REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 32700/2013

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

14/10/2014 .....

In the matter between:

ABSA BANK LIMITED Applicant

and

LEKUKU, DANIEL Respondent

JUDGMENT

MAKGOBA J and VICTOR J:

[1] Judge President Mlambo constituted this Full Bench to deal with the concerns by Banks and in particular Absa Bank Ltd (the Bank) about the variable approaches adopted by Judges in this Division when adjudicating unopposed applications to declare a primary residence specially executable. The Bank has also challenged the legality of the practice directives in particular within the context of foreclosures. Banks other than the applicant did not wish to join in these proceedings but wished to await the outcome of this application. Adv S Wilson of the Socio-Economic Rights Institute of South Africa (SERI) has assisted the court in these proceedings as *amicus curiae*.

Issues for determination by the Full Bench as raised by the Bank

[2] There is a challenge to the legality of three provisions of chapter 10.17 of the Practice Manual of the Gauteng Local Division of the High Court. In particular the challenge is to the requirement that service of the summons in seeking foreclosure is to be personal where possible thus elevating the foreclosure process to a status matter. Secondly the Practice Directive provides that in the absence of personal service the Bank has to return to court to obtain a further direction on service such as service on a Saturday or service at the debtor's place of employment thus escalating costs.

[3] Thirdly, the Bank submits that in the face of a *domicilium citandi* clause in the agreement, the service requirement in the Practice Directive conflicts with the substantive law and the principle of *stare decisis*. Historically the Supreme Court of Appeal has accepted that service on a *domicilium citandi* without service on a person is sufficient service. In the light of this approach the Banks are of the view that the

principle of *stare decisis* is being disregarded under the guise of the discretion afforded in Rule 4(10) of the Uniform Rules of Court and Chapter 10.17 of the Practice Manual. The argument is that the High Court is creating substantive law and this can only be done by the Legislature, the Supreme Court of Appeal or the Constitutional Court.

[4] An ancillary issue raised by the Bank is that the service as set out in chapter 10.17 of the Practice Directive offended the principle of *pacta sunt servanda*. Where the parties had agreed to the method of service in respect of the *domicilium citandi,* the Bank had difficulty with the requirement of personal service or service on a Saturday or at the debtor's place of employment as required by Meyer J in *First Rand Bank Ltd v Powell* [2012] ZAGPJHC 20 (6 March 2012).

[5] A further difficulty raised by the Bank was the perception that in primary residential foreclosure matters, the courts have become courts of equity in that they have interfered with an individual's right to contract under the guise of applying principles of fairness which were indefinable and applied differently by different judges. The concern by the Bank is that the High Court in these foreclosure matters, on the basis of principles of equity, is utilising the Practice Directive to change the substantive law to the extent that it amounts to an interference with the very Rule of Law itself. The Bank is concerned that importing this concept of equity introduces a tension between Equity versus the Law versus Constitutionalism.

Stare Decisis

[6] The Bank's contention that the practice directive in the context of foreclosure is a breach of the doctrine of *stare decisis* and an interference with the Rule of Law must be assessed in the light of evolving constitutional principles. In *Camps Bay Ratepayers' and Residents' Association v Harrison* 2011 (4) SA 42 (CC) para 28, Brand AJ stated:

> 'certainty, predictability, reliability, equality, uniformity, convenience: these are the principal advantages to be gained by a legal system from the principle of stare decisis. It is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution. To deviate from this rule is to invite legal chaos.'

[7] The Practice Directive on foreclosures in this division was developed to give substance to its judicial oversight role in foreclosure matters as intended by the Constitutional Court. It follows inevitably therefore that the development of the Practice Directive should be congruent with the evolving constitutional jurisprudence. The Bank has been unable to submit any persuasive argument to demonstrate that this particular Practice Directive in foreclosure matters is not in accordance with the principles referred to in *Camps Bay* supra. Therefore the Practice Directive on foreclosures matters is not in breach of the *stare decisis* doctrine.

[8] The higher courts have always recognised the principle of discretion in matters of service. In *Arendsnes Sweefspoor CC v Botha* 2013 (5) SA 399 (SCA), Shongwe JA in dealing with service on a close corporation reiterated that the court has a discretion to determine, on the facts, whether service was good. He stated at para 13:

> 'it is trite that each case must be dealt with on its own particular facts and merits. There is no differentiation or exception. The court, if service is contested, must determine whether service was good and legally recognised or substantially compliant with the rules of service.'

It follows therefore that when the High Court scrutinises and considers the question of service in foreclosure matters by introducing the guidance of a Practice Directive in order to give meaning to its judicial oversight role, the principle of *stare decisis* is not breached. It is clear that the High Court has to deal with each case on its facts and does have a discretion guided by constitutional principles.

Background

[9] This Local Division of the High Court is situated in down town Johannesburg and is in the heart of one of the biggest banking and commercial hubs in South Africa. Not unsurprisingly it has had to adjudicate the substantial rise in foreclosure applications. These applications have at times exceeded hundreds per week.

[10] In the main the judgements are taken by default as debtors fail to defend the claims in the summonses or negotiate forbearance with the banks. In this era of high unemployment, consumer over-indebtedness and acute housing shortages together with the incremental constitutional jurisprudence in relation to the housing rights contained in s26 of the Constitution, different approaches by the Bench on the question of executability of a primary residence emerged. There was a discernible reluctance by some members of the Bench to order the executability of a primary residence where the arrears were low or just a few months in arrears and where there was no overt indication of debtor delinquency. This led to a closer scrutiny of

the pleadings, the paper work, a focus on hearsay averments in the pleadings and the inadequate nature of the foreclosure information resulting in postponements and refusal of the foreclosure applications.

[11] It was inevitable that differing approaches would result when implementing the evolving constitutional jurisprudence. Closer scrutiny of procedures would follow and differing views on issues such as the proportionality between low arrears and the final effect of foreclosure within the context of the relevant socio-economic factors and rights emerged.

[12] The relevant paragraphs of Chapter 10.17 of the Practice Directive read:

> **'10.17 Foreclosure (And Execution when property is, or appears to be the defendant's primary home)**
>
> **1 Without derogating from the requirements regarding applications contained in the Rules Regulating the Conduct of the Proceedings of the Several Provisional and Local Divisions of the High Court of South Africa ('Rule' or 'the Rules') or Chapter 9 of the Practice Manual of the South Gauteng High Court ('Practice Manual'), in every matter where a judgment is sought for execution against immovable property, which might be the defendant's primary residence or home, an affidavit is required in which the matters set out below on this para 1, are stated. The affidavit must contain the following:**
>
> **.....**
>
> **1.6 That there is compliance with Folscher**
>
> **Note: When amounts are low, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of x months and that notice of set down should again be served.**
>
> **1.7.1 That there was personal service of the process upon the consumer.**
>
> **1.7.2 If personal service is not possible, that there was such service as was authorised by the Court. (Powell para 7.9). (See para 5 below.)**
>
> **.....**
>
> **5 Order if para 1.7.1 is not complied with:**
>
> **5.1 The application herein may be served at the respondent's place of employment, and only if a return of non-service is rendered in respect of such service, upon the respondent's residential address on a Saturday upon a person not less than 16 years of age.'**

[13] The practical effect of paragraph 10.17.1.7.1 read with paragraph 10.17.1.5 is that if the process cannot be served personally on the consumer, the applicant has to approach the court for an order that the process may be served on the consumer's place of work, or upon their place of residence on a Saturday. This means a further court application with further affidavits and the consequent costs. This is a cause of concern to both the Bank and the *amicus curiae*.

The Evolving Constitutional Jurisprudence on Residential Foreclosures

[14] The development of the common law that resulted in the justiciability of the traditional relationship between debtor and creditor based on socio- economic rights had its genesis in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) at para 40 where Mogoro J stated:

> 'It is difficult to see how the collection of trifling debts in this case can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated, possibly permanently, especially where other methods exist to enable recovery of the debt. This is not to say that every sale in execution to satisfy a trifling debt will be unreasonable and unjustifiable. There are a number of difficulties with such a conclusion. In the first place, it is not easy to adopt a uniform definition of the concept of a 'trifling debt'. What might seem trifling to an affluent observer might not be trifling to a poor creditor reliant on his or her ability to recover debts. Indeed, not all creditors are affluent and to many who use the execution process, it constitutes the only mechanism to recover outstanding debts.'

[15] In *Standard Bank v Saunderson* 2006 (2) SA 264 (SCA) it was held that it is 'desirable to lay down a rule of practice requiring a summons in which an order for execution against immovable property is sought to inform the defendant that his or her right of access to adequate housing might be implicated by such an order.' In *Gundwana v Steko Development* 2011 (3) SA 608 (CC), it was held that judicial

oversight in the executability of a residence was required thus changing the requirement that the Registrar issue the writ.

[16] In *First Rand Bank Limited v Folscher* 2011 (4) SA 314 (GNP), in dealing with the amendment to Rule 46(1)(a)(ii) requiring judicial oversight the Full Bench suggested a comprehensive list of issues be considered by the court when deciding whether a writ should be issued or not. These include:

> 'whether the mortgaged property is the debtor's primary residence; the circumstances under which the debt was incurred; the arrears outstanding under the bond when the latter was called up; the arrears on the date default judgment is sought; the total amount owing in respect of which execution is sought; the debtor's payment history; the relative financial strengths of the creditor and the debtor; whether any possibilities exist, that the debtor's liabilities to the creditor may be liquidated within a reasonable period, without having to execute against the debtor's residence; the proportionality of prejudice the creditor might suffer if execution were to be refused, compared to the prejudice the debtor would suffer if execution went ahead and he lost his home; whether any notice in terms of s 129 of the National Credit Act 34 of 2005 was sent to the debtor prior to the institution of action; the debtor's reaction to such notice, if any; the period of time that elapsed between delivery of such notice and the institution of action; whether the property sought to be declared executable was acquired by means of, or with the aid of, a State subsidy; whether the property is occupied or not; whether the property is in fact occupied by the debtor; whether the immovable property was acquired with moneys advanced by the creditor or not; whether the debtor will lose access to housing as a result of execution being levied against his home; whether there is any indication that the creditor has instituted action with an ulterior motive or not; the position of the debtor's dependants and other occupants of the house, although in each case these facts will have to be established as being legally relevant of the execution process against property especially hypothecated, which is the 'primary residence' of the judgment debtor and whether the protection of s 26(1) of the Constitution is extended to the debtor who may lose what is usually his only home.'

Foreclosure Practice Directives and the Substantive law of Service

[17] In order to determine whether the effect of the form of service as contained in the new Practice Directive impinges on the substantive law, it is necessary to consider whether a High Court in introducing the Practice Directive is embarking

upon a process which seeks to expand the substantive law or whether it is dealing with procedure only, or whether it has become necessary to develop the common law in relation to the service of process at the address in the *domicilium* clause.

[18] The distinction between substantive law and procedural law has been analysed in detail in a number of cases. In *Universal City Studios Inc and Others v Network Video (Pty) Ltd* 1986 (2) SA 734 (A) Corbett JA in dealing with a High Court's power to regulate its own process stated:

> 'There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice (see Stuart v Ismail 1942 AD 327; Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972 (1) SA 773 (A) at 783A - G; also Ex parte Millsite Investment Co (Pty) Ltd 1965 (2) SA 582 (T) H at 585 - 6; Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another 1979 (2) SA 457 (W) at 461F - 462H). It is probably true that, as remarked in the Cerebos Food case (at 173E), the Court does not have an inherent power to create substantive law, but the dividing line between substantive and adjectival law is not always an easy one to draw (cf Minister of the Interior and Another v Harris and Others 1952 (4) SA 769 (A) at 781C - H; Botes v Van Deventer 1966 (3) SA 182 (A) at 198H; Yew Bon Tew v Kenderaan Bas Mara [1982] 3 All ER 833 (PC) at 836B; Salmond Jurisprudence 11th ed at 503 - 4; Paton Jurisprudence 4th ed para 127). Salmond (op cit at 504) states that: "Substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained." '

[19] In *Mukaddam v Pioneer Foods (Pty) Ltd and Others* 2013 (5) SA 89 (CC) Jafta J at para 42 in dealing with s173 of the Constitution stated:

> 'Section 173 makes plain that each of the superior courts has an inherent power to protect and regulate its own process and to develop the common law on matters of procedure, consistently with the interests of justice. The language of the section suggests that each court is responsible and controls the process through which cases are presented to it for adjudication. The reason for this is that a court before which a case is brought is better placed to regulate and manage the procedure to be followed in each case so as to achieve a just outcome. For a proper adjudication to take place, it is not unusual for the facts of a particular case to require a procedure different from the one normally followed. When this happens it is the court in which the case is instituted that decides whether a specific procedure should be permitted.'

[20] *Cadac (Pty) Ltd v Weber-Stephen Products Co and Others* 2011 (3) SA 570 (SCA) Harms DP stated:

> 'in the light of a court's inherent jurisdiction to regulate its own process in the interests of justice — a power derived from common law and now entrenched in the Constitution (s 173) — I can see no justification for refusing to extend the practice to other cases'.

[21] In *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA) in para 13 Bosielo JA stated:

> 'Our courts derive their power from the Constitution and the statutes that regulate them. Historically the Supreme Court (now the High Court), in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. That power is now enshrined in s173 of the Constitution. Citing Jacob Current Legal Problems, Freedman CJM adopted the following definition of 'inherent jurisdiction': ". . . the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of the law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."
>
> [14] Jerold Taitz succinctly describes the inherent jurisdiction of the High Court as follows in his book The Inherent Jurisdiction of the Supreme Court (1985) at 8 – 9: "This latter jurisdiction should be seen as those (unwritten) powers, ancillary to its common-law and statutory powers, without which the court would be unable to act in accordance with justice and good reason. The inherent powers of the court are quite separate and distinct from its common-law and its statutory powers, eg in the exercise of its inherent jurisdiction the Court may regulate its own procedure independently of the Rules of Court." '

[22] In the light of the above cases the High Court in issuing the Practice Directive is clearly entitled to regulate its own intimate process and does so not only based on the existing common law but is also entitled to do so by virtue of s173 of the Constitution. The Practice Directive is aimed at ensuring the proper administration of justice. The impact of the evolving constitutional jurisprudence makes it imperative

that foreclosure orders are not issued based on a positivistic jurisprudential model without regard to a critical realist enquiry into the effect and fairness of the foreclosure order.

[23] Accordingly, the Bank's reliance on *Greenberg v Khumalo and Another; Greenberg v Du Preez and Another* 2012 JOL 29170 (GSJ) as authority or justification for the exclusion of practice directives since it may deny a litigant a procedural right is misplaced in the light of the authorities on judicial oversight and is certainly not authority in matters of foreclosure. This court based on constitutional principles and the inherent common law right principles referred to above clearly entitles the Judge President and the Deputy Judge President to issue Practice Directives where appropriate.

[24] Distinguishing a primary residence foreclosure from ordinary motion proceedings is not novel. There are several jurisdictions particularly in the United States of America where a foreclosure conference or foreclosure mediation is held before filing for default judgment. The intervention by the courts prior to foreclosure is really a procedural intervention into the sphere of socio-economic rights. It is also a procedural intervention into the contractual debtor and creditor relationship. In our view the procedural intervention does not change the contractual debtor creditor relationship; it merely guides its own procedure in relation to the *domicilium* clause when a debtor or creditor wishes to exercise the right.

[25] The introduction of a procedural step in the service of process in our constitutional milieu serves as a safeguard that primary residences are not lost

through inadequate service. It does not undermine the *domicilium* clause as that address remains the central point where the creditor and the Deputy Sheriff must find the debtor. The question to be answered is whether the introduction of a procedural requirement running parallel with the *domicilium* clause is permissible. This issue should be analysed using the paradigm referred to in *Brisley v Drotsky* 2002 (4) SA 1 (SCA). The starting point is not whether the court has a discretion to refuse to enforce the *domicilium* clause but whether the introduction of such a procedural step concerning the *domicilium* clause offends the commercial transaction in an unduly trammelled manner. No case has been made out that defining the service of process in foreclosure matters by way of Practice Directive restricts commercialism or results in a court assisting a party to go back on the express provisions of the contract.

[26] Accordingly to the extent that it is necessary this court is required to develop the common law around the implementation of the *domicilium citandi* clause. Such a development must commence at the High Court level.

[27] In *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) O'Regan J in para 15 and 16 stated:

> 'Our Constitution requires a Court, when developing the common law, to promote the spirit, purport and objects of the Constitution. The pervasive normative effect of our Constitution was acknowledged by this Court in *Carmichele v Minister of Safety and Security and Another* (Centre for Applied Legal Studies Intervening) where it held that: "Our Constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective, normative value system.. ..The influence of the fundamental constitutional values on the common law is mandated by s 39(2) of the Constitution. It is within the matrix of this objective normative value system that the common law must be developed." In addition to s 39(2) of the Constitution, s 8 of the Bill of Rights makes it plain that the judiciary is bound by the provisions of the Bill of Rights in the performance of its functions. The

> cumulative effect of these constitutional provisions is to create an expressly normative legal system founded on the norms articulated in our Constitution. [16].. In *S v Thebus and Another*, Moseneke J noted that there were at least two instances in which the need to develop the common law under s 39(2) of the Constitution could arise. "The first would be when a rule of the common law is inconsistent with a constitutional provision. Repugnancy of this kind would compel an adaptation of the common law to resolve the inconsistency. The second possibility arises even when a rule of the common law is not inconsistent with a specific constitutional provision but may fall short of its spirit, purport and objects. Then, the common law must be adapted so that it grows in harmony with the "objective normative value system" found in the Constitution." '

[28] In promoting the spirit, purport and object of the Bill of Rights its application in the common law of contract is necessary. A procedural requirement extending the application of the *domicilium* clause must of necessity be introduced where appropriate. Cameron JA as he then was in *Brisley vs Drotsky* (supra) stated:

> 'The Constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual freedom, and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity.'

[29] The balance between contractual freedom and the framework of the debtor creditor relationship and the foreclosure process is not imperilled by the development of the common law in respect of the common law principles of a *domicilium citandi* clause. This extension of the common law in relation to the proper application of the *domicilium* clause in a foreclosure matter is a highly desirable and a necessary infusion in the common law. The introduction of the Practice Directive in relation to foreclosure matters involving a primary residence the common law is to be developed. There is a constitutional imperative that the creditor and debtor relationship within this context of foreclosure be subjected to greater scrutiny when service of process is at issue. Courts are faced with hundreds of foreclosure applications per month where people lose their homes. It is no longer appropriate

that this happens without a further requirement of heightened focus on whether the debtor received the summons.

[30] The *amicus curiae* submitted that contractual agreements which cater for future legal proceedings do not oust a court's jurisdiction to determine how those proceedings are to be conducted. In choosing a *domicilium* the debtor is faced with *fait accompli.* It does not mean that when a debtor selects a *domicilium* he or she knowingly waives the right to personal service where possible. Accordingly, additional service requirements around the *domicilium* clause in foreclosure matters do not undermine the *pacta sunt servanda* principle. The additional service requirement does not violate a public policy principle.

[31] The effect of additional service does not mean that either party is going back on their word. In *African Dawn Property Finance 2 (Pty) Ltd v Dreams Travel and Tours CC and others* 2011 (3) SA 511 (SCA) Ponnan JA at para 15 and 16 stated:

> 'Contracts valid in form are *prima facie* enforceable in South African law and effect will be given to them unless grounds for their avoidance are proved (per Didcott J in Roffey v Catterall, Edwards & Goudré (Pty) Ltd). But, as Cameron JA correctly observed, our Constitution "requires us to employ its values to achieve a balance that strikes down the unacceptable excesses of freedom of contract, while seeking to permit individuals the dignity and autonomy of regulating their own lives". Indeed, on appeal to it (Barkhuizen v Napier) the majority of the Constitutional Court (per Ngcobo J) made that much clear in these terms (para 57): "On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim *pacta sunt servanda*, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity."

> [16] Our courts have, however, recognised that pactum sunt servanda is not a holy cow (Bredenkamp and Others v Standard Bank). As Ngcobo J observed in Barkhuizen (para 87): *"Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle. But the general rule that agreements must be honoured cannot apply to immoral agreements which violate public policy. As indicated above, courts have recognised this and our Constitution re-enforces it." '

[32] It was submitted by the *amicus curiae* that the existence of a *domicilium* clause in a contract is *prima facie* indicative that *domicilium* service would ordinarily suffice, but it does not bind a court's discretion to require more, in particular such procedural intervention by the courts. In cases where a person faces the loss of a home this pre-eminently entitles a court where there may be an infringement of his or her rights under s26 (1) of the Constitution, to decide, as in the Practice Directive that personal service should be attempted if possible. Although the Constitutional Court has not dealt with the constitutionality of a *domicilium* clause in bonded property, sufficient jurisprudence has evolved to justify a High Court engaging strategically with the Banks on issues of foreclosure, whether it be the question of service or a proportionality assessment of the amount owing to justify the foreclosure.

[33] The *amicus curiae* submits that this discretion exists separately and independently from the *domicilium* clause of a contract. The existence of such a clause may be taken into account, but it is not determinative. Reliance is placed on *First Rand Bank Limited v Gazu* 2011 (1) SA 45 KZP, where Lopes J commented that:

> 'It is notorious that, in dealing with the banks, mortgage bonds and other formal documents are presented to their clients on a "take it or leave it" basis, and the ability of the other contracting party to balance out the

unequal bargaining power on the mortgage bond is extremely limited, if not entirely excluded.'

Low Arrears, Proportionality and Foreclosure

[34] An important difficulty raised by the Bank was the issue of low arrears and the varying approaches by different judges as to what the benchmark is for arrears being too low to justify foreclosure. The difficulty with the differing approaches by the Bench results in the banks not knowing in advance whether foreclosure will be granted. A court will always have a discretion based on the facts before it as to what amount is proportional to the final effect and consequence of foreclosure. In carrying out this assessment, the court in each and every case carries out a unique enquiry in exercising its judicial oversight. To lay down a standard approach will be contrary to the constitutional imperative of judicial oversight in foreclosure matters.

[35] In *ABSA Bank v Ntsane* 2007 (3) SA 554 (T) at para 38, Bertlesman J declined to authorise execution against a debtor when the arrears at the time the matter came before him were a mere R18.46. Similarly in *Firstrand Bank Ltd v Maleka and three similar cases* 2010 (1) SA 143 GSJ, CJ Claassen also refused foreclosure where the arrears were low.

[36] It would be inappropriate to define when arrears are low for the purposes of Practice Directive 10.17.1.6 as this would unduly restrict a discretion which a judge must exercise in the particular circumstances of each case. This Full Bench cannot give guidance in this regard as the very purpose of the judicial oversight requires an enquiry and a strategic engagement with the parties. The *amicus curiae* submitted

that the overriding question is whether execution is proportionate, having regard to all the relevant circumstances. The *amicus curiae* submitted that there is no definitive number or easy calculation. If there were, claims for execution against residential property would be liquidated claims. The underlying basis of the *Jaftha* and *Gundwana* decisions is that they are not.

[37] In seeking foreclosure in respect of low arrears the Banks must examine each case and advise the court what they have done to avoid foreclosure of a primary residence in particular with reference to engagement with the debtor at a 'with prejudice' level to avoid foreclosure. This needs to be no more than a paragraph or two in the affidavit seeking foreclosure. To use computer software jargon, it should not be a 'cut and paste' exercise. This court need give no further guidance as to what should be in the affidavit justifying foreclosure. Ample guidance has been given in *Folscher* supra and the principles emerging from all the case referred to, as well as Chapter 10 of the Practice Directive. Banks having considered all the facts should only bring a foreclosure application if the execution would not be disproportionate.

Conclusion

[38] In conclusion there will always be a variance in whether a foreclosure order is granted or not. The nature of foreclosure applications and the constitutional imperative of judicial oversight inevitably leads to these differences.

[39] In the light of the request from the Bank during oral argument that if the Practice Directive is to remain in place it be simplified to avoid returning to court for direction on service thus necessitating the amendment of the Practice Directive number 10.17.1.7. In addition on the question of the triggering point on low arrears

and the number of months in arrears, this court adds to the long line of cases that suggest points for consideration before granting foreclosure. This court adds the principle of proportionality. In dealing with proportionality the affidavit in support of foreclosure must still deal with the aspects referred to in *Folscher, Saunderson, Mortinson,*[1] *Dawood* [2] *Jessa*[3] and in addition deal with the principle of proportionality. On the question of proportionality the affidavit accompanying the foreclosure application must deal with the contacts with the debtor and attempts made to avoid foreclosure. This court also directs that in matters of low arrears a postponement of the matter for a period of 6 months be made in order for the mortgagors to report back on steps taken by them to avoid foreclosure.

The order that we make is:

Prayer 1

Chapter 10.17.1.7 of the Practice Directive is amended to read:

10.17.1.7 In matters where leave to execute against property which might be a person's home is sought, the affidavit shall reflect that **every reasonable effort** has been made to draw that person's attention to the proceedings, including, where possible, serving the foreclosure application on him or her personally or at the place of employment or on a Saturday on a person over the age of 16 at the *domicilium citandi.*

Prayer 2

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[1] Nedbank Ltd v Mortinson 2005(6) SA 462 (W) para 33.1
[2] Standard Bank v Dawood 2012(6) SA151 (WCC) para 37
[3] Nedbank Ltd v Jessa and Another 2012 (6) SA 166 CC para 12

10.17.5 This paragraph is deleted in its entirety.

Prayer 3

Chapter 10.17.1.6 of the Practice Directive is amended to read:

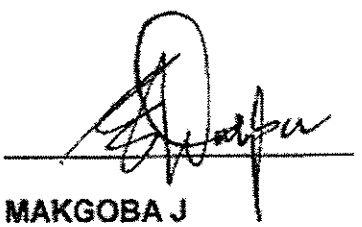
10.17.1.6.1 In respect of low arrears and period of arrears sufficient particularity must be included in the affidavit seeking foreclosure justifying the proportionality of foreclosure.

10.17.1.6.2 In the event that the applicant has not demonstrated the requisite proportionality the application may be postponed for a period of not less than 6 months and the application shall be duly amplified reporting back what further steps the applicant has taken to avoid foreclosure.

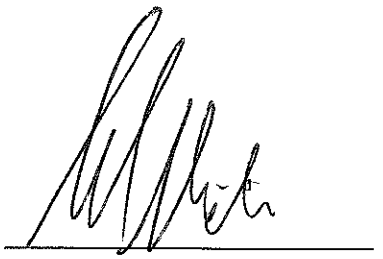
10.17.1.6.3 The order and the new notice of set down shall be served on the debtor.

Prayer 4

There shall be no order for costs.



MAKGOBA J



VICTOR J

Vally J

[40] I have read the judgment of my colleagues. I support most of its conclusions but respectfully disagree with some. I write separately in order to explain my reasoning.

[41] For a considerable time this Court has been inundated on a weekly basis with hundreds of applications for default judgments involving the foreclosure of a property which is the primary residence of the debtor and the debtor's family. The applicant in all cases is a bank which had advanced a loan to the debtor. The advancing of the loan is crucial for the debtor/homeowner, for without it she would be unable to purchase the property. In most cases the loan advancement takes the form of a bilateral contract between the debtor/homeowner and the creditor/bank. The contract is in all cases a standard one utilised by the particular bank for the loans it advances towards the purchase of the property. To protect its interests the bank requires that the property be hypothecated. Absent this, the loan would, in all probability, not be granted. The debtor agrees to the condition. The agreement caters for a monthly repayment of the loan. Failure by the debtor to meet a monthly repayment on the due date triggers an acceleration clause in terms of which the full outstanding amount becomes due. Sometimes the bank waits for a few months, during which period it tries to take steps to avert approaching the Court for relief. However, this does not halt the operation of the acceleration clause. When the bank decides that

its only option is to approach the Court it does so on the basis of the full outstanding amount, and not just on the amount of arrears, being due.

[42] In all these applications the banks tend to be represented by the same small set of attorneys and counsel. The applications from each bank are so frequent that they have become standardised. The same averments are found in most of the affidavits deposed to in support of the applications. In addition, the affidavits from each of the banks tend to be deposed to by the same employee of the particular bank seeking the order. The order that is sought is for money judgment against the debtor - the full outstanding amount on the loan and not just the arrears – as well as an order declaring the property executable. Once the order is granted the process spelt out in Rule 46 of the Uniform Rules of Court (the Rules) is set in motion.

[43] As stated above the applications are for default judgment. The banks deliver their summonses at the *domicilium* chosen by the debtor in the loan agreement. Often the debtor is not available to receive it. The sheriff renders a return which states:

> "This is to certify that on (date) at (time) at (address) being the chosen domicilium citandi executandi of the defendant, (name of defendant), a copy of the Combined Summons, Particulars of Claim and Annexures A to Z was served by affixing a copy to the outer door as the premises was found locked. After a diligent search and enquiry, no other manner of service was possible at the given address. Rule 4(1)(a)(iv)"

[44] Often the debtor fails to deliver a Notice of Intention to defend, as is required by the Rules, if she intends to oppose the relief claimed in the summons. The applicant bank then waits the necessary ten days, whereafter its attorneys seek a date from the registrar to set down the application for default judgment. As mentioned earlier, there are hundreds of such applications each week. The Judge presiding in the

unopposed motion court has to deal with all of them in that week. At times the counsel moving the applications does so in batches. If the orders are granted the debtors' primary residence is eventually sold in execution. The process continues unabated each week.

[45] Unsurprisingly, some of the matters re-appear on the Court roll either as applications for rescission of the judgment granted by default, or as applications to stay the sale in execution. As a result, Judges of this Division became concerned about the manner in which these applications found themselves on the roll, about the control they were having over the process and about whether justice was being served by the Court giving judgment in default in these circumstances, and ordering that the property be sold in execution.

[46] Eventually, the Court, per Meyer J, handed down judgment in *First Rand Bank Ltd v Powell*[4], which dealt with this issue. The Court, in *Powell*, highlighted the fact that every week this Court deals with hundreds of applications where a bank seeks an order allowing it to sell a person's home, but where the summons had not reached the defendant, as service had taken place in a manner similar to that referred to in paragraph 43 above. The Court found that such service was inadequate as the order had a direct impact on the debtor's constitutionally entrenched right to housing. The Court relied on the findings of the Constitutional Court (CC) in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz* and *Others*[5] and *Gundwana v Steko Development and Others.*[6] The Court concluded that the constitutional right of the debtor called for caution to be exercised when considering

[4] [2012] ZAGPJHC 20 (6 March 2012)
[5] 2005 (2) SA 140 (CC)
[6] 2011 (3) SA 608 (CC)

whether the service of the process had been effective, even where there had been compliance with the provisions of Rule 4.[7] It further found that such service was inadequate. In arriving at this conclusion the Court took particular note of the fact that service upon a person has the benefit of the sheriff explaining the nature and contents of the summons to the person upon whom service is being effected. The caution exercised is warranted as the debtor/defendant and her family, which may include the elderly, the infirm and the very young, may well be rendered homeless should the order be granted. The exercise of caution resulted in the Court issuing a rule *nisi* calling upon the defendant to furnish reasons as to why her property should not be declared executable, and ordering that the rule *nisi* be served upon the defendant's place of employment, and "*only if a return of non service is rendered in respect of such service, upon the defendant's domicilium or residential address on a Saturday.*"[8]

[47] *Powell* failed to stem the huge number of applications for default judgment where it is sought, *inter alia*, that the primary residence of the defendant and her family be declared executable and where the summons was only served by "*affixing it to the outer door*". It was not uncommon for the Court to refuse to grant the order sought as there was no indication that the summons was brought to the attention of the defendant. Invariably, the matter would be postponed *sine die* or removed from the roll in order to allow the plaintiff/bank to attempt to serve the summons on the defendant at her place of employment, and if that failed, on a person at the chosen *domiciluim*. This would be done. However, the consequence of this was that valuable judicial resources were expended in attending to the matter without any progress

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[7] *Powell*, fn 4, at [10]
[8] Id at [12]

being made towards its finalisation, as the plaintiff was in no better position after the matter was postponed *sine die* or removed from the roll than it would have been had it just taken a further step towards effecting personal service or service in terms of *Powell*. As a result, the Deputy Judge-President, after consulting with the Judges of this Division, decided to add Chapter 10.17 to the Practice Manual applicable to the Division in the hope that it would resolve this problem. Chapter 10.17 of the Practice Manual was issued in early 2013. It came into effect on 22 April 2013.

[48] Chapter 10.17 aims to give effect to the numerous decisions that arose in the Courts, and which in one form or another touched on the many issues involved in the execution of the primary residence of the debtor and her family. These are: *Standard Bank of South Africa Ltd v Gordon and Others*[9]; *Standard Bank of South Africa Ltd v Saunderson and Others*[10]; *Nedbank Ltd v Jessa and Another*[11]; *Standard Bank v Dawood*[12]; *Nedbank Ltd v Mortinson*[13]; *First Rand Bank Ltd v Folscher and Another, and similar matters*[14] and, of course, *Powell*[15]

[49] The relevant paragraphs of Chapter 10.17 read:

> "10.17 Foreclosure (And Execution when property is, or appears to be the defendant's primary home)
>
> 1 Without derogating from the requirements regarding applications contained in the Rules Regulating the Conduct of the Proceedings of the Several Provisional and Local Divisions of the High Court of South Africa ('Rule' or 'the Rules') or Chapter 9 of the Practice Manual of the South Gauteng High Court ('Practice Manual'), in every matter where a judgment is sought for execution against immovable property, which might be the defendant's primary residence or home, an affidavit is

[9] [2011] JOL 27838 (GSJ)
[10] 2006 (2) SA 264 (SCA)
[11] 2012 (6) SA 166 (CC)
[12] 2012 (6) SA 151 (WCC)
[13] 2005 (6) SA 462 (W)
[14] 2011 (4) SA 314 (GNP)
[15] Above, fn. 4

required in which the matters set out below on this para 1, are stated. The affidavit must contain the following:

...

1.6 That there is compliance with *Folscher*[16]

Note: When amounts are low, the court may, in its discretion, postpone the matter with an order that it may not be set down before the expiry of x months and that notice of set down should again be served. (There is reference to various judgments in this regard)

1.7.1 That there was personal service of the process upon the consumer.

1.7.2 If personal service is not possible, that there was such service as was authorised by the Court. (*Powell* para 7.9). (See para 5 below.)

...

5 Order if para 1.7.1 is not complied with:

5.1 The application herein may be served at the respondent's place of employment, and only if a return of non-service is rendered in respect of such service, upon the respondent's residential address on a Saturday upon a person not less than 16 years of age."

[50] The banks have often taken issue with some of the provisions of this chapter. The provisions that they are aggrieved about are sub-paragraph 1.6 and sub-paragraphs 1.7.1 and 1.7.2. Sub-paragraphs 1.7.1 and 1.7.2 deal with the issue regarding the service of the summons. Often this issue became the main focus of the Court hearing the application.

[51] Notwithstanding the findings in *Powell,* the banks turned their attention to these sub-paragraphs and pointed out that, as the Practice Manual is merely a guideline for Courts, it does not have the force of law. They asked that service by affixing to the outer or principal door of the chosen *domicilium* of the debtor be accepted, as it

[16] *Folscher*, fn 14

complied with the provisions of Rule 4(1)(a)(iv). This is the view adopted by the applicant, Absa Bank (Absa), in this matter. Absa claims that sub-paragraphs 1.7.1 and 1.7.2 of Chapter 10.17 is legally incompetent and, therefore, not binding upon it. As a result, the failure on its part to comply therewith should not prejudice its claim to have the primary residence of the debtor declared executable. This Court was constituted to consider the claim of Absa. In this case, Absa did not serve the summons personally on the debtor, Mr Lekuku. It served it on a person at his chosen *domicilium.* Mr Lekuku failed to deliver a Notice of Intention to Defend, which resulted in Absa seeking default judgment against him. When the matter was called, the Court, per Sutherland J, referred it to the Judge-President for him to consider establishing a full-bench to hear it. This was so that the issue of the service could be examined in thorough detail in the hope that the problem of this Court being inundated with these applications, where there is uncertainty as to whether the summons came to the attention of the debtor, can be resolved. The Judge-President decided to constitute this Bench to deal with the application. By the time the matter was called, Mr Lekuku had come to learn of the application and had attended Court. He had not appointed any legal representative(s) to assist him. However, as the Court was constituted to consider in particular the issues regarding the validity of sub-paragraphs 1.6 and 1.7.1 and 1.7.2 of Chapter 10.17, and as Absa believed that these issues should be resolved since they affect so many matters it brings to this Court, it asked that they be decided. Mr Lekuku, being unrepresented, elected not to participate in the hearing on these issues. However, when the matter was postponed by Sutherland J, it came to the attention of the Socio-Economic Rights Institute (Seri) which, thereafter, sought and was granted the right to act as *amicus curiae*. It is a non-governmental organisation. Its interest lies in the fact that it is often approached

by persons who seek assistance because their primary residences are either on the verge of being sold in execution, or have already been sold in execution, pursuant to a Court Order granted in default. I am indebted to Seri and its counsel for the well balanced written submissions provided and for their general assistance in this matter.

[52] In support of its claims Absa relied, *inter alia*, upon certain *dicta* in a judgment of Potgieter AJ in the matter of *Greenberg v Khumalo and Another; Greenberg v Du Preez and Another*[17]. In that matter the applicants failed to comply with the terms of paragraph 5 of Chapter 9.22 of the Practice Manual in that they had failed to appear in Court when the matter was first called, resulting in it being struck from the roll in the Unopposed Court. The provisions of paragraph 5 of Chapter 9.22 precluded them from re-enrolling the matter without filing an affidavit explaining why they failed to make an appearance. When the applicant, Mr Greenberg, failed to comply with paragraph 5 of Chapter 9.22 the respondent, Mr Khumalo, asked for the matter to be struck from the roll, and that Mr. Greenberg be ordered to pay the wasted costs as well as to file the necessary affidavit before enrolling the matter again. Potgieter AJ held that paragraph 5 of Chapter 9.22 was inconsistent with Rule 6(5)(f) which only required a party to apply to the registrar to allocate a date for hearing. The requirement that Mr. Greenberg, who defaulted by failing to appear on a previous occasion, should file an affidavit explaining the default before being allowed to re-enrol the matter is an imposition of an additional burden upon him which, according to Potgieter AJ, is not warranted. He questioned the legality of the Deputy Judge-President's decision to issue paragraph 5 of Chapter 9.22 and in this regard said:

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[17] 2012 JOL 29170 (GSJ)

> "I do not see where the power to impose a requirement in addition to and inconsistent with that contained in Rule 6(5)(f) of the Rules of Court derives from, unless it has to do with the prevention of the abuse of this rule. However, non-appearance when a matter allocated for hearing is called does not to my mind without more constitute an abuse of process which requires or justifies the inherent power of the High Court to be harnessed to supplement the requirements of Rule 6(5)(f) on a blanket basis.
> On my analysis the practice directive under discussion is procedurally incompetent, has no legal force or effect and should not be applied by either the registrar or a Court to constitute a bar to (or additional requirement for) the allocation of a date (enrolment) for the hearing of an application."[18]

[53] He further found that "*neither a party nor a Court nor any 'practice' can simply avoid the application of the Rules of Court.*"[19] As a result he concluded that Mr. Greenberg need not comply with paragraph 5 of Chapter 9.22, though he did not set aside paragraph 5 of Chapter 9.22.

[54] Absa submits that Potgieter AJ's finding supports its contention that it need not comply with the provisons of sub-paragraphs 1.7.1 and 1.7.2.

[55] It is trite that the provisions of the Practice Manual do not bind the Court. A litigant and the registrar, however, are bound to comply with their terms.[20] The Court has a discretion to condone non-compliance therewith. The Court is also not bound by the Rules. These are there for the convenience of the Court. It is now well established that "*rules are for the Court, and not the Court for the rules.*"[21] Potgieter AJ is, therefore, incorrect to say that "*neither a party, nor a Court nor any 'practice' can simply avoid the application of the Rules of Court.*"

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[18] *Id.* at [23]-[24]
[19] *Id.* at [20)
[20] See: *Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at [62]; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others,* 2004 (6) SA 222 (SCA) at [31]; *Judicial Service Commission and Another v Cape Bar Council and Another* 2013 (1) SA 170 (SCA) at [13]
[21] *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) at [32]; See also *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A) at 783

[56] The matter before Potgieter AJ dealt with a general disregard for Court proceedings by litigants who, after setting the matter down for hearing in the Unopposed Court, do not bother to make an appearance when the matter is called. This is not the same as the matter before us. However, given that both cases focus on the validity of a Practice Directive, and on the need for litigants to adhere to the relevant Practice Directive, I believe it is necessary to voice my concern at the fact that Potgieter AJ's judgment gives licence to litigants to ignore paragraph 5 of Chapter 9.22 of the Practice Manual.

[57] The conduct of litigants who set a matter down for hearing but who fail to make an appearance in the Unopposed Court when the matter is called causes wasteful expenditure of judicial and other resources. It results in judges being required to unnecessarily read the papers in preparation for the hearing, only to find that there is no appearance by the party. The roll gets unnecessarily clogged up preventing other matters ripe for hearing from being enrolled for that day. This practice makes for inefficient use of the Court's resources. Paragraph 5 of Chapter 9.22 is directed at ending such wasteful expenditure and is designed to ensure that the judicial system runs smoothly and efficiently.

[58] For over a century now the common law has recognised that the Court has an inherent power to control and regulate its own processes.[22] The inherent powers are there to avert an injustice, or to facilitate the achievement of justice: "(T)*he Court will exercise an inherent jurisdiction whenever justice requires that it should do so.*"[23].

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[22] *Ritchie v Andrews* (1881 – 1882) 2 EDL 254; *Connolly v Ferguson* 1909 TS 195; *Oosthuizen v Road Accident Fund* 2011 (6) SA 31 (SCA) at [15]

[23] *Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis and Another* 1979 (2) SA 457 (W) at 463A

The inherent power is used to create procedural rules where such rules are necessary in order to apply (and develop) the substantive law. The procedural (adjectival) law is, no doubt, bound to interfere with the substantive law. As Corbett CJ observed:

> "There is no doubt that the Supreme Court possesses an inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice. ... It is probably true that, ... the Court does not have an inherent power to create substantive law, but the dividing line between substantive and adjectival law is not always an easy one to draw" [24]

[59] This has been recognised by the Courts over the years. Didcott J surveyed the common law on the issue and held that:

> "I am far from sure that the order which the applicant wants can be rated as simply procedural. It goes a good deal further, I am inclined to think. That, however, is by the way. I say this because the Supreme Court's inherent power is not confined, as I see it, to procedure in the strict sense. VIEYRA J refused in *Ex parte Millsite Investment Co (Pty) Ltd* 1965 (2) SA 582 (T) to accept the limitation. He declared (at 585H):
>
> "The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation."
>
> The outer reaches of the power do not have to be explored now. All that matters at present is this. The power is wide enough, it seems, to encompass directions concerning the search for and collection of evidence that is needed in litigation. Two of the cases to which BOTHA J referred illustrate that. I have in mind *Mackenzie v Furman* and Pratt 1918 WLD 62 and *Cohen and Tyfield v Hull Chemical Works* 1929 CPD 9. The same broader view happens to have been taken in England. Lord MACDERMOTT has spoken in the House of Lords of the High Court's
>
> "... inherent jurisdiction to make interlocutory orders for the purpose of promoting a fair and satisfactory trial."
>
> The occasion was *S v S; W v Official Solicitor* 1972 AC 24 (at 46E) (see also [1970] 3 All ER 107). The speech continued thus (at 46E - F):
>
> "I do not think there is now any question about the existence of this jurisdiction... It may be procedural in character, but it is much more than that. It is a jurisdiction which confers power, in the exercise of a judicial discretion, to prepare the way by suitable orders or directions for a just and proper trial of the issues joined between the parties."
>
> This is not to say, however, that an order providing for evidence to be investigated and gathered is obtainable here whenever the evidence is or may well be material to the case of the party who asks for the order and he has no other means of assembling the information. The Court will come to his assistance in that situation, one may safely assume, once it has nothing else that matters to take into account, once it has no real reason to withhold help. It will no doubt feel satisfied then, to quote BOTHA J, that:
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> "... justice cannot properly be done unless relief is granted to the applicant."[25]

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[24] *Universal City Studios Inc and Others v Network Video(Pty) Ltd* 1986 (2) SA 734 (A) at 754G-755A, (references omitted)

[25] *Seetal v Pravitha and Another NO* 1983 (3) SA 827 (D) at 832B-832G

[60] This common law principle has now been recognised and endorsed in, the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution). Section 173 of the Constitution provides that:

> "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

[61] In *Williamson v Schoon*, Navsa J (as he then was) held that with the advent of the new Constitution, Courts now are enjoined to have regard to principles of equity when exercising their inherent jurisdiction to regulate their own process. He reasoned it thus:

> "Whereas our Courts are now, because of the new Constitutional order, obliged to have regard to notions of basic fairness and justice, the point that emerges from the examination of the authorities examined above is that the Supreme Court is empowered to regulate its own procedure within the system where it adjudicates cases. In doing so, our Courts will have regard to equitable principles as established over time and as now informed by the Constitution"[26]

[62] The CC has called on Courts to take care when exercising inherent jurisdiction so that the rights in the Bill of Rights are given effect: This is manifest in the following *dicta* from the CC:

> "The power recognised in s 173 is a key tool for Courts to ensure their own independence and impartiality. It recognises that Courts have the inherent power to regulate and protect their own process. A primary purpose for the exercise of that power must be to ensure that proceedings before Courts are fair. It is therefore fitting that the only qualification on the exercise of that power contained in s 173 is that Courts in exercising this power must take into account the interests of justice."
>
> "When Courts exercise the power to regulate their own process it is inevitable that that power will affect rights entrenched in ch 2 of the Constitution. A Court must regulate the way proceedings are conducted and this will inevitably affect both the right to a fair trial (s 35 of the Constitution) and the right to have disputes resolved by Courts (s 34). Courts are bound by the provisions of the Bill of Rights and therefore bear a duty to respect those rights. In exercising the power, therefore, they must take care to ensure that those rights are not unjustifiably attenuated."[27]

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[26] 1997 (3) SA 1053 (T) at 1068 H-I; See also *Ncoweni v Bezuidenhout* 1927 CPD 130 at 130
[27] *SABC Ltd v National Director of Public Prosecutions* 2007 (1) SA 523 (CC) at [36]-[37]

[63] These authorities demonstrate that the Court is enjoined to exercise its inherent jurisdiction to ensure that Courts are accessible, fair, efficient and that the rights enshrined in the Bill of Rights are given full effect.

[64] It is the duty of this Court to oversee the execution process of the primary residence.[28] Failure to do so would "*render the procedure unconstitutional.*"[29] In performing this role the Court has to have regard to the fact that the execution process eventually culminates in the debtor and her family vacating their home, either voluntarily or by force. In both cases the experience involves a painful inroad into their right to dignity,[30] thus making it necessary for the Court to carefully examine the facts and circumstances before granting the order allowing the property to be sold in execution. It can only perform this function if, at the very least, all the necessary steps have been taken to ensure that it can be apprised of the facts and circumstances surrounding the debt and the debtor's situation.

[65] The Court has over the years exercised its inherent power to issue Anton Pillar orders[31]; to compel further and better discovery in circumstances where the rules proved to be inadequate;[32] to stay proceedings in order to prevent an abuse of its processes and to protect a party from possible prejudice[33]; to grant condonation for non-compliance with its rules in circumstances where strict compliance with the rules

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[28] *Jaftha,* fn 5, at [55]; *Gundwana*, fn 6, at [45]; Rule 46(1)(ii)
[29] *Mkhize v Umvoti Municipality and Others* 2012 (1) SA 1 (SCA) at [26], per Navsa and Snyders JJA
[30] *Jaftha*, fn 5 at [21] and [29]
[31] *Universal City Studios Inc,* fn 24, at 754G-755A, (references omitted)
[32] *Moulded Components and Rotomoulding South Africa (Pty) Ltd,* fn 23 at 463A
[33] *Williamson,* fn 26, at 1066G

may defeat the cause of justice.[34] Some of these, no doubt, are much more invasive interventions than merely asking a plainiff seeking forclosure of a primary residence to ensure that personal service is effected, or a serious attempt at personal service is made. Further, if an individual who is in danger of losing her spouse through divorce proceedings, or of losing her estate through sequestration proceedings, is entitled to personal service, we see no reason why a person who is in danger of losing her primary residence through foreclosure should not be entitled to personal service, or at least an attempt at personal service. In a case which involves the constitutional rights of persons, and where there is a real prospect of those rights being trampled upon, it is imperative that the Court examines very carefully the circumstances under which this occurs, failing which there is real danger of an injustice prevailing. There are therefore good grounds to deploy the inherent jurisdiction of the Court to avert such injustice.

[66] Further, there is no doubt in my mind that to the extent that rule 4(1)(a)(iv) allows for service on the "*outer*" or "*principal door*" or "*under a stone*" of a chosen *domicilium* it fails to be of any assistance to the Court when performing its inquisitorial role of ensuring that all the circumstances are taken into account before a primary residence of the debtor and her family is taken away. Courts must exercise caution when making a decision of such magnitude. Requiring that personal service upon the debtor be at least attempted is certainly part of exercising such caution and is part of the Court performing its constitutionally imposed duty to ensure the foreclosure process and outcome involving a primary residence is fair and just. In this case the process followed can have a direct impact on the outcome.

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[34] *Moluele and Others v Deschatelets N.O* 1950 (2) SA 670 (T) at 676-677

[67] To conclude on this aspect the Court, in my view, is not, and can never be, deterred by the Rules from calling for personal service or for an attempt at personal service, if justice so requires. The authorities demonstrate, without doubt, that the Rules do not, and cannot, impede a Court from doing justice:

> "I can entertain no doubt whatever that the Court possesses this inherent power to grant relief where an insistence upon exact compliance with a Rule of Court would result in substantial injustice to one of the parties."".[35]

[68] Absa also contended that sub-paragraphs 1.7.1 and 1.7.2 are legally incompetent as they interfere with the substantive common law regarding service on a chosen *domicilium*. Absa placed particular reliance on a *dicta* in *Loryan (Pty) Ltd v Solarsh Tea and Coffee (Pty) Ltd* where the Court reasoned:

> "The choice of a *domicilium citandi et executandi* is primarily related to the service of process in judicial proceedings. As appears from Rule 4 (1) (a) (iv), which reflects our common law practice, service of any process may be effected by delivering or leaving a copy thereof at the *domicilium* chosen by the party concerned. Such service is then good, even if the process may not be received, for the very purpose of requiring the choice of a *domicilium* is to relieve the party causing service of the process from the burden of proving actual receipt. Hence the decisions in which service at a *domicilium* has been held to be good, even though the address chosen was vacant ground, or the party was known to be resident abroad, or had abandoned the property, or could not be found.
> Where a contract provides for a *domicilium* for notices under the contract, as well as for the service of process, there is a so-called double provision. The purpose of choosing a *domicilium* for the giving of a prescribed notice under a contract is the same as it is for the service of process,... namely to relieve the party giving the notice from the burden of proving receipt thereof. ... Obviously the service of process or the giving of notice at a *domicilium*, to be valid, must be effected as required by the Rules of Court or by the contract, as the case may be. Thus, for instance, where delivery of a notice under a contract is to be effected at a residence chosen as a *domicilium*, it would not be enough merely to drop the notice over the garden fence or to put it into the hedge. Delivery would have to be made in the manner required by the contract."[36]

[69] Absa overstates the importance of *Loryan* to our case. It is not support for the proposition that the choice of a *domicilium* in a contract, regardless of the nature of

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[35] *Moluele and Others v Deschatelets,* N.O. 1950 (2) SA 670 (T) at 676. See also *Leibowitz and Others v Schwartz and Others* 1974 (2) SA 661 (T) at 662A-B.
[36] 1984 (3) SA 834 (W) at 847C - I

the contract, renders the service upon that *domicilium* adequate, even if the papers were not brought to the attention of the party whose *domicilium* it is. The Court in *Loryan* was dealing with a commercial lease. It did not concern itself with problems associated with service on a chosen *domicilium* in a matter involving the foreclosure of a primary residence. Loryan was a pre-Constitutional decision and did not have to pay any attention to the fact that the Court has a particular duty to oversee the foreclosure process to ensure that it is just and fair.

[70]It is Absa's contention that service of the summons on the chosen *domicilium* is part and parcel of the contract, and that the defendant has agreed to allow Absa to serve at the *domicilium*, and by so doing has assumed the risk of the summons not coming to her attention. It had exercised its contractual right and was entitled to do so. If the debtor was concerned that service effected on the chosen *domicilium* might not come to her attention she should have objected to the *domicilium* clause when concluding the contract. Parties must abide by their contracts, and in accordance thereto this stipulation in the contract must be observed, according to Absa. This is a well-established principle of contract law, commonly known as "*pacta sunt servanda*." Absa's contention must be assessed in the light of two CC judgments.

[71] In *Gundwana* it was pointed out that the fact that the debtor may agree to place her primary residence at risk does not mean that the stipulation to this effect in the contract escapes constitutional scrutiny. It was further noted that the fact that a debtor agreed to give up her primary residence should she default on the loan repayments does not mean that the Court has to automatically grant a claim asserted soley on the terms of the agreement. The Court has a constitutional duty to

look at all the facts before ordering that the primary residence be sold in execution. The stipulation in the contract, should there be one, may (depending on the circumstances) have to yield to the constitutional right of the debtor to adequate housing.[37] *Pacta sunt servanda* is a crucial aspect of our law and is based on at least two constitutional values, namely, freedom and dignity, but it is not sacrosanct. It can be departed from if, without compromising these values, there are other constitutional values that require prominence for justice to prevail.

[72] More recently, the CC had occasion to consider the right of a party to a bilateral contract to cancel the contract if there was a material breach by the counterparty. The CC highlighted the fact that enforcement of stipulations in bilateral contracts require good faith from both parties. Though this was part of our common law, it has now received constitutional approval. Considering the principal of reciprocity in bilateral contracts, the CC iterated the following:

> "To the extent that the rigid application of the principle of reciprocity may in particular circumstances lead to injustice, our law of contract, based as it is on the principle of good faith, contains the necessary flexibility to ensure fairness. In *Tuckers Land and Development Cooperation v Hovis* (1980 (1) SA 645 (A)) it was pointed out that the concepts of justice, reasonableness and fairness historically constituted good faith in contract. The principle of reciprocity originated in these notions. This accords with the requirements of good faith.
>
> "... Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each other to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way."[38]

[73] The CC had recourse to this principle in dealing with the question of whether a party's (in that case, Botha's) breach allowed the counterparty (in that case, the

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[37] *Gundwana*, fn 6, at [46]-[48]
[38] *Lorraine Sophie Botha and Another v Henry Robins Rich N O and Others* [2014] ZACC 11 at [45]-[46]

Trustees) to cancel the contract without more. The CC came to the following conclusion:

> "For the same reasons mentioned above, granting cancellation – and therefore, in this case forfeiture – in circumstances where three quarters of the purchase price has already been paid would be disproportionate penalty for the breach. In their application for cancellation the Trustees did not properly address the disproportionate burden their claim for relief would have on Ms Botha, They took the view that the question of forfeiture and restitution was independent of, and logically anterior to, the question of cancellation. That was a fundamental error. The fairness of awarding cancellation is self-evidently linked to the consequences of doing so. The Trustees' stance therefore meant that they could not justify this Court's awarding the relief they sought. In view of the above the cancellation application must fail."[39]

[74] Despite the fact that the Trustees were entitled, on the basis of a stipulation in the contract, to cancel the contract because of the breach by Botha, the CC refused to enforce this stipulation because of its disproportionate effect. This is consistent with its earlier finding that *pacta sunt servanda* cannot be applied mechanistically. Its application must take into account other constitutional imperatives, and where these direct towards a refusal to apply it strictly in order to do justice by the parties, then the Court must do so.

[75] To return to the facts of our case. To allow Absa and the banks that rely on the *domicilium* clause, read with rule 4(1)(a)(iv), to serve on the outer or principal door could result in an injustice prevailing. For that reason I hold that Absa's reliance on the doctrine of *pacta sunt servanda* is misplaced. It is no bar to this Court refusing to accept such service.

[76] In my view, in all matters where the plaintiff seeks to execute against the primary residence of a debtor and her family, there should be personal service, or at least an attempt at personal service, on the defendent. The process should begin with an

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[39] *Id.* at [50]

attempt at personal service at the chosen *domicilium* of the defendent and where that fails, personal service at her place of employment. If this were to fail then service should be on any person on a Saturday at the chosen *domicilium* of the defendant. If that fails, then the plaintiff can approach the Court either for further direction or for an order declaring the primary residence of the defendent and her family to be executable. The Court hearing the application can, in the exercise of its discretion, make whatever decision it holds to be just and fair. The process I advocate is slightly different from that in *Powell* and in the process required by sub-paragraph 1.7.2 of Chapter 10.17. Sub-parargraph 1.7.2 read with sub-paragraph 5.1 of Chapter 10.17 does do not require personal service at the place of employment of the defendent. In my view, two attempts at personal service are required, once at the chosen domicilium and, if that fails, once at the place of employment. The defendent should be found at either of the two locations. However, if the plaintiff fails on both counts it is not without a remedy. It can then serve on a person entitled to accept service at the *domicilium* on a Saturday. Should this process be followed it would, in my view, indicate that the plaintiff has taken reasonable steps towards ensuring that the summons was brought to the attention of the defendent. Finally, it needs to be said that, when the plaintiff fails to secure personal service at the first attempt at the chosen *domicilium*, it need not approach the Court for an order to serve at the place of employment and, if necessary, thereafter at the *domicilium* on a Saturday on any person. It may just proceed to the next stage.

[77] The view I adopt is different from that of my colleagues in the majority judgment. They do not require personal service at the place of employment of the defendent.

The reason I emphasise personal service is because this minimises, if not altogether eliminates, any future controversy that may arise if the defendent is no longer employed there.

[78] Absa also complains about the provisions of sub-paragraph 1.6 as it allows the Court to refuse to grant the foreclosure application if it is of the view that the amount outstanding is low. Sub-paragraph 1.6 draws attention to various judgments where it was held that the outstanding amounts were relatively low and did not justify an order that the primary residence may be sold in execution. Absa complains that since sub-paragraph 1.6 has generalised the position it is now impossible for it to know in advance whether its application to foreclose on the primary residence of its debtor will be granted, as there is no indication as to what constitutes a low outstanding amount. I find this concern of Absa to be unfounded. The power of the Court to refuse to grant the foreclosure application on the basis that the outstanding debt is low is integral to the enquiry as to whether it is in the interest of justice to allow foreclosure. The Court acting in its supervisory capacity is required to undertake this enquiry. Sub-paragraph 1.6 does not give the Court any power it did not already have.

[79] That an outstanding amount may be too low to justify the taking of the person's primary residence cannot be disputed: it is possible that the harm suffered by the debtor and her family far outweighs the benefit to be gained by the creditor should the order allowing a sale in execution be granted.[40] What constitutes a low amount is something that must be determined by the Court dealing with the application. The

[40] This has been amply demonstrated in the cases referred to in the footnote to sub-paragraph 1.6

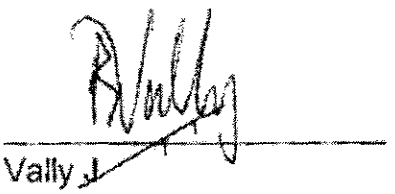
determination can only be case-specific. It will, undoubtedly, be determined in relation to other factors, such as for how long the mortgage bond has been in existence, what arrangements can be made to reduce, and ultimately eliminate, the outstanding amount and the circumstances under which the debtor has fallen behind with her payments. This, obviously, is not an exhaustive list of factors that the Court could take into account. Furthermore, a low outstanding amount may yet result in the primary residence being sold in execution.[41] It is a matter best left to the discretion of the Court receiving the application. This is precisely what sub-paragraph 1.6 does. I, therefore, find nothing offensive about it.

[80] Accordingly, for the reasons set out above, I hold that sub-paragraphs 1.6, 1.7.1 and 1.7.2 of Chapter 10.17 of the Practice Manual are valid and should be adhered to by parties affected thereby.

[81] My colleagues take the view that it is necessary to amend the sub-paragraphs in order to further streamline the process. In contrast, I hold that that is a matter best left in the hands of the Deputy-Judge President or the Judge-President, who after consulting the Judges of this Division can advise the Chief Justice to amend the relevant sub-paragraphs. This has the benefit of ensuring that the actual wording of the amendment would, in all likelihood, be expressive of the collective experience of the Judges rather than the outcome of an objection by a single party, like Absa, in a single case. Earlier in this judgment I spelt out the history of Chapter 10.17. Chapter 10.17 was a product of a collective discussion of the Judges of this Division who had approved it. In this sense it resulted from a process not dissimilar to the one that was

[41] *Jaftha*, fn 5 at [42]

followed in *Cele v South African Social Security Agency and 22 Related Cases*[42] where before a practice directive was issued, Judges in that Division gave input as to its terms. The benefit gained from such a process is not to be underestimated. In conclusion, I believe that this Court should not tamper with the provisions of sub-paragraphs 1.6, 1.7. 1 and 1.7.2 of Chapter 10.17 of the Practice Manual.



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[42] 2009 (5) SA 105 (D) at [38]