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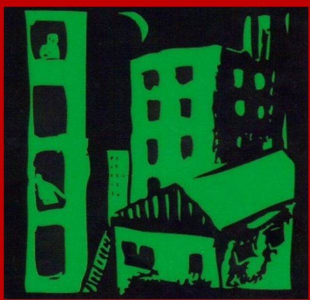

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The right to housing and its application in sequestration: Body Corporate of Old Trafford v Muronzi (016676/2023) [2024] ZAGPPHC 623 (21 June 2024)

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ABSTRACT

Insolvency law in South Africa limits the insolvent's fundamental rights, such as the right of access to adequate housing under section 26 of the Constitution of South Africa, 1996. This limitation arises because the Insolvency Act 24 of 1936 does not exempt the insolvent's primary residence from vesting in the insolvent estate, vesting that may therefore render the insolvent and his or her family homeless. Before an application for compulsory sequestration can succeed, the applicant must prove a reason to believe that the sequestration will benefit the estate's creditors. The courts exercise their discretion to grant or refuse a sequestration order, depending on whether this requirement is satisfied. In special circumstances, the court may exercise its discretion to refuse a sequestration order. Special circumstances in Body Corporate of Old Trafford v Muronzi *(016676/2023) [2024] ZAGPPHC 623 (21 June 2024) were held to infringe an insolvent's right to adequate housing without judicial oversight. Rule 31 and rule 46A of the Uniform Rules of Court require the court to consider alternatives to execution before declaring a property executable in an application for default judgments involving a debtor's home. This case note explores whether rule 46A should also be considered in sequestration applications, where a debtor may be rendered homeless. It also discusses how the right to access adequate housing is enforced in sequestration proceedings. The case note shows that the courts exercise their discretion and creatively apply the advantage requirement to enforce section 26 of the Constitution in the absence of special rules governing judicial oversight of sequestration proceedings.*

Keywords: abuse of the sequestration process; homelessness; judicial oversight; rule 31 and rule 46(1)(a)(ii) of the Uniform Rules of Court; section 26 of the Constitution

1 INTRODUCTION

South African creditors seeking to recover money from defaulting debtors may use the ordinary execution procedure or apply for compulsory sequestration.[1] Choosing between these processes depends on the facts of each case. Supposing that the sole creditor already holds a civil judgment, the ordinary execution procedure is cheaper and quicker than sequestration,[2] and a sale in execution will yield enough money. As such, the creditor may recover all or most of its debt sooner than in compulsory sequestration.[3] What happens, though, if the creditor lacks a judgment? Compulsory sequestration may then be quicker and cheaper than issuing a summons and proceeding to judgment and execution.[4] And what happens if the debtor is hopelessly insolvent and cannot meet the judgment? Sequestration may then be more advantageous to creditors than the ordinary execution procedure.[5]

Each process may also involve selling the debtor's home. This outcome infringes his or her right to access adequate housing under section 26 of the Constitution of the Republic of South Africa, 1996 ("the Constitution").[6] Different procedures precede that sale. Rule 31 and rule 46A of the Rules regulating the Conduct of the Proceedings of the Provincial and Local Divisions of the High Court of South Africa ("the Uniform Rules") control ordinary execution. Rule 46 sets the basic procedure for execution against

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1 Boraine A "Does the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 provide adequate family home protection to insolvent debtors or is it still PIE in the sky? (part 1)" (2020) 41(2) *Obiter* 199 at 209; Van Heerden C, Boraine A & Steyn L "Perspectives on protecting the family home in South African insolvency law" in Omar P (ed) *International insolvency law: Reforms and challenges* Farnham: Ashgate Publishing (2013). See also Steyn L "Treatment of a debtor's home in insolvency: Comparative perspectives and potential developments in South Africa" (2013) 22(3) *International Insolvency Review* 144; Evans RG "Does an insolvent debtor have a right to adequate housing?" (2013) 25(2) *South African Mercantile Law Journal* 119.

2 Meskin PM et al. *Insolvency law and its operation in winding-up* Durban: LexisNexis (2025) at para 2.1.4; *Gardee v Dhanmanta Holdings and Others* 1978 (1) SA 1066 (N) 1071–1072 ("*Gardee*"); *Absa Bank Ltd v De Klerk and Related Cases* 1999 (4) SA 835 (E) 839 ("*De Klerk*"); *Maxwell v Holderness* [2009] JOL 23740 (KZP) ("*Maxwell*").

3 See *Lexshell 824 Investments Proprietary Limited v Wiese* (8603/2021) [2024] ZAGPPHC 691 (19 July 2024) at para 41 ("*Lexshell*").

4 Meskin (2025) at para 2.1.4; *Maxwell* (2009) at paras 9–11.

5 Meskin (2025) at para 2.1.4; *De Klerk* 839; *Prudential Authority v Duma* (21546/2020) [2024] ZAGPJHC 789 (20 August 2024) at para 16.

6 See paras 3.1 and 3.3 of this case note.

immovable property in the High Court. Rule 46A specifically regulates execution against *residential* immovable property. It applies when an execution creditor seeks to execute against the residential immovable property of a judgment debtor.[7] Under rule 46A(2), the court hearing the application must:

> (i) establish whether the immovable property that the execution creditor seeks to execute against constitutes the judgment debtor's primary residence; and (ii) consider whether that debtor has alternative means to satisfy the judgment debt, other than execution against the primary residence.

Under rule 46A(2)(b), a court may not authorise execution against immovable property that serves as a judgment debtor's primary residence unless, after considering all relevant factors, it is satisfied that execution against such property is warranted. Rule 31 and rule 46(1)(a)(ii) thus require a judge to consider default judgments and execution involving a debtor's home before declaring the property executable.[8] This judicial oversight ensures that all alternatives are considered before execution, thereby justifying the eventual decision[9] and safeguarding a debtor's right to adequate housing in section 26 of the Constitution.[10] But the requirement has prevented creditors from recovering their money through ordinary execution.

As the general rule in South African insolvency law, once a sequestration order is granted, all the debtor's assets vest automatically in the trustee of the estate to be sold to

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7 On the application of these rules, see generally Singh C "To foreclose or not to foreclose: Revealing the 'cracks' within the residential foreclosure process in South Africa" (2019) 31(1) *South African Mercantile Law Journal* 145 at 156; Brits R "Execution against residential immovable property in terms of high court rule 46A" (2021) 32(1) *Stellenbosch Law Review* 47.

8 *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC); *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA); *Gundwana v Steko Development CC and Others* 2011 (3) SA 608 (CC) at paras 43–49; Van der Walt AJ & Brits R "Judicial oversight over the sale in execution of mortgaged property: *Gundwana v Steko Development* 2011 3 SA 608 (CC); *Nedbank Ltd v Fraser Four Other Cases* 2011 4 SA 363 (GSJ)" (2012) 75(2) *Journal of Contemporary Roman-Dutch Law* at 312 at 322; Steyn (2013) at 144; Singh (2019) 145 at 156; Brits (2021) at 47.

9 Brits R *Mortgage foreclosure under the Constitution: Property, housing and the National Credit Act* (LLD thesis, University of Stellenbosch, 2012) at 91; Brits R & Van der Walt AJ "Application of the housing clause during mortgage foreclosure: A subsidiarity approach to the role of the National Credit Act (part 1)" 2014 2 *Journal of South African Law* 288.

10 Singh (2019) 145 at 157; Brits (2021) at 52.

benefit the creditors.[11] This step includes the debtor's primary residence, thus rendering him and his dependants homeless. Creditors relying on insolvency law can foreclose on this immovable property without showing the court that all alternatives to execution have been exhausted. However, they must show a reason to believe that the sequestration will be to the advantage of creditors,[12] or face the court's refusal of the sequestration order.[13] The concept of "advantage to creditors", not defined in the Insolvency Act, has been judicially interpreted as yielding at least a dividend that is not negligible.[14] The question is whether a "substantial portion" of the total of the creditors (all of them, or at least the general body of them),[15] determined according to the value of the claims, would derive advantage from the sequestration.[16] They cannot recover their money by sequestration if they cannot show this advantage.

Sequestration has no judicial oversight rule to protect the debtor's primary residence. So, as in *The Body Corporate of Old Trafford v Morunzi*,[17] creditors have tended to choose sequestration to recover their money even though ordinary debt collection was arguably the better option. The court (per Strydom AJ) further held that infringing an insolvent's right under section 26 of the Constitution,[18] without judicial oversight, constitutes special circumstances allowing the court to exercise its discretion in refusing to grant a sequestration order.[19]

This case note is arranged as follows. It begins by summarising the facts and judgment in *Muronzi*. Then it discusses how the right to housing is currently enforced in

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11 Section 20 of the Insolvency Act 24 of 1936 ("Insolvency Act").

12 Section 12(1)(c) of the Insolvency Act.

13 *Ex parte Arntzen (Nedbank Ltd as intervening creditor)* 2013 (1) SA 49 (KZP) at para 1; Meskin (2025) at para 2.1.4.

14 *Stratford and Others v Investec Bank Ltd and Others* 2015 (3) SA 1 (CC) at para 44 ("*Stratford"*); *Lynn & Main Inc v Naidoo and Another* 2006 (1) SA 59 (N) at paras 33–35; *Ex parte Bouwer and Similar Applications* 2009 (6) SA 382 (GNP) at para 13.

15 Smith A, Van der Linde K & Calitz J *Hockly's law of insolvency, winding-up and business rescue* 10th ed Cape Town: Juta (2022) at 52.

16 Smith et al. (2022) at 52.

17 *Body Corporate of Old Trafford v Muronzi* (016676/2023) [2024] ZAGPPHC 623 (21 June 2024) ("*Muronzi")*. See also *Lexshell* at paras 29, 39, and 41.

18 This right is discussed in paras 3.1 and 3.3 of this case note.

19 *Muronzi* (2024) at para 48.

sequestration proceedings. This entails examining how the courts exercise their discretion in relation to the advantage requirement in implementing section 26 of the Constitution where applicable. The note briefly explores whether the type of judicial oversight provided by rule 31, rule 46(1)(a)(ii) and rule 46A of the Uniform Rules should also be considered in sequestration applications, where a debtor may be rendered homeless. It considers whether using sequestration proceedings to avoid judicial oversight in execution procedures constitutes an abuse of process, and it highlights the factors that prompted Strydom AJ to exercise her discretion in refusing to grant a final order of sequestration in *Muronzi*. Comparisons are drawn with international practice in regard to treating honest but unfortunate debtors differently from dishonest debtors when considering whether sequestration would lead to a fresh start for the honest debtor. The fresh start and discharge policy in the United States of America (USA) thus offers insights in this regard. The case note concludes with some final remarks.

2 FACTS AND JUDGMENT IN *MURONZI*

The applicant, the Body Corporate of Old Trafford ("Old Trafford"), administered a sectional title scheme. The respondent, Mr Morunzi, lived in one of the units and fell behind in paying his levies.[20] The applicant took judgment against him for R14,272, with the sale in execution yielding only R3,910.[21] A further judgment of R49,104.11 was taken against the respondent, but the Sheriff issued a *nulla bona* return. The applicant then obtained the provisional sequestration of the respondent's estate.[22] In opposing the application for a final sequestration order,[23] the respondent argued that he fell into arrears with his levies because he lost his job during the Covid-19 pandemic in 2020. He had since tried to pay. As he had recently been working as an e-hailing service driver, he

20 *Muronzi* (2024) at paras 1 and 2.
21 *Muronzi* (2024) at para 2.
22 *Muronzi* (2024) at para 3.
23 *Muronzi* (2024) at para 3.

expected to be able to bring his debt up to date soon. He had apprised the applicant of these developments and tried to arrange payments with it.[24]

Strydom AJ confirmed the applicant's right to choose between execution and sequestration. By launching the latter proceedings, it had circumvented the rule 46A procedure constitutional safeguards.[25] Just because sequestration is a recognised "legitimate form of execution" and a creditor is entitled to choose between execution or sequestration, should courts take a mechanical approach in deciding these applications?[26] No, said Strydom AJ: although it had been "passed for the benefit of creditors and not for the relief of harassed debtors",[27] the Insolvency Act, within its ageing folds, still bestowed on a court that great equaliser of justice: discretion.[28]

The applicant had satisfied sections 12(1)(a) and (b) of the Insolvency Act. Section 12(1) allowed the court to exercise its discretion in two instances. First, under section 12(1)(c), the applicant must satisfy the court that there is reason to believe the sequestration would be to the creditors' advantage.[29] With "advantage" being a relative concept, the court had discretion to decide if it had been proved. Judges Didcott and Van der Schyff had, on similar facts, provided definitive guidance on how such discretion should be exercised.[30]

Secondly, once the applicant had proved the section 12(1)(a) requirements, the court still had an overall discretion to refuse the application if the respondent proved special or unusual circumstances justifying such a refusal.[31] Here, the crisp issue was whether the possible infringement of the respondent's constitutional right to adequate housing constituted special or unusual circumstances warranting the refusal of the application,

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24 *Muronzi* (2024) at para 6.
25 *Muronzi* (2024) at para 8.
26 *Muronzi* (2024) at para 8.
27 *R v Meer and Others* 1957 (3) SA 641 (N) 619A.
28 *Muronzi* (2024) at para 9.
29 *Muronzi* (2024) at para 10.
30 Para 11. Strydom AJ was alluding to Didcott J in *Gardee* and Van der Schyff J in *Waterkloof Boulevard Homeowners Association (Association Incorporated under Section 21) v Yusuf* (028945/2022) [2023] ZAGPPHC 737 (28 August 2023) ("*Waterkloof")*.
31 *Muronzi* (2024) at para 10.

even if all the other requirements had been met.[32] The applicant's papers indicated only one creditor. The unit, bought for R252,500, would probably fetch R820,000.[33] On similar facts in *Waterkloof*, a sequestration application had been refused.[34] The applicant there had not shown greater benefit from sequestration than from sale in execution.[35]

Counsel for Old Trafford tried to distinguish *Waterkloof* from *Muronzi.* In *Waterkloof*, the application for levies due was brought after summary judgment had been obtained; in *Muronzi*, the application was brought after obtaining two orders for execution and the sale of the respondent's movable assets.[36] In this regard, Strydom AJ cited *Gardee v Dhanmanta Holdings and Others*.[37] Didcott J explained that sequestration was sometimes described as a valid type of execution. However, it did not give the judgment creditor the same automatic right he would have in standard execution: he or she still had to prove the advantage-to-creditors requirement. In addition,[38] with creditors' advantage being relative, this would not follow from sequestration unless sequestration suited the creditors better than any other practicable, reasonably available alternative method. Determining this advantage thus presupposed a comparison. Old Trafford's further distinction concerned the stages of sequestration. *Waterkloof* was an application for provisional sequestration; *Muronzi* was one for a final sequestration order.[39] Strydom AJ held that Van der Schyff J had decided *Waterkloof* as a final application. Given the stage of the application, differentiating between applications for provisional or final sequestration was irrelevant because it did not affect the court's discretion.[40]

Old Trafford made two further arguments in support of sequestration proceedings. The trustees could sell the property privately and obtain a higher price, thereby providing

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32 *Muronzi* (2024) at para 12.
33 *Muronzi* (2024) at para 13.
34 *Waterkloof* (2023) at para 14.
35 *Muronzi* (2024) at para 14.
36 *Muronzi* (2024) at para 15.
37 *Gardee* (1978) 1069B-C; *Muronzi* (2024) at para 17.
38 *Gardee* (1978) 1070B-C; *Muronzi* (2024) at para 17.
39 *Muronzi* (2024) at para 15.
40 *Muronzi* (2024) at para 16.

creditors with a monetary advantage.[41] Furthermore, if the trustees auctioned the property, the bondholders could not accept or reject the final bid. So this outcome would serve the interests of the entire *concursus creditorum*, not just those of the bondholder.[42] Strydom AJ also rejected this argument. A bondholder could object to or influence the price obtained. Yet this possibility would not have affected the applicant's claim: the applicant would be favoured over other creditors in sequestration anyway.[43] Registration of the transfer of the immovable property would not be permitted unless the body corporate had certified that the moneys the transferor owed to the body corporate in respect of the unit had been paid in full or to the body corporate's satisfaction.[44] In practice, therefore, if funds were available, the body corporate would be paid before the immovable property was transferred.[45]

Moreover, Old Trafford alleged that an advantage to creditors existed because Mr Muronzi had not sought to pay the outstanding amounts, which accrued monthly interest. This failure increased the financial burden, adversely affecting the other owners in the development.[46] Resolving the current state of affairs for Mr Muronzi would benefit the creditors as a group. There would be no further loss to them.[47]

Strydom AJ held that it was factually incorrect to say that Mr Muronzi had not tried to pay the outstanding amounts. Old Trafford's replying affidavit stated that Mr Muronzi had, in fact, made regular, although partial, payments since the two judgments.[48] Nor, added Strydom AJ, did sequestration hold a distinct advantage over execution for the "adversely affected" other owners.[49] Amounts levied by a body corporate are used for

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41 *Muronzi* (2024) at para 18.

42 *Muronzi* (2024) at para 18.

43 *Muronzi* (2024) at para 20.

44 Section 15B(3)(a)(i)(aa) of the Sectional Titles Act 95 of 1986; *Muronzi* (2024) at para 20. The position was confirmed in *Body Corporate, Marsh Rose v Steinmuller and Others* 2024 (2) SA 270 (SCA) at para 36 ("*Steinmuller*").

45 If funds could not cover all the debts owing to both the mortgagee and the body corporate, those parties might have reached an accommodation, but neither of them was legally obliged to do so (*Steinmuller* at para 36; *Muronzi* at para 21).

46 *Muronzi* (2024) at para 22.

47 *Muronzi* (2024) at para 22.

48 *Muronzi* (2024) at para 23.

49 *Muronzi* (2024) at para 24.

administration, operational expenses, and maintenance of the sectional title scheme. The pro rata portion to be contributed by the owner of a unit within the scheme does not "disappear" if that owner's estate is sequestrated.[50] Those costs would have to be borne by the other owners no matter how the body corporate collects levies due. Sequestrating the respondent's estate would not end the applicant's losses.[51]

The court confirmed the practical approach that there is no reason to believe that sequestration would advantage creditors if execution were cheaper and quicker and the only creditor already held a judgment.[52] Here, Old Trafford had not led any evidence showing the relative expense of its chosen procedure, and nor had it argued that the sequestration route was quicker.[53] Instead, it had waited 10 months after the *nulla bona* return was issued before bringing the sequestration application. Two years had passed between the receipt of the *nulla bona* return and the hearing of this application.[54] Sequestration proceedings provided no benefit over following ordinary execution proceedings for the sole creditor.[55]

As for the potential losses suffered by the hypothetical other creditors, the "advantage" seemed more illusory than actual. Since the granting of the provisional order in October 2023, no such creditors had come forward. No evidence of voidable dispositions had emerged or been alleged by the applicant.[56] Strydom AJ then examined what the finding would be if she had erroneously concluded that the applicant had not proved an advantage to creditors.[57] The words in section 12(1) of the Insolvency Act were "may sequestrate". So the court was not obliged to grant a sequestration order even if the

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50 *Muronzi* (2024) at para 24.
51 *Muronzi* (2024) at para 24.
52 *Rodel Financial Services Proprietary Limited v O'Callaghan* (2016/23121) [2017] ZAGPJHC 467 (31 March 2017) at para 34; *Muronzi* at para 25.
53 *Muronzi* (2024) at para 26.
54 *Muronzi* (2024) at para 26.
55 *Muronzi* (2024) at para 27.
56 *Muronzi* (2024) at para 28.
57 *Muronzi* (2024) at para 29.

requirements had been satisfied. Once again, the court was afforded a discretion.[58] This overall discretion had to be exercised judicially on consideration of all the facts and circumstances and in accordance with the correct principles.[59] If the creditor had met the requirements for the order, the court could not decline it on a whim. There had to be a good reason for withholding it.[60] The respondent bore the onus of proving special circumstances that would negate an order sequestrating his estate.[61]

Clearly, the asset for sale as well as the basis for the reasonable possibility of advantage to creditors was the respondent's primary residence. Four school-going children lived with him there.[62] When seeking the provisional sequestration order, the applicant's heads of argument had conceded that the property was the primary residence of the respondent and his family. But the applicant sought a sequestration order, not an order declaring the property specially executable.[63] The trustee in sequestration would have to investigate claims against the insolvent estate. He could decide whether to sell the property to settle sums due by the respondent to creditors such as the applicant. The respondent owned two immovable properties.[64] Thus, he and his family would not be left homeless if the trustee sold the sectional title unit.

The same heads of argument were relied on for the final order of sequestration. Strydom AJ remarked that, since the provisional sequestration order, no investigations had been conducted into whether the property needed to be sold.[65] Nor was it legally sound to argue that, because the respondent owned a second home, he would not be homeless if his estate were sequestrated. Using sequestration for debt collection was drastic. Rule 46 execution would lead to the loss of one property. Sequestration would

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58 *Muronzi* (2024) at para 31.

59 *Muronzi* (2024) at para 32.

60 *Orestisolve (Pty) Ltd t/a Essa Investments v NDFT Investment Holdings (Pty) Ltd and Another* 2015 (4) SA 449 (WCC) at para 18; *Muronzi* (2024) at para 32.

61 *FirstRand Bank Ltd v Evans* 2011 (4) SA 597 (KZD) at para 27; *Muronzi* at para 33.

62 *Muronzi* (2024) at para 34.

63 *Muronzi* (2024) at para 35.

64 Annexure FA2 to the applicant's founding affidavit (*Muronzi* (2024) at para 35).

65 *Muronzi* (2024) at para 36.

divest the respondent of all his assets,[66] including both of his immovable properties. The applicant chiefly argued that it had the right to choose the sequestration route. It was not levying execution against the immovable property. So, neither rule 46 nor rule 46A applied here.[67]

This argument was supported by *Shackleton Credit Management (Pty) Ltd v Ngakatau and Another*.[68] A preliminary argument based on non-compliance with rule 46A was dismissed in *Shackleton*. Abrahams AJ held that sequestration was different from execution or debt recovery. Sequestration created the *concursus creditorum*, benefiting all creditors and not only one.[69] The Insolvency Act set out the procedures and mechanisms. Section 20(1) of that Act vested the estate in the Master and then the trustee. This was the law, unless it was challenged as unconstitutional.[70]

Strydom AJ acknowledged that rule 46A did not apply in insolvency proceedings.[71] However, the respondent in *Shackleton* had relied on rule 46A as though it encompassed the complete protection afforded by section 26 of the Constitution. Strydom AJ held that it was misguided to elevate a procedural tool into substantive law. Rule 46A merely gave practical effect to the need for judicial oversight identified by the courts when potential infringement of the constitutional rights entrenched in section 26 of the Constitution was foreseen.[72] The absence of a concomitant obligation in insolvency proceedings to comply procedurally with a rule of court did not affect the court's duty to give effect to the Constitution. The need for judicial oversight in cases affecting section 26 rights was recognised and enforced long before the legislature even drafted rule 46A.

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66 *Muronzi* (2024) at para 36.
67 *Muronzi* (2024) at para 37.
68 *Shackleton Credit Management (Pty) Ltd v Ngakatau and Another* (2020/38729) [2022] ZAGPJHC 58 (11 February 2022).
69 *Muronzi* (2024) at para 16.
70 *Muronzi* (2024) at para 18; *Muronzi* (2024) at para 38.
71 *Muronzi* (2024) at para 39.
72 *Muronzi* (2024) at para 39.

Strydom AJ held that the constitutionality of section 20(1) of the Insolvency Act was beyond the scope of this judgment. In addition, the insolvent's divestiture of his assets after a final order of sequestration had no bearing on whether a court should, before issuing the final sequestration order, consider how that would affect the respondent's rights under section 26 of the Constitution.[73] Strydom AJ quoted an insolvency commentator[74] explaining the court's predicament:

> Where these requirements have been met nevertheless there may be special circumstances such as abuse of process which convince the court not to grant the order. Currently, there is no direct and clear authority that a court should consider the fact that sequestration following a compulsory sequestration application renders the insolvent homeless, and such a plea by the respondent-debtor will be weighed against the entrenched advantage for creditors-principle that is a hallmark of our rather pro-creditor insolvency system. Yet, as a matter of principle, the question may be posed if the same kind of principles provided in the rules of the court following the judgments in *Jaftha* and subsequent cases should not be considered in case of especially compulsory sequestration applications as well.[75]

As Strydom AJ observed, courts had considered public policy in exercising the discretion afforded by the Insolvency Act.[76] In *Ex parte Ford and Two Similar Cases*,[77] most of each applicant's debts arose from credit agreements under the National Credit Act (NCA). Reckless extension of credit was suspected.[78] The applicant creditors in *Ford* argued that it was convenient for them to meet the Insolvency Act requirements "mechanically and superficially".[79] Binns-Ward AJ considered this approach "misdirected" and reasoned that

73 *Muronzi* (2024) at para 40.
74 Boraine (part 1) (2020) at 218.
75 *Muronzi* (2024) at para 41.
76 *Muronzi* (2024) at para 42.
77 *Ford* (2009) at paras 19–22.
78 *Muronzi* (2024) at para 43.
79 *Ford* (2009) at para 19.

> where the grant of the selected remedy is discretionary ... it is the duty of the court, in the exercise of its discretion in cases like the current, to have proper regard to giving due effect to the public policy reflected in the NCA.[80]

Strydom AJ held that the applicant's motivation in launching the sequestration application in *Muronzi* was to sell the respondent's primary residence. The applicant had mentioned the property as an asset to be sold for the benefit of creditors, and said that it had said it wanted to "put a stop to this state of affairs" (that is, the respondent's failure to pay the levies).[81] This purpose could be achieved only if the respondent no longer owned the unit in the sectional title scheme. Unjustifiably rendering homeless a person, such as the respondent, who had owned his home for 22 years, was the exact mischief which the Constitutional Court in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* sought to cure when it espoused the principles that would culminate in rule 46A.[82] *Jaftha* was decided in the context of execution proceedings. It did not address procedural issues. Its overarching determination was the purpose of section 26 of the Constitution.

As Mokgoro J explained,

> [s]ection 26(3) is the provision which speaks directly to the practice of forced removals and summary eviction from land and which guarantees that a person will not be evicted from his or her home or have his or her home demolished without an order of court considering all of the circumstances relevant to the particular case. The whole section, however, is aimed at creating a new dispensation in which every person has adequate housing and in which the state may not interfere with such access unless it would be justifiable to do so.[83]

Strydom AJ added that while the Constitutional Court in *Jaftha* recognised a creditor's right to payment, it introduced the concept of judicial oversight when a person's section

80 *Ford* (2009) at paras 19 and 20, quoted in *Muronzi* (2024) at para 43.
81 *Muronzi* (2024) at para 44.
82 *Muronzi* (2024) at para 45.
83 *Jaftha* (2005) at para 28, quoted in *Muronzi* (2024) at para 45.

26 rights were at risk.[84] The *Jaftha* principles infused all appropriate instances. If litigation proceedings could infringe section 26, a court could not look the other way: it was duty-bound to act. The court's duty did not arise from the nature of the proceeding, but flowed from how the proceeding might affect the homeowner's section 26 rights:[85]

> Although section 26(3) of the Constitution requires judicial oversight for the *eviction* of a person from his or her home, the effect of the judgment in *Gundwana*, particularly paragraph 41, is that the *execution process is equated with eviction* for the purposes of section 26(3) that "judicial oversight by a court of law of the execution process is a must". This early judicial interposition permits a mechanism to *prevent abuse at an early stage* before a bona fide purchaser and new owner seeks the eviction of the incumbent at which later time circumstances are different and the scope to remedy a past abuse is much narrower than prior to attachment of the property.[86]

In *Muronzi*, Strydom AJ held that the *Jaftha* principles had already been infused into insolvency law. This was clear from *J.J v A.J*.[87] In dismissing the application for voluntary surrender, the court (per Loubser J) considered the section 26 rights of other occupants of the property:

> [10] Having regard to all of the facts and circumstances of this case, it would appear that a sale of the property will be the only meaningful way in which money will become available for distribution amongst the Applicant's creditors. This fact has to be weighed up against the reality that the Respondent has acquired a personal right in the property, which right precedes any right that the Applicant's creditors may have in the property. *Moreover, the sequestration order may possibly have the effect of an eviction order against the Respondent and her children, with inevitable negative consequences for them*. Should this happen, the Respondent may end up with nothing more than a concurrent claim for damages against the insolvent estate. [11] *In these respects the Court also has to be mindful of the provisions of Section 26 of the Constitution*.

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84 *Muronzi* (2024) at para 46.

85 *Nedbank Ltd v Fraser and Another and Four Other Cases* 2011 (4) SA 363 (GSJ) ("*Fraser*").

86 *Muronzi* (2024) at para 9 (quoted with Strydom AJ's emphasis in para 46).

87 *J.J v A.J* (4041/2019) [2020] ZAFSHC 4 (9 January 2020).

> Section 26 provides for the fundamental right to adequate housing. Section 26(3) protects the homeowner and ensures judicial oversight before an order of eviction may be issued. It basically has the effect that all possible alternatives have to be considered before an eviction is ordered.[88]

Accordingly, Strydom AJ was satisfied that the potential infringements of the rights enshrined in section 26 of the Constitution, if proven, would constitute special circumstances to be considered in exercising her overall discretion to refuse an application for final sequestration.[89] Although sequestration might be a *legitimate* form of execution, it could hardly be described as *just*, because it could result in a person's losing his primary residence of 22 years for a judgment debt under R50,000 without judicial oversight.[90] So, the application for a final sequestration of Mr Muronzi's estate was refused and the provisional sequestration order, set aside.[91]

3 COMMENTARY

3.1 The right to access adequate housing and its application in sequestration proceedings

Section 26 of the Constitution guarantees everyone the right to access adequate housing. The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.[92] No one may be evicted from his or her home without a court order issued after consideration of all relevant circumstances.[93] The Constitution and the rules of court do not define relevant circumstances.[94] The difficulty of this socio-economic right lies in the extent to which the

[88] *Muronzi* (2024) at para 47 (Strydom AJ's emphases).
[89] *Muronzi* (2024) at para 48.
[90] *Muronzi* (2024) at para 48 (with Strydom AJ's emphasis).
[91] *Muronzi* (2024) at para 50.
[92] Section 26(1) and (2) of the Constitution.
[93] Section 26(3) of the Constitution.
[94] *Fraser* (2011) at para 15.

courts can and should enforce it.[95] It should be implemented on a case-by-case basis.[96] This case note concentrates on the aspects of section 26 (thus, section 26(3)) that affect the sale of the primary residence of an insolvent debtor without judicial oversight.[97] The question is mainly how section 26 is and should be enforced in sequestration proceedings. Section 26(3) protects the homeowner and ensures judicial oversight before an eviction order may be issued.[98] Essentially, all possible alternatives must be considered before eviction is ordered.

The Insolvency Act automatically vests the insolvent's assets,[99] such as his immovable property,[100] including his primary residence or home, in the Master and, later, the trustee, who sells them and uses the proceeds to pay the estate's creditors.[101] The debtor's primary residence is neither excluded from the vesting nor exempted from a sale by the trustee.[102] The Insolvency Act allows the sale of the insolvent's home without first requiring the courts to investigate whether alternatives have been considered to prevent the homelessness of the debtor, before the debtor is evicted from his or her home. As indicated in *Muronzi*, referring to *J.J v A.J*, a sale of the insolvent's home has the effect of an eviction order on the spouse (respondent) and children of the insolvent, inevitably with negative consequences for them.[103] Thus, Loubser J in *J.J v A.J* held that the courts must be mindful of the provisions of section 26 of the Constitution. While the Insolvency Act does not oblige the courts to exercise judicial oversight in sequestration proceedings, in *J.J v A.J*, an application for voluntary surrender, Loubser J exercised judicial oversight, finding that the insolvent applicant could use debt review[104] as an alternative to

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[95] Currie I & De Waal J *The bill of rights handbook* 6th ed Cape Town: Juta (2013) at 265; Freedman DW et al. "Constitutional law: The bill of rights" in Joubert WA & Faris JA (eds) *The law of South Africa* vol 5, part 3 2nd ed Durban: LexisNexis (2012) at para 158.

[96] *Government of the Republic of South Africa & Others v Grootboom and Others* 2001 (1) SA 46 (CC) at para 20.

[97] The progressive realisation aspect of section 26 of the Constitution is beyond the scope of this case note.

[98] *J.J v A.J* (2020) at para 11.

[99] See the definition of "property" in section 2 of the Insolvency Act.

[100] See the definition of "immovable property" in section 2 of the Insolvency Act.

[101] Smith et al. (2022) at 205. See para 1 of this case note.

[102] See generally Evans RG "Legislative exclusions or exemptions of property from the insolvent estate" (2011) *Potchefstroom Electronic Law Journal* 38.

[103] *J.J v A.J* (2020) at para 10.

[104] In terms of the NCA.

sequestration.[105] This alternative, the court held, would protect the respondent's personal right in the property and her right to adequate housing and prevent the devastating effect of sequestration on the respondent and her children.[106]

Similarly, in *Muronzi*, the court, mindful of section 26 of the Constitution and the devastating effect of a final sequestration order on the insolvent and his children, refused to grant the sequestration order. Thus, in the absence of rules prescribing judicial oversight in sequestration proceedings, courts currently use creative means to enforce section 26. The question is whether these workarounds are sufficient to create legal certainty in protecting insolvent debtors from homelessness. This case note now discusses how the court exercises its discretion and creatively applies the advantage requirement to preserve the right to adequate housing in sequestration proceedings.

3.2 The court's discretion and the advantage requirement as a means to protect the right to access adequate housing in sequestration proceedings

When determining the proof of the mandatory requirement of advantage to creditors,[107] the courts may consider many factors[108] in a list that is not closed.[109] They may consider the special circumstances of the case before exercising their discretion to grant or refuse an application for compulsory sequestration. The deciding factor is how they will exercise their discretion and what they consider "special or unique circumstances" to sway their discretion to favour the debtor and refuse an application to sequestrate his estate in circumstances where they are satisfied that there is reason to

[105] *J.J v A.J* (2020) at para 12.

[106] *J.J v A.J* (2020) at para 12.

[107] See *J.J v A.J* (2020) at para 1 of this case note.

[108] See Meskin (2025) at para 2.1.4 for examples of these factors: a pecuniary benefit to creditors that is not negligible; an advantage to be gained through an enquiry into the debtor's financial affairs; the trustees to take control of the estate since the debtor is wasting the property of the estate or there is a real concern that the debtor is concealing assets of the estate or attempting to dissipate his assets; or the debtor's conduct is found to be "unbusinesslike" and possibly imperilling a *concursus creditorum*.

[109] *Stratford* (2015) at para 44.

believe that sequestration will be to the creditors' advantage.[110] As indicated in *Muronzi*, this discretion allows the court, in special circumstances, to protect the debtor's primary residence where sequestration would render the debtor homeless and to refuse a sequestration order. It is this discretion that, in the absence of judicial oversight or a rule similar to rule 46A in sequestration proceedings, the courts can exercise to enforce section 26.

Two questions follow. Is the court's ability to exercise its discretion without legislative amendments to protect a section 26 violation in sequestration proceedings sufficient? Or are special rules needed, similar to rule 46A and dedicated explicitly to sequestration proceedings? It is submitted that while the court's discretion can be used in this way to protect a debtor from homelessness in sequestration proceedings, special rules are still required for the sake of certainty. This is even more so for debtors whose section 26 rights would be infringed by a sequestration order, but unlike the debtor in *Muronzi*, who, for lack of knowledge, opposed the compulsory sequestration application but did not attack it as a violation of section 26. Introducing special rules would also place sequestration proceedings on an equal footing with ordinary execution proceedings. In those ordinary proceedings, the defaulting debtor need not object under section 26. His or her section 26 rights are automatically protected by judicial oversight.

3.3 Should rule 46A apply in sequestration proceedings?

Protecting a debtor's primary residence during sequestration under South African debt-collection law has evolved significantly. This improvement is due to the constitutional considerations regarding the right to adequate housing. A pivotal moment in this evolution was the Constitutional Court's *Jaftha* ruling. Sales in execution of a debtor's home now require judicial oversight to prevent unjustifiable infringements on the right to adequate housing. Following *Jaftha* and subsequent precedents, the Uniform Rules

[110] In *Body Corporate Palm Lane v Masinge* 2013 JDR 2332 (GNP), the court exercised its discretion not to grant a sequestration order but considered that the debtor should rather be afforded an opportunity to repay the debt. But it should exercise such a discretion only if satisfied that the debt would in fact be paid if a sequestration order were not granted (*Nedbank v Potgieter* (2012/5210) [2013] ZAGPJHC 242 (3 October 2013) *at* paras 19 and 22; Meskin (2025) at para 4.1.2.

were appropriately amended. Rule 31 and rule 46(1)(a)(ii) require that requests for default judgments involving a debtor's primary residence be referred to a judge for consideration before the property is declared executable. The introduction of rule 46A in 2017 added specified procedures for executing against immovable property. These emphasised the need to assess whether the property is the debtor's primary residence and to explore alternative means of satisfying the debt.[111]

Under rule 46A, courts exercise a broad discretion. This includes setting reserve prices for sales in execution, denying execution orders, or issuing other appropriate directives, such as permitting the debtor and dependants to remain in the residence for a specified period. Comprehensive information must be presented to the court to facilitate these determinations.[112] It is necessary to consider all relevant factors before granting an order that could result in the sale of a debtor's primary residence.[113] It is submitted that these statutory developments may guide law reform regarding the consideration of compulsory sequestration applications.[114] However, these developments also need to be considered in the context of insolvency, which differs from ordinary execution. Insolvency law lacks a procedure like rule 46A, but some judges, as shown above, are considering other ways to protect the primary residence of an insolvent debtor.

However, judges have not directly considered circumstances in which the sequestration process may result in the loss of the primary residence, as in the *Jaftha* case, to open the law to reform in the context of sequestration. This situation may arise because the courts, as in *Muronzi* and *J.J v A.J*, have exercised their discretion under existing requirements in such matters to refuse an application for sequestration where it would render the debtor homeless. Insolvency proceedings have no direct and dedicated

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[111] Boraine (part 1) (2020) at 222–224. See also Sibanyoni N "Striking a constitutional balance between the rights of creditors and a judgment debtor" (2019) *LindsayKeller Attorneys* available at https://www.lindsaykeller.com/striking-a-constitutional-balance-between-the-rights-of-creditors-and-a-judgment-debtor/ (accessed 31 October 2025); Singh (2019) 145 at 157; Brits (2021) at 47.

[112] Boraine (part 1) (2020) at 213.

[113] *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ), especially paras 59 and 65.

[114] Moolla M "Major breakthrough in foreclosure applications in respect of primary residences" (2019) *De Rebus* 28.

equivalent to rule 46A. Yet some judges have sought to protect insolvent debtors' primary residences by scrutinising sequestration applications, particularly in relation to the advantage-to-creditors requirement.

If a sequestration order is granted, a debtor and his or her dependants may still be occupying the primary residence when sequestration commences. This property will form part of the insolvent estate from the commencement of sequestration. In terms of section 20 of the Insolvency Act, such occupation may continue only until the trustee of the insolvent estate gives notice to the debtor (and where relevant, the dependants) to vacate the property so that it may be realised as part of the insolvent estate. From the effective date of the notice to vacate, the continued occupation may be deemed illegal. Suppose the order has the effect of rendering the debtor and his or her dependants homeless: in that case, the debtor may, in principle, rely on the PIE[115] legislation to continue occupying the property.[116]

The debtor, as the respondent, may oppose an application for the compulsory sequestration of the estate. To this end, and apart from facts that may be contested, various legal points may also be raised against the sequestration. These objections could include procedural irregularities or the failure to meet the substantive requirements for such an application. Of course, when it comes to preventing a sequestration order, a direct or indirect contestation of the application may be aimed at protecting the primary residence. Two things are clear. First, this purpose may be achieved by opposing the advantage requirement, as mentioned earlier; secondly, if the order is granted and the occupation of the property becomes illegal, there is some room for relying on the PIE legislation to protect continued occupation. Brits opines that the PIE legislation probably provides sufficient protection in the post-commencement phase.[117]

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115 Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 (PIE).

116 Boraine A "Does the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act of 1998 provide adequate family home protection to insolvent debtors or is it still PIE in the sky? (part 2)" (2020) 41(4) *Obiter* 871.

117 Brits R "Protection for homes in South African insolvency law" in *A collection of short papers by INSOL Early Research Academics (INSOL ERA)*(November 2021) *INSOL International* available at https://www.institutoiberoamericanoderechoconcursal.org/images/normas/organismos_internacionales/insol/insol-era-collection-2021.pdf (accessed 30 October 2025).

It is submitted that, despite these judicial efforts, a comprehensive policy approach remains necessary. Examining international models, such as the exclusion of some equity in the family home in the USA or the temporary protections implemented in the United Kingdom (UK), could inform South African law reform. Until such reforms are enacted, the courts may, in line with judgments such as the *Muronzi* one, need to rely on existing principles, even if outdated, to navigate these complex issues within the framework of a modern constitutional democracy that upholds a robust bill of rights. Apart from this, a statutory provision outlining the factors to be considered in an application for compulsory sequestration could provide courts with a tailored set of principles to guide the protection of a debtor's primary residence. This improvement would enable the court to determine whether sequestration is likely to render the debtor homeless.

3.4 Sequestration applications as a means to evade the judicial oversight applicable in ordinary execution proceedings

Self-serving sequestration proceedings launched while a viable remedy is available amount to an abuse of the sequestration procedure.[118] Developments in individual execution procedures make it difficult for creditors to foreclose on the primary residence when using the ordinary execution procedures. Some creditors began using sequestration, presumably to avoid these hurdles. This stratagem is not the intended purpose of sequestration. In *Fraser*, Peter AJ held that abusive execution offends against attaining two social values. One is the social value of ensuring that a debt is paid; the other is the social value of people being housed and having a home.[119] Peter AJ mentioned some factors that should be considered to identify abuse in execution proceedings and that may also assist in identifying abuse in sequestration proceedings:

> [T]he circumstances in which the debt was incurred: (whether the property was specially hypothecated as security for debt (possibly no abuse)[120] or

[118] *Steyn v Steyn NO and Others* 2024 (4) SA 285 (GP) at para 52 ("*Steyn")*.

[119] *Fraser* (2011) at paras 17 and 22.

[120] *Fraser* (2011) at paras 27 and 44. Peter AJ held that it could hardly be said that, in the ordinary course, there is an abuse of process where a judgment creditor seeks to execute against a person's home where

whether it was an independent debt (which should be scrutinised for abuse));[121] the amount of the debt (the amount must justify the loss to the debtor);[122] and the existence of reasonable alternatives to the satisfaction of the judgment debt without resorting to execution.[123]

In *Muronzi,* the unpaid debt of R49,104.11 was incurred from unpaid levies: it was thus an independent debt, and Mr Muronzi had already arranged to pay in instalments. Yet the body corporate still sought compulsory sequestration. As illustrated in the facts of *Muronzi* in paragraph 2 above, Strydom AJ identified the following factors in *Muronzi* that indicated an abuse of the sequestration process and the self-serving nature of the sequestration application in this case that needs to be emphasised, namely:

- The applicant creditor did not provide any evidence showing the relative expense of its chosen procedure, nor argued that the sequestration route was more expeditious.[124]

- The applicant creditor waited 10 months after the *nulla bona* return was issued to apply for sequestration. Thus, two years had passed between the receipt of the *nulla bona* return and the hearing of this application.[125]

- As there was a sole creditor, sequestration proceedings would provide no benefit over execution proceedings.[126]

- The "advantage" that sequestration would yield for the potential losses suffered by the hypothetical other creditors seemed more illusory than actual. Since the

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the debt arose from providing the funds to purchase the property, the property was specially hypothecated as security for such credit, and there has been a default on the debt.

121 *Fraser* (2011) 27. Peter AJ held that, where the judgment debt has arisen independently and without hypothecation of the property, the court would be more astute to enquire into the need to execute against the immovable property in coming to a determination whether or not to make an order as contemplated in section 26(3) of the Constitution.

122 *Fraser* (2011) at paras 22, 28 and 46. Peter AJ held that a greater degree of enquiry and scrutiny is called for where the judgment debt is unrelated to the property or the amount is relatively insignificant.

123 *Fraser* (2011) at para 43.

124 *Muronzi* (2024) at para 26. See para 2 above.

125 *Fraser* (2011) at para 26. See para 2 above.

126 *Fraser* (2011) at para 27. See para 2 above.

granting of the provisional order in October 2023, no such creditors had appeared. No evidence of voidable dispositions had emerged or been alleged by the applicant.[127]

- The applicant's motivation in launching the sequestration application was to sell the respondent's primary residence. This was clear from the references to it as an asset to be sold for the purposes of advantage to creditors, as well as from the applicant's expressed desire to "put a stop to this state of affairs" (that is, to the respondent not paying the levies).[128] This aim could only be achieved if the respondent no longer owned the unit in the sectional title scheme.

- This motive was also evident from the applicant's argument that the respondent would not be homeless because he owned a second home. This contention was legally unsound. It also exposed the drastic nature of sequestration: all assets would be attached, and not just one.[129] This motive showed a personal aim to remove the debtor from the unit. This aim was not the aim of the sequestration process. The objective of sequestration is not to punish the respondent but to ensure the equitable distribution of the assets of the insolvent among the creditors according to their order of preference.[130] In *Steyn v Steyn NO and Others*, Marumoagae AJ held that any purpose other than this is an abuse of the sequestration process.[131]

As a result of these factors, when abuse is suspected, judges like Strydom AJ are carefully considering the advantage requirement, such as using sequestration proceedings rather than individual execution. In these circumstances, the court will probably deny the drastic measure (that is, sequestration). The creditor could use

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[127] *Fraser* (2011) at para 28. See para 2 above.
[128] *Fraser* (2011) at para 44. See para 2 above.
[129] *Fraser* (2011) at para 36. See para 2 above.
[130] *Steyn* (2024) at para 53. See para 2 above.
[131] *Steyn* (2024) at para 53. See para 2 above.

individual execution or other means to satisfy the judgment debt, such as voluntary arrangements, debt review, or administration.[132] In *Gardee*,[133] Didcott J held that sequestration could not be said to be to the creditors' advantage unless it suited them better than any feasible and reasonable alternative. However, the possibility of an abuse of process in these circumstances depends on the facts of each case.[134] Clearly, where the judgment creditor wishes to evade the protection provided by rule 46A for the debtor, the discretion of the court, as explained and exercised in Strydom AJ's judgment, can protect the debtor.

3.5 Factors considered and the potential influence of the international practice of treating honest but unfortunate debtors differently

South African insolvency law does not distinguish between dishonest debtors and honest but unfortunate ones. Contrast this approach with those in two foreign countries. In the USA, an honest debtor who is adjudged bankrupt receives a discharge after three months.[135] In the UK, an adjudged bankrupt receives a discharge after 12 months.[136] In these foreign countries, the importance of distinguishing between different types of debtors is to ensure that only honest but unfortunate debtors receive a fresh start through a discharge of their pre-bankruptcy debts.[137] The debtor's conduct before and during the bankruptcy process is the determining factor in identifying the type of debtor.[138] The cause of the insolvency, the debtor's conduct of his or her affairs, and his or her co-operation with the trustee are among the critical factors considered in this respect.

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[132] In terms of the Magistrates' Courts Act 32 of 1944.

[133] *Gardee* (1978) at paras 1069–1070.

[134] *Fraser* (2011) at para 14.

[135] Rule 4004(c) of the Federal Rules of Bankruptcy Procedure.

[136] Section 279(1) of the Insolvency Act of 1986 (c 45). See Fletcher IF *The law of insolvency* 5th ed London: Sweet & Maxwell, Thomson Reuters (2017) at 338.

[137] Ferriell JT & Janger EJ *Understanding bankruptcy* 3rd ed New Providence, NJ: LexisNexis (2013) at 1–2. See also Department of Trade and Industry *The productivity and enterprise: Insolvency – A second chance* Cm 5234 (2001) at paras 1.2–1.6.

[138] In the UK, debtors whose conduct is not deserving of a fresh start are awarded a bankruptcy restriction order or bankruptcy undertaking, which may subject them to bankruptcy restrictions for up to 15 years from the date of discharge. See section 281A and schedule 4 of the Insolvency Act of 1986; Fletcher (2017) at 348–352. In the USA, dishonest debtors are punished with a denial of discharge. See section 727(a)(2) of the Bankruptcy Reform Act of 1978 (the Bankruptcy Code).

The chief requirement for a sequestration order in South African insolvency law is that it must confer an advantage on creditors. In standard practice, once the court is convinced that such an advantage exists, it exercises its discretion and grants a sequestration order. The cause of insolvency must be indicated in the founding documents for the sequestration application. But that cause (and the identification of factors beyond the debtor's control that caused the insolvency) is not a factor that, if considered, would ordinarily alter the outcome of the sequestration application in the debtor's favour.[139]

Even so, the courts are, in general, slowly moving towards balancing the interests of creditors, debtors, and their dependants in sequestration proceedings. The discretion given to the courts by the Insolvency Act allows them to exercise it by no longer rigidly focusing solely on creditors' interests but by weighing the interests of all parties affected by a sequestration and considering other viable remedies. Consequently, Strydom AJ in *Muronzi* considered the causes of Mr Moronzi's failure to pay his levies. These included the following:

- Mr Morunzi was an honest debtor. His papers indicated that he fell behind on payments due to sudden unemployment caused by the Covid-19 pandemic in 2020.

- The debt arose from unpaid levies for residential property used for the upkeep of the sectional title units. Strydom AJ held that whether or not Mr Morunzi paid the levies, the maintenance of the sectional title units would continue. Therefore, other creditors would not be disadvantaged, since sequestration would not take away any potential loss suffered.

[139] Mabe Z *A comparative analysis of an insolvent's capacity to earn a living within the South African constitutional context* (unpublished LLD thesis, University of Pretoria, 2022) at 85.

- Levies were subject to a special preference in the sale of immovable property. So, it did not matter whether the execution process used was sequestration or the standard execution procedure.

- Mr Morunzi tried to make payments and had made arrangements with the body corporate since obtaining other employment.

- He had lived in the unit with his school-going children for a long time.

- As for the amount of the debt, Strydom AJ held that a debt of less than R50,000 did not justify the loss of a home in which Mr Morunzi had lived for 22 years.

- Only one creditor was identified.

- In sequestration proceedings, all the debtor's assets (including immovable property in the form of the debtor's primary home) would be attached and sold. By contrast, in the standard execution procedure, only the one house that had been attached would be sold. Strydom AJ held that this difference showed the drastic nature of the sequestration process as compared to the standard execution procedure.

- No evidence was provided comparing the expenses to be incurred in sequestration and the expeditiousness of the process with the expenses and expeditiousness of the standard execution process.

- Most importantly, issuing a final sequestration order would lead to the debtor's homelessness, which was not justified, considering all the factors mentioned above.

From these factors, it can be inferred that the court concluded that sequestration would not give this type of debtor a fresh start to participate in economic activity, as sequestration could last up to 10 years in South Africa.[140] During that time, the debtor

[140] See section 127A of the Insolvency Act.

would be subjected to credit limitations and other disabilities.[141] He would be homeless, thus burdening society. The court thus reasoned that a fresh start for this type of honest debtor would not be sequestration, even though all the requirements for such an order had been met, but a refusal of the sequestration order, because, in any case, the sole creditor would not be disadvantaged if the usual execution route were taken.

In *Muronzi*, Strydom AJ focused on how a sequestration order would affect the debtor and his dependants. Mentioning *Jaftha*, she said that while the rights of a creditor to payment are important, judicial oversight should be exercised where a person's section 26 rights stand to be affected, and the courts are duty-bound to do so. In this regard, no emphasis was placed on whether the insolvent whose section 26 rights were at risk was an honest or dishonest debtor. It was held in *Fraser* that the right affected determines the duty, not the nature of the proceedings.[142] Therefore, it is submitted that the courts are obliged to protect the section 26 rights of all debtors (even dishonest ones) and other occupants living with them.

4 CONCLUSION

Primary-residence protection can be considered from the perspective of the creditor or debtor. Here, the issue arose primarily from the perspective of the creditor, the applicant in *Muronzi*. It viewed compulsory sequestration as the more appropriate method of extracting payment. This creditor cannot be faulted for using sequestration where good reason exists. But where the individual procedure is available and the creditor chooses compulsory sequestration, the courts should consider various issues. These include the drastic nature of sequestration, the benefits derived from this process compared to the individual execution procedure, and the possibility of abuse. The *Muronzi* court correctly

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[141] Roestoff M "Insolvency restrictions, disabilities and disqualifications in South African consumer insolvency law: A legal comparative perspective" (2018) 81(3) *Journal of Contemporary Roman-Dutch Law* 393 at 399.

[142] In *Fraser*, the court considered the amount of the debt (R986,853.87) and the fact that the property was specially hypothecated as security for the debt. Under these circumstances, the court held that a proper case had been made out for the grant of default judgment and that the prayer seeking an order declaring the property executable for the judgment debt was not an abuse. See *Fraser* at para 52.

applied the advantage-to-creditors principle in this context, which prevented the more drastic consequences that sequestration would impose on the debtor.

It is submitted that the question of the abuse of process becomes relevant if the sequestration procedure is used where the individual execution procedure could have achieved the same results, and possibly at less expense, thereby avoiding all the consequences that follow for the debtor and perhaps even other creditors. A further consideration is the additional burden placed on state resources. The Master's office, for one, will become involved in the administration of such an insolvent estate. Abuse becomes even more evident where the aim of using the sequestration procedure is to avoid the consideration of the rules of court when levying execution against the debtor's primary residence.

The matter may also be considered from the debtor's perspective. The objections to the sequestration stated above continue to apply. The further question arises: How far does South African law protect the section 26 right to housing once the estate has been sequestrated following a compulsory sequestration application? No direct, dedicated provision can be relied on by a court hearing this application. Yet various avenues are being considered by judges who appear mindful of the implications of the *Jaftha* case. In the *Muronzi* judgment, the court in fact gave effect to *Jaftha* by applying the well-known requirements of an application for sequestration (that is, the advantage to creditors) and by exercising its judicial discretion in view of the facts of the case. To this end, and by denying the sequestration order, the court directed the applicant creditor towards the individual execution procedure, should it decide to continue with the matter. Rule 46 would then apply. In this regard and – it must be emphasised – on the basis of the facts of the case, denying the sequestration order would mean in effect that execution against the property had to be considered in terms of rule 46 in the obvious debt-enforcement procedure left for the executing creditor.

Finally, it is submitted that although there are ways to ensure section 26 compliance when compulsory sequestration is used – which may inevitably result in the debtor losing his or her primary residence and potentially becoming homeless – the factors which a court considers when declaring such property executable under individual debt-enforcement procedures may also be relevant in the context of sequestration. For the time being, however, it appears that there are some alternative ways to protect a debtor and his or her dependants from becoming homeless as a result of sequestration.

AUTHOR CONTRIBUTIONS

Both authors conceptualised and developed the manuscript. Author 1 was responsible for drafting sections 1, 2, 3.1, 3.2, 3.4 and 3.5. Author 2 was responsible for sections 3.3 and 3.5. Author 1 contributed to editing the manuscript, and both authors contributed to the finalisation of the article.

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