgage Enforcement: Human-Rights Approaches in South African and English Law" 2015 132 *South African Law Journal* 567.

7 S 1 of the High Court Act 16 of 1990.

8 Brits 2015 *SALJ* 566.

9 UNGA *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976. Namibia ratified the ICESCR on 28 February 1995; see Horn "International Human Rights Norms and Standards: The Development of Namibian Case and Statutory Law" in Horn and Bösl *Human Rights and the Rule of Law in Namibia* (2008) 169.

Constitution.[10] The enforcement of mortgage foreclosures necessitates a careful balance owing to the inherent tension between mortgagors, mortgagees and governmental stakeholders, as the use of credit is central to the Namibian economy and the sustainability of financial institutions.[11] The pursuit of an optimal equilibrium between creditors' enforcement rights and debtors' residential protections has emerged as a significant focus of jurisprudential discourse.[12]

To respond to this challenge, Namibia has imposed mandatory judicial oversight over the foreclosure of primary homes as contemplated by section 35A of the High Court Amendment Act,[13] read with rule 108A of the High Court Rules.[14] Prior to the coming into force of the High Court Amendment Act, the foreclosure procedure relating to primary homes was provided for in rule 108(2). The purpose of this article is, therefore, to evaluate critically the scope and application of this existing regulatory framework to foreclosure cases, with the aim of determining whether the regulatory framework in Namibia adequately reconciles the competing interests of creditors and debtors in the foreclosure process of primary homes. Adopting a desktop research approach, the article is structured as follows: a brief historical background of judicial oversight in foreclosure proceedings follows the introduction. Thereafter, the scope and application of judicial oversight over sales in execution of primary homes in Namibia are analysed. This is followed by a comparative evaluation of selected jurisdictions before the article reaches its conclusion.

2 JUDICIAL OVERSIGHT IN FORECLOSURE PROCEEDINGS

Judicial oversight in cases concerning the sale in execution of immovable properties has been a prerequisite since classical Roman times.[15] This classical Roman position was eventually transmitted to Roman-Dutch law, under which a judicial decree was mandatory before a creditor could sell a property in execution,[16] mainly to combat the abuse of process manifest in the self-help mechanism of debt recovery.[17] Under Roman-Dutch law, a stipulation in the mortgage agreement in terms of which the debtor permits the creditor to sell the mortgaged property if the debt is not paid is immediately enforceable.[18] When Namibia inherited Roman-Dutch law as its

10 Constitution of the Republic of Namibia, 1990.

11 Amoo *Property Law in Namibia* 166; *Standard Bank Namibia Limited v MGM Properties CC* 2020 NAHCMD 28 par 11.

12 See e.g., Brits 2015 *SALJ* 576; Fox *Conceptualising Home: Theories, Laws and Policies* (2007) 71.

13 2 of 2024.

14 Rules of the High Court of Namibia 4 of 2014, as amended.

15 Buckland *Manual of Roman Private Law* (1925) 637. Buckland notes that executions against a property under the formulary procedure were enforced through a *Praetean* decree.

16 Van Zyl *History and Principles of Roman Private Law* (1983) 196–198; Buckland *Manual of Roman Private Law* 621.

17 Wessels *History of the Roman-Dutch Law* (1908) 55ff.

18 Wessels *History of the Roman-Dutch Law* 596–597.

common law,[19] the requirement of judicial oversight over the execution of immovable property became part of Namibian law.[20] In *Namib Building Society v Du Plessis*,[21] a case that was decided shortly after independence, the High Court confirmed that a judicial decree was a necessary prerequisite to a sale in execution of immovable properties, whether hypothecated or not. In particular, the court affirmed:

> "A mortgagee plaintiff should in principle be entitled to realise the property over which a mortgage bond was registered for the very purpose of securing the debt on which he sues. Such a plaintiff has advanced money on the understanding that he can preferentially look to the proceeds of the mortgaged property. Unless some compelling reason exists to require such a plaintiff first to execute against movables, no reason occurs to me why he should not be given the benefit of his bargain. If some such compelling reason exists, the duty surely lies on the mortgagor defendant to persuade the Court why the property should not be declared executable."[22]

The judicial decree required for property executions under common law proved insufficient to safeguard debtors' interests, as judicial oversight was whittled down to a perfunctory determination of default rather than a substantive evaluation of the competing rights between mortgagor and mortgagee.[23] This restrictive approach to judicial oversight rendered the common-law framework particularly onerous for debtors seeking to retain their residential property, as the mere establishment of default effectively foreclosed further enquiry into the proportionality or equity of the execution.[24] The common law underwent a notable transformation following the introduction of rule 108(2) of the High Court Rules in 2014. This rule delineated the procedural safeguards for primary residences; it provided that courts must take into account all pertinent factors with a particular focus on exploring less severe alternatives prior to declaring primary homes to be specially executable.[25]

3 SCOPE AND APPLICATION OF RULE 108(2) OF THE HIGH COURT RULES

A procedural framework governing residential property executions was provided for in rule 108(2) of the High Court Rules. As of 22 August 2025, a new but similar procedural safeguard for primary homes was introduced in the recent amendments of the Magistrates' Court Act, High Court Act and High Court Act Rules.[26] Rule 108(2) of the High Court specifically dealt with

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19 Roman-Dutch law was formally introduced as the common law of the territory of South West Africa (now Namibia) by Proc 21 of 1919 (SWA) in GN 25 of 1919; see also Amoo *An Introduction to Namibian Law: Materials and Cases* (2018) 60.

20 *Namib Building Society v Du Plessis* 1990 NR 161 (HC).

21 *Supra.*

22 *Namib Building Society v Du Plessis supra* 163–164.

23 *Futeni Collection (Pty) Ltd v De Duine (Pty) Ltd* 2015 NAHCMD 119 par 24.

24 *Futeni Collection v De Duine supra* par 25.

25 See *Futeni Collection v De Duine supra* par 27–29; *Hiskia v Body Corporate of Urban Space* 2018 NAHCMD 279 par 25; and *Namib Building Society v Du Plessis supra* 161.

26 Magistrates' Courts Amendment Act 18 of 2023 and the High Court Amendment Act 2 of 2024. GN 208 of 2025 brought the High Court Amendment Act 2 of 2024 into force and

attachment and sale in execution of primary homes. It provided that when an immovable property subject to attachment serves as the primary home of the execution debtor or is leased to a third party as a home, the court could not declare the property executable, unless:

> "(a) The execution creditor has personally served the execution debtor, through the deputy sheriff, with a notice (Form 24) informing them of the intended court application for an order declaring the property specially executable. This notice must also invite the debtor to present reasons why such an order should not be granted;
> (b) The execution creditor must ensure that the same notice is personally served on any lessee occupying the property in question; and
> (c) The court has issued an order after carefully evaluating all relevant circumstances, particularly considering whether less severe alternatives exist. Such alternatives may include the attachment of a different immovable property instead of the debtor's primary residence or any property claimed by a third party."

In *Standard Bank Namibia Ltd v Shipila (First National Bank Namibia Ltd and Others Intervening; The Ombudsman as Amicus Curiae)*,[27] it was argued on behalf of the creditor that the requirement to consider less drastic alternatives did not apply in cases where the judgment creditor had a mortgage registered against the immovable property of the judgment debtor and that therefore the judgment creditor had a substantive right in the property that was enforceable by an outright sale of the mortgaged property in execution.[28] It was held that rule 108 did not distinguish between mortgaged property and any other property; rule 108(2) judicial oversight was equally applicable to hypothecated property.[29] On appeal, the Supreme Court upheld the High Court's decision when it stated:

> "[M]ortgage creditors can rely on a limited real right and can insist, absent abuse of process or *mala fides*, on directly executing their claims against specially hypothecated immovable property of the debtor in order to satisfy a claim, but where the immovable property is 'the home of a person' judicial oversight is required in order to ascertain whether foreclosure can be avoided, having regard to viable alternatives."[30]

The Supreme Court in *Shipila* determined that the mortgagee creditor could straightaway seek execution against mortgaged primary homes without the need first to obtain a *nulla bona* return, the only limitation being that when the property concerned was the primary home, the court had to consider less drastic alternatives.[31]

The precise circumstances and the less drastic alternatives that the court could consider when exercising judicial oversight were ambiguous. This ambiguity was evident from the abstract language used in the preconditions for the execution sale of primary homes; rule 108(2) referred vaguely to the

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amended the High Court Act and the High Court Rules of 2014. A discussion of the amendments follows under heading 4 below.

27 2016 (2) NR 476 (HC) (*Shipila* High Court judgment).

28 *Shipila* High Court judgment par 10.

29 *Shipila* High Court judgment par 25.

30 *Standard Bank Namibia Ltd v Shipila* 2018 (3) NR 849 (SC) (*Shipila* Supreme Court judgment) par 51.

31 *Shipila* Supreme Court judgment par 51.

consideration of "all relevant circumstances" and "less drastic measures", without providing sufficient clarity on these expansive notions. Nevertheless, the courts endeavoured to clarify the scope and nature of the considerations that must be taken into account.[32]

It appeared from the *Shipila* Supreme Court judgment that a court need only consider less drastic alternatives to foreclosure when exercising its judicial oversight.[33] However, in the subsequent case of *Kisilipile*, the Supreme Court not only clarified the underlying rationale for judicial oversight, but also emphasised that it must take into account all the relevant circumstances.[34] The *Kisilipile* judgment highlighted that the sale in execution of a primary home had to be a last-resort measure, as judicial oversight existed to ensure that debtors were not left homeless unnecessarily.[35] The Supreme Court also pointed out that courts, in their exercise of judicial oversight, had to take into consideration the personal circumstances of the debtor – such as the payment history of the debtor,[36] the extent of the balance outstanding[37] and the age of the debtor.[38]

Notably, even if the property concerned were not the debtor's primary home, the court still had a discretion to consider the circumstances of third-party occupiers, the effect of declaring the property executable to such occupiers, and the availability of less drastic measures.[39] The exercise of the court's discretion in this regard was based on humaneness and equity considerations.[40] In addition, the *Kisilipile* and *Emmarentia Nanette Irion* cases ascertained that when taking into account less drastic measures (as prescribed in rule 108(2)), the courts had to bear in mind that the creditor had a right of satisfaction of the bargain to foreclose the bonded property, and the principle of *pacta sunt servanda* was a relevant consideration.[41] The principle to be inferred from these cases was that in determining whether the bonded property should be declared specially executable, courts should also consider the contractual rights of the parties and the interests of the creditors, and that, at times, the contractual rights of the mortgagee could override the available alternatives even if viable.

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32 See e.g., *Shipila* Supreme Court judgment par 68; *Kisilipile v First National Bank of Namibia Limited* 2021 NASC 52 par 18 and *Bank Windhoek Limited v Emmarentia Nanette Irion* 2021 NAHCMD 464 par 4.

33 *Shipila* Supreme Court judgment par 52. The fact that the Supreme Court in *Shipila* only mentioned less drastic alternatives as a requisite consideration to execution of primary homes implies that the court has limited the scope of enquiry to less drastic alternatives and not a broader scope of "all relevant considerations".

34 *Kisilipile v First National Bank supra* par 2.

35 *Kisilipile v First National Bank supra* par 20.

36 The court held that greater latitude should be given to the debtor who has a reasonably good payment history (*Kisilipile v First National Bank supra* par 21).

37 The court stated that, "[f]or example, it would be oppressive to sell a home valued at N$1 million to recover an outstanding balance of N$100 000 when there are good prospects of a debtor making arrangements to dispose of another asset within a reasonable time to liquidate the outstanding balance" (*Kisilipile v First National Bank supra* par 21–22).

38 The court remarked that this is an important factor in determining whether the debtor will be able to secure another loan to buy a home (*Kisilipile v First National Bank supra* par 21).

39 *Standard Bank Namibia Ltd v Bock* 2021 NAHCMD 78 par 43.

40 *Ibid*.

41 *Kisilipile v First National Bank supra* par 19; *Bank Windhoek Limited v Irion supra* par 10.

Since the implementation of rule 108(2), the appropriate inquiry that the court must undertake when exercising judicial oversight over the sale of bonded properties appears to have been shrouded in ambiguity. The Supreme Court's application of rule 108(2) presented conflicting positions by asserting that the substantive right of foreclosure can only be overridden by a more compelling substantive right, while simultaneously compelling the mortgagee to accept an alternative to foreclosure based on rule 108, which is fundamentally procedural and equitable. Furthermore, in the case of *Shipila*, the Supreme Court focused solely on less severe alternatives to foreclosure, whereas in *Kisilipile*, the Supreme Court expanded its consideration to include the personal circumstances of the debtor under the framework of 'all relevant circumstances'. Consequently, the lack of clarity and depth regarding the balance of the opposing rights and interests of the mortgagor and mortgagee during foreclosure proceedings led to inconsistencies in the proper application of rule 108(2) as it read before the 2025 amendments.

In *Nedbank Namibia Limited v Eva Fifteen CC,*[42] the High Court stated that a mortgagee had a right to seek recourse against a bonded property, affirming that when property had been specially mortgaged, that property must first be sold in execution before any other property could be taken, and only for the deficiency could other property be taken. The view of the court was that an immovable property should be declared specially executable if there were no viable alternative or no less drastic measure other than a sale in execution.[43] As there was no indication as to how the first respondent intended to settle the outstanding amount – using the rental amount being received every month was insufficient – the property was declared specially executable.[44]

In *Fruit & Veg City (Pty) Ltd t/a Fresh Produce Market v Rudolph Izaaks t/a Namsea Ship Supplies*,[45] the court stated that where an order declaring property executable was sought in respect of a primary home, the court was obliged in terms of rule 108(2) to ensure that personal service of the relevant papers was effected on the execution debtor or their lessee.[46] Furthermore, it would be improper to declare a property specially executable without the applicant first exploring the possibility of the options given by the debtor as alternatives or rather less drastic measures than a sale in execution of the primary home.[47] The respondent in this matter failed to convince the court and did not assist the court in exercising its judicial oversight despite being served with a rule 108 application personally.[48] The court indicated that it

42 2023 NAHCMD 14 par 8.

43 *Nedbank Namibia Limited v Eva supra* par 9.

44 *Nedbank Namibia Limited v Eva supra* par 10.

45 *Fruit & Veg City (Pty) Ltd t/a Fresh Produce Market v Rudolph Izaaks t/a Namsea Ship Supplies* 2023 NAHCMD 3.

46 *Fruit & Veg City v Rudolph Izaaks supra* par 7.

47 *Fruit & Veg City v Rudolph Izaaks supra* par 11; see also *Futeni Collection v De Duine supra* par 32.

48 *Fruit & Veg City v Rudolph Izaaks supra* par 8.

could not, in the circumstances, *mero motu*, invent less drastic measures when the respondent did not assist the court in establishing the same.[49]

Judicial oversight concerning the sale of primary homes aims to safeguard the primary homes of debtors and their lessees. At first glance, rule 108(2) seemed to enhance the common-law oversight, which focused primarily on determining whether the debtor had indeed defaulted on payments – a positive finding in this regard would typically lead to an order for sale in execution. However, the stipulation to evaluate all relevant factors, particularly the consideration of less severe alternatives, signified a shift away from the presumption that the creditor's interests must prevail. Courts have exercised caution in enforcing foreclosure on a debtor's primary residence when less severe options are available.[50] The oversight of rule 108(2) was thus rooted in equitable principles, aimed at softening the harsh realities of foreclosing on primary residences.[51] However, the intention of rule 108(2) rendered rather minimal protection of homes. Sympathy for a debtor's struggle to retain their home does not suffice in negating the established right to foreclose, nor does it challenge the fundamental principle of *pacta sunt servanda*, which upholds a creditor's entitlement to fulfil their agreement with the debtor.[52] Acknowledging that rule 108(2) was grounded in equity raises questions about its interference with the enforcement of a contract voluntarily entered into. Historically, equitable principles were applied through the now obsolete *exceptio doli generalis*, a defence against the enforcement of unjust contract terms.[53] Since this principle is not applicable under Namibian law, one must wonder on what grounds equitable considerations can be invoked against the enforcement of a mortgage agreement that was freely accepted. In the *Shipila* case, the Supreme Court affirmed that a mortgagee's right to foreclosure would not be upheld in instances of "abuse of process" or "bad faith".[54] While these concepts suggest a basis for equitable considerations, the court did not clarify what these instances may in fact entail.

In the case of *South African Forestry Co Ltd v York Timbers Ltd*,[55] the court clarified that the notion of good faith does not serve as a stand-alone rule that judges can invoke to interfere in contractual matters. Essentially, the ruling indicated that good faith by itself cannot be used as a basis for courts to step in and refuse to uphold terms deemed unfair or unreasonable.[56] Consequently, it seems that even if equitable considerations under rule 108(2) were tied to good faith, this did not grant courts the authority to prevent a creditor from enforcing their agreement regarding a

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49 *Fruit & Veg City v Rudolph Izaaks supra* par 15.

50 See *Standard Bank Namibia Ltd v Bock supra; Kisilipile v First National Bank supra* and *Bank Windhoek Namibia Ltd v Mokasa Trading Enterprises CC* 2022 NAHCMD 573.

51 *Bank Windhoek Limited v Irion supra* par 3.

52 *Ibid*.

53 Bennett "*Ubuntu*: An African Equity" 2011 14(4) *Potchefstroom Electronic Law Journal* 44. In *Bank of Lisbon and South Africa v De Ornelas* 1988 (3) SA 580 (A) 607, the concept of *exceptio doli generalis* was labelled a "defunct anachronism".

54 *Shipila* Supreme Court judgment par 49.

55 2005 (3) SA 323 (SCA) par 27.

56 Hutchison and Pretorious *The Law of Contract in South Africa* 3ed (2017) par 1.8.4.

primary residence solely on the grounds that it would be unjust for the debtor to lose their home.

While the creditor may not face significant harm in retrieving the loan amount and interest through methods other than the sale of the hypothecated property, requiring the creditor to accept an alternative debt-recovery approach directly contradicts the established common-law right to foreclosure concerning that property.[57] In addition, urging the creditor to agree to a different debt-recovery method also clashes with the fundamental common-law principle of *pacta sunt servanda*, which emphasises the importance of honouring contracts.[58] In examining the potential conflict between rule 108(2) and the common law, the Supreme Court in *Shipila* determined:

> "The appellant has a substantive right to foreclosure subject to a court order having been obtained and rule 108 being procedural in nature should not be read to take away that right… It seems that the bargain or common law right of the judgment creditor can only be overruled if a stronger substantive right resting in the judgment debtor exists." [59]

Rule 108(2) provided a procedural framework for the protection of a debtor's home, while the creditor's right to foreclosure was categorised as a substantive right. This differentiation raised significant challenges in achieving a balance, as the substantive nature of the creditor's right inherently carried more weight. Typically, any balancing efforts would favour creditors, who possessed more robust legal rights. It is posited that the exploration of less severe alternatives under rule 108(2), motivated by compassion for the debtor's circumstances, ultimately weakened the protections available for primary homes in foreclosure situations.

Courts appear to acknowledge that the application of rule 108 was influenced by legal developments in South Africa.[60] Nonetheless, it is crucial to recognise that the legal environment in South Africa is distinct from that in Namibia. In South Africa, judicial oversight is informed by constitutional obligations under section 26 of the Constitution of the Republic of South Africa, 1996 (South African Constitution), which guarantees the right of access to adequate housing.[61] Unfortunately, the Namibian Constitution lacks an explicit provision for this right, resulting in a diminished level of home protection; Namibia has resorted to equitable considerations through rule 108(2).

The Supreme Court's decision in *Shipila* presents a clarification regarding the enforcement of judgments. It established that a judgment creditor was not required to secure a *nulla bona* return concerning movable assets prior

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57 *Kisilipile v First National Bank supra* par 19; *Bank Windhoek Limited v Irion supra* par 10; *Namib Building Society v Du Plessis supra* 163–164.

58 *Kisilipile v First National Bank supra* par 19; *Bank Windhoek Limited v Irion supra* par 10.

59 *Shipila* Supreme Court judgment par 59 and 62.

60 *Shipila* Supreme Court judgment par 32; see also *Futeni Collection v De Duine supra* par 33.

61 See *Mkhize v Umvoti Municipality* (2012 (1) SA 1 (SCA)), where the Supreme Court of Appeal stated that the purpose of judicial oversight was to guarantee that all executions against immovable property carried out under the Magistrates' Courts Act did not infringe upon the constitutional right to housing.

to initiating a sale in execution of hypothecated property.[62] This ruling appeared to contradict the prevailing inclination to seek economically viable and less severe alternatives, as the pursuit of debt recovery from movable assets offered substantial options that could potentially avert the execution sale of residential properties.

A significant criticism of judicial oversight under rule 108(2) before it was amended is that the exploration of less severe alternatives tended to happen too late in the course of legal proceedings. Ideally, these options should be explored prior to initiating legal action to have a primary home declared specially executable; this could help avoid unnecessary legal expenses. Considering the high costs associated with legal action in Namibia, it would be far more advantageous for both parties to negotiate alternatives directly rather than resorting to court. The court's involvement could be streamlined, merely ensuring compliance and verifying efforts made to prevent foreclosure, thereby reducing the financial burden typically faced by the losing party. Given that creditors hold stronger legal rights, debtors often find themselves bearing these costs, which diminishes their likelihood of receiving any surplus after a sale. Establishing the reserve price for primary-home sales at 75 per cent of the property valuation instead of the actual debt amount further hampers the creditor's ability to recover the full debt, including legal fees, potentially resulting in significant commercial losses.

4 THE 2024 AMENDMENTS

The High Court Amendment Act has inserted section 35A in the High Court Act,[63] which introduces a significant statutory restriction on execution against immovable property, in particular primary homes, by subjecting such execution to enhanced judicial oversight.[64] In terms of section 35A(1), no sale in execution of immovable property may take place unless authorised by a court order issued after the court is satisfied, on the sheriff's return of service, that the judgment debtor lacks sufficient movable property to satisfy the judgment debt,[65] and that the judgment creditor has applied to court for an order declaring the immovable property executable.[66] An exception to the requirement in section 35A(1)(*a*) is created by section 35A(2), where the debt arises from a mortgage bond registered in favour of the judgment creditor and the default under that bond gave rise to the judgment debt. Where the immovable property sought to be executed upon constitutes a primary home, section 35A(3) imposes an additional and substantive safeguard. The court is expressly prohibited from authorising execution unless it has conducted an inquiry, in accordance with the rules of court, and is satisfied that the sale in execution of the primary home is the most

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62 *Shipila* Supreme Court judgment par 59 and 62.

63 16 of 1990.

64 In *Nedbank Namibia Ltd v Anga Enterprises CC* (2025 NASC par 27), the Supreme Court stated that in response to the growing public apprehension regarding the sale of immovable property, the legislature has recently taken a purposeful step to enhance judicial oversight, although this particular protection has been limited to primary homes.

65 S 35A(1)(*a*) of the High Court Act.

66 S 35A(1)(*b*) of the High Court Act.

appropriate means of satisfying the judgment debt.[67] This provision elevates the protection of primary homes by requiring a proportionality assessment that goes beyond the mere existence of a valid judgment and an executable asset.

If, after the inquiry envisaged in section 35A(3), the court concludes that execution against the primary home is not appropriate, section 35A(4) empowers it to grant alternative relief that balances the interests of the judgment creditor, the judgment debtor and any other occupier using the property as a primary home. Such alternatives include the attachment of other immovable property,[68] restructuring of repayment obligations,[69] debt assumption arrangements without transfer of ownership,[70] or permitting voluntary disposal of the property within a defined period,[71] as well as any other order that is considered proper and just in the circumstances.[72] Collectively, these provisions establish that a primary home may be declared specially executable only as a measure of last resort, following judicial inquiry and consideration of less drastic means of enforcement.

The new rule 108A outlines a structured, court-driven procedural inquiry contemplated in terms of section 35A(3) and (4) of the Act aimed at ensuring increased judicial oversight before a primary home may be declared specially executable.[73] The inquiry is initiated by an application to court by the execution creditor, who bears the onus of placing before the court facts and circumstances indicating that the sale in execution of the primary home is the most appropriate means of satisfying the judgment debt.[74] This obligation is reinforced by rule 108A(2), which requires the creditor to go further and positively address why the alternative enforcement mechanisms contemplated in section 35A(4) of the High Court Act would not be suitable in the particular circumstances. Rule 108A(3) prescribes service of the application on all interested parties, including occupiers, at least 14 days before the application is set down for hearing, ensuring a meaningful opportunity to respond. Opposing parties are required to file an affidavit articulating reasons why execution should not be granted and also suggesting feasible and realistic alternatives for debt satisfaction, substantiated by evidence.[75] This reciprocal evidentiary framework transforms the inquiry into an adversarial engagement on the appropriateness of foreclosure, rather than a unilateral creditor-driven process.

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67 S 35A(3) of the High Court Act provides that "[t]he court shall not issue an order authorising execution against immovable property of a judgment debtor which immovable property is used by the judgment debtor or by any other person as a primary home, unless the court is satisfied, after holding an inquiry in the manner set out in the rules of the court, that the sale of such immovable property is the most appropriate order to satisfy the judgment debt".

68 S 35A(4)(*a*) of the High Court Act.

69 S 35A(4)(*b*) of the High Court Act.

70 S 35A(4)(*c*) of the High Court Act.

71 S 35A(4)(*d*) of the High Court Act.

72 S 35A(4)(*e*) of the High Court Act.

73 Rule 108A is entitled "Inquiry in terms of section 35A(3) and (4) of Act".

74 Rule 108A(1).

75 Rule 108A(4) and (5).

From the perspective of debtor protection, the new rule significantly strengthens participatory and substantive rights. Whereas the old rule 108(2) required notice and invited reasons for why execution should not be granted, it placed no positive obligation on the debtor to propose alternatives, nor did it structure the inquiry beyond a general reference to "less drastic measures". In addition, the express right to appear in person, address the court, and, in appropriate cases, give oral evidence enhances procedural fairness and access to justice, particularly for vulnerable occupiers of primary homes who may otherwise be marginalised in application proceedings.[76] However, this enhanced debtor protection is not without cost to creditors. The new framework imposes a heavier evidentiary and procedural burden on execution creditors, who must now anticipate and negate alternative enforcement mechanisms in their founding papers, rather than merely demonstrating compliance with conditions precedent.[77] This may increase litigation complexity, delay enforcement and raise costs, particularly in cases where the debt is undisputed and the creditor's security interest is clear.

Judicial oversight is further strengthened by the flexible, inquiry-based nature of the proceedings at the hearing stage, where the execution creditor is allowed a limited right of reply,[78] while execution debtors or occupiers have the right of self-representation.[79] In appropriate cases, the court may permit oral evidence and cross-examination,[80] signalling that the inquiry is not confined to paper adjudication where factual disputes arise. The process culminates in a mandatory judicial determination requiring the court either to declare the property executable or to fashion an alternative order in terms of section 35A(4).[81] Collectively, these amendments institutionalise a procedurally robust inquiry that foregrounds proportionality, participation and judicial discretion in execution proceedings involving primary homes.

Under the old rule 108, the balance tilted more towards efficiency and finality, with strict time limits, limits on repeat applications and a clearer pathway to alternative enforcement through a transfer to a magistrates' court.[82] Nonetheless, when assessed holistically, the new rule does not unduly prejudice creditors but recalibrates the balance to reflect the gravity of execution against a primary home. Creditors retain the right to seek special executability, to reply to opposition, to cross-examine in appropriate cases and ultimately to obtain execution where no viable alternative exists.[83] What has changed is that execution against a home is no longer treated as a default consequence of judgment but as a remedy of last resort, justified only after a transparent, adversarial inquiry. In this sense, the new procedural framework achieves more balance by subordinating procedural efficiency to substantive justice, while acknowledging the legitimate enforcement rights of judgment creditors.

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76 Rule 108A(7)–(8).
77 Rule 108A(2).
78 Rule 108A(6).
79 Rule 108A(7).
80 Rule 108A(8).
81 Rule 108A(9).
82 Rule 108(5).
83 Rule 108A(6) read with rule 108A(9).

5 A COMPARATIVE EVALUATION OF SELECTED JURISDICTIONS

5 1 South Africa

The regulation of sales in execution of immovable property in South Africa is provided for by rule 46A of the Uniform Rules of the High Court and rule 43A of the Magistrates' Courts Rules, both of which took effect on 22 December 2017.[84] The introduction of rule 46A is rooted in section 26 of the South African Constitution, which explicitly affirms the right of access to adequate housing and addresses the complex challenges associated with the execution of debtors' homes.[85] Primarily, this rule examines the justification for selling a debtor's home in execution.[86] It is important to note that rule 46A applies, and must thus be followed, "whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor".[87] If the facts of a particular case do not involve "residential immovable property of a judgment debtor", the rule will not apply.[88]

Although the Namibian High Court Rules were amended in 2024, the pre-amendment rule 108(2) closely resembled Rule 46A, in that when a court reviews an application under rule 46A and determines that the property in question is the debtor's primary residence, it is required to explore alternative means for satisfying the debt that are less severe than executing against the primary residence.[89] These alternatives, when feasible, should aim to uphold the mortgage agreement and restore the debtor to a position where they can sustainably manage the debt.[90] Rule 46A is silent on the scope of all relevant circumstances to be considered by the court. The Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Stoltz*[91] provided some guidelines with respect to the factors the court must take into consideration. These guidelines are as follows:

> "(a) any attempts made by the debtor to pay off the debt;
> (b) the financial situation of the parties;

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84 GN R1272 in *GG* 41257 of 2017-11-17. As the two rules are similar, only Rule 46A is discussed.

85 Brits "Execution Against Residential Immovable Property in terms of High Court Rule 46A" 2021 32(1) *Stellenbosch Law Review* 47; Brits and Van der Walt "Application of the Housing Clause During Mortgage Foreclosure: A Subsidiarity Approach to the Role of the National Credit Act (Part 1)" 2014 2 *South African Law Journal* 288; Brits and Van der Walt "Application of the Housing Clause During Mortgage Foreclosure: A Subsidiarity Approach to the Role of the National Credit Act (Part 2)" 2014 3 *Journal for South African Law* 508–519.

85 Brits 2021 *Stellenbosch Law Review* 47–48.

86 Rule 46A(2)(a)(i).

87 Brits "Executing a Debt Against Residential Potential: The Potential Application of Rule 46A of the Uniform Rules of Court Beyond a Literal Reading of Property of a Judgment Debtor" 2020 45 (2) *Journal of Juridical Science* 77.

88 Brits 2020 *Journal of Juridical Science* 78.

89 Rule 46A(2)(a)(ii).

90 Brits 2021 *Stellenbosch Law Review* 50–51. See also *Absa Bank Ltd v Njolomba* 2018 (5) SA 548 (GJ) par 3.

91 2005 (2) SA 140 (CC).

(c) the amount of the debt;
(d) whether the debtor is employed or has a source of income to pay off the debt; and
(e) any other factor relevant to the particular facts of the case before the court."[92]

The other alternatives may be to sell alternative immovable property that is not a home or to sell movables in settling the debt. The National Credit Act,[93] which is discussed separately below, provides further alternatives. The underlying rationale for considering alternatives is to avoid a possible violation of the debtor's right of access to adequate housing entrenched in section 26 of the South African Constitution,[94] which provides as follows:

"(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

In *Jaftha*, the Constitutional Court held that "at the very least, any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in s 26(1)".[95] It follows that the mortgagee creditor's substantive right to foreclosure must be weighed against the mortgagor debtor's right to adequate housing. The court in *Jaftha*, however, pointed out that a measure limiting the right of access to adequate housing in section 26(1) may be justified by the limitation clause under section 36(1) of the South African Constitution.[96] Thus, the court in *Jaftha* prescribed the proportionate test in terms of which the sale of a home in execution must be proportionate to the debt recovery.[97]

Section 26(3) of the South African Constitution provides procedural protection of homes by ensuring that the court exercises its discretion in relation to circumstances unique to each case prior to granting an order that may have the effect of eviction from a home. This is done by "considering all relevant circumstances". Although the proviso of section 26(3) is limited to cases of eviction, the courts have applied the principle in section 26(3) to mortgage cases.[98] The court's judicial oversight in execution of residential homes is now unassailable in South African mortgage law, as it has been cemented by rule 46A of the Uniform Rules of Court.

Although section 26(3) of the South African Constitution does not provide for relevant circumstances nor lay down a test to determine which steps are relevant, section 26 must be read as a whole and with reference to section 26(1), which substantially protects the right to have access to adequate

92 2005 (2) SA 140 (CC) par 60.
93 34 of 2005.
94 *NPGS Protection & Security Services CC v Firstrand Bank Ltd* 2020 (1) SA 494 (SCA) par 51.
95 *Jaftha v Schoeman supra* par 34.
96 *Jaftha v Schoeman supra* par 34.
97 Brits 2021 *Stellenbosch Law Review* 51.
98 *Standard Bank of South Africa Ltd v Snyders* 2005 (5) SA 610 (C) par 13–17, 22; Brits *Mortgage Foreclosure* 73.

housing.[99] Primarily, section 26(1) and (2) places a positive obligation on the State to take "reasonable legislative and other measures" within the available resources to achieve the realisation of the section 26 right.[100] However, the courts have held that section 26(1) also imposes a negative duty on all persons to refrain from limiting someone's access to adequate housing.[101] The negative duty on all persons emanates from the nature of the Bill of Rights; that is, if the aggrieved party proves that he is a beneficiary of a certain right that was violated, then the defendant has to prove the justifiability of the infringement in terms of section 36(1) of the South African Constitution.[102] Thus, if execution proceeds despite the availability of less drastic alternatives to settle the debt or settle the arrears, the proportionality test in section 36(1) of the South African Constitution would probably not be satisfied since the means of selling the home will not justify the end (which is debt collection), if there is a less invasive way to achieve the same end.[103] For instance, in *ABSA Bank Ltd v Ntsane*,[104] the enforcement of the creditor's right to foreclose a home for arrears of R18.46 (N$18.46) would be disproportionate to the right guaranteed in section 26(1) of the South African Constitution.

Notably, the South African courts readily assume that a sale in execution will violate section 26(1).[105] However, in the absence of abuse of process[106] and bad faith,[107] the courts operate on the assumption that execution against hypothecated property that is the home of the mortgagor is *prima facie* constitutionally justifiable, even if its effect would be to infringe the judgment debtor's section 26 rights.[108]

In *Gundwana v Steko Development*,[109] the Constitutional Court was tasked to determine whether the human-rights-motivated proportionate enquiry was applicable in mortgage cases before the High Court, considering that the debtor agreed to subject their home to a mortgage. The court held that a freely agreed mortgage bond against the debtor's house does not grant the creditor the leeway to enforce a sale in execution even if it is done in bad faith.[110] The court held further that a mortgage agreement

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99 Brits 2015 *South African Law Journal* 584.

100 *Jaftha v Schoeman supra* par 22.

101 *Jaftha v Schoeman supra* par 34; *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) par 34; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 (3) SA 531 (CC) par 32.

102 Brits 2015 *South African Law Journal* 584.

103 See s 36(1)(*e*) of the South African Constitution; Brits 2021 *Stellenbosch Law Review* 51.

104 (2007) 3 SA 554 (T).

105 *Standard Bank of South Africa Ltd v Bekker* 2011 (6) SA 111 (WCC) par 8.

106 In *FirstRand Bank Ltd v Folscher* (2011 (4) SA 314 (GNP) 332E–F), the court stated that the creditor's conduct need not be wilfully dishonest or vexatious to constitute an abuse. The consequences of intended writs against hypothecated properties, although *bona fide*, may be iniquitous because the debtor will lose their home, while alternative modes of satisfying the creditor's demands might exist, which would not cause any significant prejudice to the creditor.

107 *Gundwana v Steko Development* 2011 (3) SA 608 (CC) par 41.

108 *Standard Bank of South Africa Ltd v Bekker* 2011 (6) SA 111 (WCC) par 14.

109 *Gundwana v Steko supra*.

110 *Gundwana v Steko supra* par 44 45–48. See also Van der Walt and Brits "Judicial Oversight Over the Sale in Execution of Mortgaged Property: *Gundwana v Steko Development* 2011 3

does not constitute a waiver of the debtor's housing rights under section 26 of the South African Constitution.[111] The import of the *Gundwana* case is that the court put to bed the arguments that a mortgage agreement freely entered into is a purely private-law relationship immune to the proportionality enquiry. Notwithstanding the fact that a freely agreed-upon mortgage agreement is a relevant consideration,[112] the court should ensure that there is no disproportionality between:

> "the means used in the execution process to exact payment of the judgment debt, compared to other available means to attain the same purpose." [113]

The right to enforce the mortgage agreement is subject to sections 129 and 130 of the National Credit Act (NCA).[114] The NCA overtly regulates the implementation of debt-enforcement agreements in South Africa. The NCA introduced the debt-review mechanism under which an over-indebted debtor is assisted by a debt counsellor and receives guidance on how they can service their debt timeously by employing their income optimally.[115] The debt counsellors will primarily attempt to restructure the consumer's debt in a way that is acceptable to the creditors.[116] This debt-review mechanism has a bearing on the mortgagee's right to foreclosure, as section 130(4)(*c*) of the NCA entitles the court to adjourn proceedings if the debtor is subject to a debt review.[117] Alternatively, the court may declare a person over-indebted and refer them for debt review.[118] More particularly, if the court believes that the creditor approached the court while the dispute was subject to debt review, section 130(3)(*c*)(i) affords the court discretion not to enforce the mortgage obligation. The general effect of the debt-review mechanism is temporarily to delay foreclosure and find less drastic alternatives to executing homes of over-indebted mortgagors.[119]

5 2 England and Wales

Under English law, the mortgagee has three remedies available to them in enforcing their debt. These remedies are foreclosure, taking possession and sale.[120] Under English law, the term "foreclosure" is used to denote the transfer of ownership of a mortgaged property to the mortgagee by court order.[121] The effect of foreclosure is to "vest the mortgagor's entire legal

SA 608 (CC); *Nedbank Ltd v Fraser and Four Other Cases* 2011 4 SA 363 (GSJ)" 2012 (75) *THRHR* 324.

111 *Gundwana v Steko supra* par 44 45-48

112 Brits 2015 *South African Law Journal* 592.

113 *Gundwana v Steko supra* par 54.

114 34 of 2005.

115 S 130 of the NCA.

116 *Ibid*.

117 S 130(4)*(c)*(i) of the NCA.

118 S 130(4)*(c)*(ii) of the NCA.

119 Brits *Mortgage Foreclosure* 175.

120 Ridall *Introduction to Land Law* 5ed (1993) 397; MacKenzie and Phillips *Textbook on Land Law* 9ed (2002) 493–495.

121 Ridall *Introduction to Land Law* 398.

estate in the mortgagee".[122] If the creditor successfully obtains a decree of foreclosure, it abrogates the equity of redemption, and consequently, the transfer of the mortgaged property to the mortgagee is free of any rights of the mortgagor.[123] The exploitation of this drastic remedy is extremely rare.[124] The notion of foreclosure in Namibia stands in stark contrast to the English approach regarding the same remedy. Accordingly, this article does not delve deeply into the specifics of foreclosure but rather redirects attention to the other two remedies that bear a closer resemblance to the Namibian interpretation of foreclosure.

The most used and effective remedy available to the mortgagee to enforce their debt is the exercise of their right to immediate possession upon the debtor's default.[125] This mortgagee right is inherent in the mortgage agreement, but is usually restricted by the mortgage agreement to instances where the mortgagor defaults on a mortgage agreement term.[126] The act of exercising the right to take possession precedes the sale of mortgaged property intended to satisfy the debt.[127] The primary purpose of taking possession is to ensure that the mortgagor will be in a position to give vacant possession to the purchaser in a subsequent sale.[128] Notably, in exercising the right to sale, the mortgagee does not need to apply for a court order.[129] Put alternatively, there is no judicial oversight required in the exercise of the mortgagee's right to sale. However, the act of taking an order for possession that is antecedent to sale must be sanctioned by a court order.[130]

If the mortgagee brings an action to recover possession of the property consisting of a dwelling house, section 36 of the Administration of Justice Act[131] (AJA) affords the mortgagor protection. In terms of this provision, an order for possession may be delayed for a certain period of time if the court believes that there are reasonable prospects for the mortgagor to pay any sums due under the mortgage within a reasonable time, thus granting a debtor relief from temporary financial difficulties. The phrase "any sum due" is used in a restrictive sense to mean unpaid arrears as opposed to the whole mortgage debt.[132] However, this protection is not applicable in cases where there is little to no prospect of the debtor being able to take reasonable steps towards settling accumulated arrears, let alone future repayments.[133]

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122 S 88 of Land Property Act 1925; Goo *Sourcebook on Land Law* (1994) 995.

123 Dixon *Principles of Land Law* 3ed (1999) 346.

124 See *Palk v Mortgage Services Funding Plc* (1993 (2) All ER 481), where it was stated that foreclosure actions are almost unheard of today and have been for so many years.

125 Dixon *Principles of Land Law* 342–343.

126 *Ibid*; Gray and Gray *Elements of Land Law* 5ed (2009) 291.

127 Dixon *Principles of Land Law* 3ed (1999) 346.

128 Dixon *Principles of Land Law* 342–343; Gray and Gray *Elements of Land Law* 291.

129 MacKenzie and Phillips *Textbook on Land Law* 493.

130 Gray and Gray *Elements of Land Law* 291.

131 Administration of Justice Act (AJA) of 1970 as amended by s 8 of AJA 1973.

132 S 8(1) of AJA 1973; Dixon *Principles of Land Law* 344; *National and Provincial Building Society v Lloyd* 1996 (1) All ER 630.

133 Dixon *Principles of Land Law* 344; *First National Bank v Syed* 1991 (1) All ER 250.

The judicial oversight over possession cases in England and Wales is further regulated by the Pre-Action Protocol for Possession Claims.[134] The Protocol seeks to encourage mortgagees and mortgagors to engage in pre-action communication as soon as the mortgagor starts falling into arrears in a bid to avoid possession proceedings.[135] It further seeks to ensure that the parties act fairly and reasonably with each other in resolving any dispute concerning mortgage arrears,[136] and imposes upon mortgagees a number of procedural requisites that ought to be complied with before initiating litigation against the debtor.[137] These include the requirement that the mortgagee should first notify the debtor of the arrears amount and incurred interest or charges.[138] Moreover, there is a corresponding obligation on both mortgagor and mortgagee to discuss with each other the cause of the arrears, the borrower's financial circumstances and proposals for the repayment of arrears.[139] In addition, before the institution of a possession claim, the parties, with regard to personal circumstances of the debtor and the nature of the agreement, are encouraged to consider extending the term of the mortgage, changing the type of the mortgage, deferring payment of interest due under the mortgage, capitalising the arrears or making use of any government forbearance initiatives in which the lender chooses to participate.[140]

Notably, the Protocol does not in any way intend to alter the parties' legal rights.[141] The Protocol only has a dilatory effect on how quickly a mortgagee can obtain an order for possession, as it requires the parties to comply with the steps set out in the Protocol before a possession claim can be launched.[142] The Protocol requires creditor and debtor alike to complete a formal checklist explaining the actions taken to avoid repossession.[143] Furthermore, the Protocol is drafted in discretionary terms; thus, compliance with the terms is optional and non-mandatory.[144] It follows, therefore, that one of the criticisms levelled against the Protocol is its minimal impact on creditors' behaviour prior to court action, and thus in assisting debtors to avoid repossession.[145] Non-compliance with the Protocol results in the imposition of an adverse costs order on the creditor.[146] It is opined that the imposition of an adverse costs order on creditors for non-compliance may

134 The Pre-Action Protocol for Possession Claims Based on Mortgage or Home Purchase Plan Arrears in Respect of Residential Property was implemented by the Civil Justice Council on 19 November 2008 (Pre-Action Protocol).

135 Pre-Action Protocol par 2.1(2).

136 Pre-Action Protocol par 2.1(1).

137 Pre-Action Protocol par 5.1–5.7.

138 Pre-Action Protocol par 5.1.

139 Pre-Action Protocol par 5.2.

140 Pre-Action Protocol par 7.

141 Pre-Action Protocol par 1.2.

142 Pre-Action Protocol par 1.2.

143 Pre-Action Protocol par 9.1.

144 Pre-Action Protocol par 7.1, 8.1–8.2.

145 Whitehouse "The Mortgage Arrears Pre-Action Protocol: An Opportunity Lost" 2009 72(5) *The Modern Law Review* 815.

146 *Ibid*.

not be enough, and more meaningful sanctions are required.[147] Be that as it may, in the context of Namibia, the adoption of guidelines and rules to be followed by creditors before instituting foreclosure proceedings may help prevent some foreclosures and also circumvent the incurrence of unnecessary legal costs, usually borne by the debtor as the defaulting party.

Relevantly, English domestic law is subject to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950.[148] Article 8 of the European Convention guarantees the right to respect for private and family life, home and correspondence. Pursuant to this right, the English courts have applied the human-rights proportionality test to possession proceedings brought by local authorities.[149]

5 3 Lessons for Namibia

The comparative survey reveals that the prevailing trend in mortgage foreclosures and debt enforcement is towards aiding debtors who are on the brink of losing their homes, allowing them either to retain their properties or at least postpone the impending sale in execution. When compared to Namibia, it becomes evident that the other jurisdictions have implemented stronger protective measures for homeowners than those currently available in Namibia. The procedural safeguards related to the sale of primary homes in South Africa, England and Wales are quite similar to those in Namibia in that there are procedural protections aimed at ensuring that the personal circumstances of debtors are judicially considered before a writ of execution is granted.

A key distinction in the context of South Africa is that judicial oversight is fundamentally aimed at upholding the housing rights of occupants. Unlike Namibia, which relies on equitable considerations, South Africa's foreclosure process is based on a proportionality assessment, allowing the mortgagee to enforce foreclosure rights only under justifiable conditions, specifically when such action represents a proportionate limitation on the mortgagor's right to housing.[150] Therefore, in South Africa, the evaluation of all pertinent circumstances includes a careful consideration of substantive rights, particularly the debtor's right of access to adequate housing.

Brits describes South Africa's human-rights-driven proportionality inquiry as "radical", signalling its departure from the traditionally absolute rights of mortgagees in asserting their property claims.[151] Instead, the proportionality inquiry introduces a framework where these rights are tempered by human-rights principles that extend beyond the private-law dynamics between the involved parties. Beyond the proportionality inquiry, South African judicial

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147 Singh *A Critical Analysis of the Home Mortgage Foreclosure Requirements and Procedure in South Africa and Proposals for Legislative Reform* (doctoral thesis, University of Kwazulu-Natal) 2020 150.

148 S 3(1) of the Human Rights Act of 1998.

149 See *Manchester City Council v Pinnock* 2010 UKSC 45; *London Borough of Harrow v Qazi* 2003 UKHL 43.

150 Brits 2015 *South African Law Journal* 593.

151 Brits 2015 *South African Law Journal* 594. See also Nield and Hopkins "Human Rights and Mortgage Repossession: Beyond Property Law Using Article 8" 2013 33 *Legal Studies* 431.

oversight is further informed by section 130 of the NCA, which mandates that the court assess whether a debtor's default stems from over-indebtedness.[152] If this is determined to be the case, the court can initiate a debt-review process, directing the debtor to seek professional help for managing their debts, with the potential for restructuring payment plans if creditors consent.

When comparing the legal frameworks of England and Wales with that of Namibia, a key distinction lies in the point during execution proceedings where all relevant factors and less severe options are evaluated. In England and Wales, the Pre-Action Protocol establishes standardised guidelines that both creditors and debtors must adhere to prior to commencing possession actions against a debtor. These guidelines focus primarily on promoting amicable resolutions and exploring alternatives to home possession. It is argued that implementing similar guidelines and protocols in Namibia before initiating foreclosure actions could significantly reduce the number of preventable foreclosures and help avoid the unnecessary legal expenses typically incurred by the debtor, who is often the party in default.

The main criticism that can be levelled against judicial oversight as embodied in the old rule 108(2) lies in its reliance on equitable considerations rather than robust substantive rights. As indicated above, the scope and judicial application of rule 108(2) rested solely on principles of equity and judicial sympathy. Its intended protective function has been weakened by the Supreme Court's decision that a creditor's contractual right to foreclosure can only be superseded by a stronger substantive right held by the judgment debtor. Rule 108(2) invited courts to consider "less drastic measures" without anchoring that inquiry in an identifiable substantive right protecting the debtor's home. Without such a countervailing substantive right protecting the debtor's home, the creditor's contractual and property rights will typically prevail. This balance predictably favoured creditors and explains why reform became necessary.

While the recent amendments have responded to the critique of rule 108(2), by codifying what was previously an ambiguous equity-based inquiry, they do not fully entrench an explicit substantive right to housing. Section 35A and the new rule 108A represent a legislative corrective, but not a complete paradigm shift of the kind seen in South Africa. While the new framework introduces a structured inquiry, proportionality language in the "most appropriate order", participatory rights and mandatory consideration of alternatives, it still does not expressly recognise a substantive right to housing or to a primary home. The debtor's protection remains instrumental and conditional, arising from judicial discretion under section 35A(3)-(4), rather than from an entrenched right that can normatively outweigh a creditor's foreclosure right. In this sense, Namibia has moved closer to a rights-based model but has stopped short of fully embracing one.

Rule 108A undoubtedly strengthens procedural justice and deepens judicial oversight, but it still requires debtors to justify why execution should not occur, often by proposing alternatives that preserve the creditor's entitlement. This is conceptually different from the South African model,

[152] S 130 of the NCA.

where courts weigh foreclosure against the substantive constitutional right of access to adequate housing, allowing limitation of a creditor's rights even in the absence of fault or alternative assets. Under Namibia's amended regime, foreclosure is delayed, mediated or restructured, but is unlikely to be defeated, unless compelling factual circumstances exist. It can thus be argued that Namibia has acknowledged the insufficiency of equity-based oversight by introducing proportionality and inquiry mechanisms yet has done so without elevating the debtor's interest in the home to the level of a substantive right. The creditor's substantive rights remain the normative baseline. The reform, therefore, mitigates harsh outcomes but does not fundamentally recalibrate the hierarchy of rights to balance creditor foreclosure rights with those of debtor rights.

It is argued that Namibia should emulate South Africa's human-rights-based approach, which provides a more balanced framework for foreclosure proceedings. This approach employs a proportionality test, weighing competing substantive rights, offering a more equitable resolution than a process that weighs established substantive rights against mere equitable considerations. The proposition of the human-rights-based approach in foreclosure proceedings in Namibia could be a challenge, as the Namibian Constitution does not recognise the right of access to adequate housing as in South Africa. Be that as it may, Namibia, being a party to the International Covenant on Economic, Social and Cultural Rights (ICESCR),[153] whose article 11(1) provides for the right to housing,[154] under the auspices of the right to an adequate standard of living, the right should be embraced through constructive interpretation.

The right to adequate housing, while significant, offers little protection against foreclosure, as this right is derived from international conventions that impose obligations primarily on the State, both positive and negative.[155] Private individuals and entities bear no responsibility to uphold the debtor's right to housing. Nevertheless, drawing from the jurisprudence of the African Commission, the right to adequate housing, in conjunction with the right to family,[156] can be interpreted as being part of the constitutionally recognised fundamental right to property.[157] In the case of *Social and Economic Rights Action Center and Center for Economic and Social Rights v Nigeria*,[158] the complainants argued before the African Commission that the Nigerian government was complicit in the oil-production protests in Ogoniland, which

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153 Namibia ratified the ICESCR on 25 February 1995; see Bangamwabo "The Implementation of International and Regional Human Rights Instruments in the Namibian Legal Framework" in Horn and Bosl *Human Rights and the Rule of Law in Namibia* (2008) 165.

154 Art 11(1) of the ICESCR provides as follows:

"The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent".

155 Damaseb *Court-Managed Civil Procedure of the High Court of Namibia: Law, Procedure and Practice* (2020) 327.

156 Art 14 of the Namibian Constitution.

157 Art 16 of the Namibian Constitution.

158 Communication 155/96 *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v Nigeria* (SERAC case).

led to the violent destruction of homes by security forces, thereby violating the right to adequate housing, among other rights. The African Commission ruled on the matter of adequate housing or shelter, stating:

> "Although the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health, and family life are adversely affected. It is thus noted that the combined effect of Articles 14, 16 and 18(1) reads into the Charter a right to shelter or housing which the Nigerian Government has apparently violated."[159]

The African Commission's reasoning suggests that a right can be inferred from a legal document if it emerges from a blend of other rights contained within that same document. In the SERAC case, the Commission identified the right to adequate housing or shelter by synthesising the rights to health, property and family life. While the latter two rights are explicitly acknowledged in the Bill of Rights of the Namibian Constitution, the right to health is encompassed within the principles of state policy outlined in the Constitution.[160] It can be argued that the combined impact of these explicitly recognised rights within the Namibian Constitution allows for the interpretation of the right to housing and shelter as being inherent to the Constitution itself. A recognition of the right to adequate housing within the Namibian Constitution, especially in the Bill of Rights, would enable it to be enforced horizontally against all individuals and legal entities in Namibia.[161]

To tackle the challenge of escalating legal expenses, it is proposed that a compulsory settlement process be established, akin to the English system under the Pre-Action Protocol. This process should serve as a prerequisite for any judicial actions aimed at foreclosing on a mortgagor's primary residence. By ensuring that this process remains entirely non-judicial, we can effectively limit the accumulation of costs that could otherwise diminish the proceeds from the sale of the mortgagor's home. Following the English model, these pre-litigation steps would involve filling out a standardised checklist or, in certain cases, submitting affidavits that provide comprehensive details about potential alternatives for settling the debt and avoiding possession proceedings.[162] The checklist would outline the measures taken by both parties to prevent the repossession of primary homes, with a strong focus on exploring alternative solutions for addressing the arrears.[163] Completing this checklist would facilitate easy access to all pertinent circumstances that should be taken into account in foreclosure proceedings, should the mandatory pre-action settlement process not yield a resolution.

The two Supreme Court rulings on judicial oversight regarding rule 108(2) have shown a troubling inconsistency in their approaches. In the *Shipila*

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159 The *SERAC case* 60.

160 Art 95(b) read with Art 95(h) of the Namibian Constitution.

161 Art 5 of the Namibian Constitution.

162 Pre-Action Protocol par 9.1.

163 Pre-Action Protocol par 5.

case, the court focused solely on less severe alternatives to the foreclosure of primary homes. In contrast, the *Kisilipile* case took a broader view, examining all relevant factors, including the personal interests of the debtor. As a result, the current foreclosure process is shrouded in ambiguity. To rectify this and facilitate the proposed mandatory pre-action non-judicial discussions between creditors and debtors, the introduction of a new piece of legislation on foreclosure is essential. Drawing on the principles outlined by the Supreme Court in *Kisilipile* and the South African Constitutional Court in *Jaftha*, the proposed foreclosure legislation would establish clearer and more comprehensive guidelines, delineate a minimum set of considerations to ensure consistency and clarity regarding the circumstances under which foreclosure is deemed appropriate.[164]

6 CONCLUSION

This article has sought to examine the foreclosure laws and processes in Namibia to assess how effectively they shield mortgagors from being evicted from their primary residences while still respecting the rights of creditors. The case law analysed in Namibia indicates that while rule 108(2) served as a potential 'safety net' for borrowers facing foreclosure, its foundation in equitable principles means it could easily be overshadowed by the mortgagee's established contractual and property rights. To ensure that the interests of creditors are weighed fairly against the debtors interests, it was argued that the protective measures of the old rule 108(2) should not rely solely on equity, but rather on a more robust substantive right that secures a debtor's home. This stronger right could be the right to adequate housing. Although the Namibian Constitution does not explicitly acknowledge this right, it can be inferred through the *SERAC* reasoning, which combines the rights to health, property and family life.

A comparative analysis of Namibia's legal framework alongside that of South Africa and England and Wales, respectively, highlights a significant difference in their approaches to foreclosure. While South Africa, England and Wales have established comprehensive regulations on foreclosure, not only outlining a clear process for foreclosure, but also incorporating protective measures for homeowners, Namibia's system relies heavily on the Rules of Court. In contrast to the more robust protections found in these other jurisdictions, Namibia lacks a specific constitutional provision that safeguards primary homes. It is proposed that Namibia should adopt South Africa's human-rights-based approach to balance effectively the rights of debtors and creditors in foreclosure cases. This approach involves a proportionality analysis that weighs multiple substantive rights, providing a more equitable balance than when a firmly established right to foreclosure is compared with less substantial equitable considerations.

The 2024 amendments codify the principles of judicial oversight affirmed in case law, embedding fairness and proportionality while affirming creditors' rights. Section 35A and rule 108A now provide a clear and structured framework that protects primary homes, when necessary, while at the same

[164] Singh "A Need for a Specialised Foreclosure Act?" 2020 *Without Prejudice* 48–49.

time ensuring creditors can enforce their rights effectively. They impose a substantive threshold beyond mere procedural compliance, signifying a transition from a creditor-centric presumption to a more nuanced approach in the judicial oversight of foreclosure processes. Execution creditors are required to "set out facts and circumstances to satisfy the court that the sale in execution of the primary home is the most appropriate order" and simultaneously demonstrate why alternative remedies under section 35A(4) "will not be appropriate in the circumstances".

In principle, this achieves a reasonable balance by requiring both parties to substantiate their positions, maintaining judicial oversight through a comprehensive inquiry process, and preserving creditor enforcement rights where execution proves genuinely necessary and proportionate. However, whether the framework will ultimately succeed in attaining an equitable balance remains contingent on the passage of time and, more immediately, on implementation factors that extend beyond the text of the rule itself, including the effective service of process, meaningful debtor access to legal representation or assistance, judicial readiness to exercise discretion by permitting oral evidence and supporting unrepresented parties, and the availability of adequate court resources to facilitate substantive inquiries rather than merely perfunctory reviews. To address the inconsistencies seen in the application of the old rule 108(2) and to improve efficiencies in foreclosure proceedings, it is advisable to establish a comprehensive regulatory framework for foreclosure. It is therefore proposed that Namibia could benefit from implementing guidelines similar to the Pre-Action Protocol used in England and Wales. Such measures would help reduce the number of preventable foreclosures and alleviate the financial burden of legal costs typically shouldered by debtors in default.