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EXECUTIVE SUMMARY

SALE OF IMMOVABLE PROPERTY RESULTING IN PEOPLE LOSING THEIR HOUSES THROUGH SHADY DEALS AND UNFAIR COURT PROCESSES

1. Background:

1.1 During the past couple of years numerous reports were filed with various institutions and published in the daily newspapers about persons losing their homes through shady deals or through an unfair judicial process in court. The result of this is that people, often those who are most vulnerable in society, lose their homes without understanding the process that was followed or without any opportunity to request for further particulars. Often, these disowned homeowners do not even have the opportunity to conduct a “fire sale”¹ in which they have a prospect of making some profit and thus they are left with nothing.

1.2 Repossession of houses poses a challenge between human rights and private contractual obligations, which requires a reform in the judicial process that will be mindful of the voice of citizens in reflecting an equitable balance of the rights applicable to all role players in the execution process. The expansion of human rights into private contractual obligations needs to be carefully evaluated.

1.3 Whilst a certain degree of ignorance on the part of the homeowners is a major contributing factor towards this unfortunate state of affairs, there is also a moral obligation upon banks, conveyancers and other role players, including the courts, to ensure that homeowners are not disproportionately adversely affected. This ignorance coupled with

¹ Also known as forced sale or sale at short notice

desperation, unmanageable debts, unemployment and other socio-economic factors result in homeowners succumbing to pressure and giving in to shady deals, donating their homes or selling it for a much reduced price to family or friends.

2. The right to housing as a human right:

2.1 The right to adequate housing is a recognized human right that falls within the sphere of economic, social and cultural rights. This right is recognized in the Universal Declaration of Human Rights and International Covenant on Economic, Social and Cultural Rights, to which Namibia is a State party.

2.2 International human rights law recognizes everyone's right to an adequate standard of living, including adequate housing. Adequate housing was recognized as part of the right to an adequate standard of living in the 1948 Universal Declaration of Human Rights and in the 1966 International Covenant on Economic, Social and Cultural Rights. Other international human rights treaties have since recognized or referred to the right to adequate housing or some elements of it, such as the protection of one's home and privacy.²

2.3 The right to adequate housing contains freedoms. These freedoms include but are not limited to:

- Protection against forced evictions and the arbitrary destruction and demolition of one's home;
- The right to be free from arbitrary interference with one's home, privacy and family; and
- The right to choose one's residence, to determine where to live and to freedom of movement.

The right to adequate housing also contains entitlements. These entitlements include but are not limited to:

- Security of tenure;
- Housing, land and property restitution;
- Equal and non-discriminatory access to adequate housing;
- Participation in housing-related decision-making at the national and community levels.

² <https://www.ohchr.org/EN/HRBodies/Pages/Overview.aspx>

2.4 Namibia is also a co-sponsor of the Human Rights Council (HRC) resolution on “Adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context”.

2.5 In her most recent report to the UN Human Rights Council, the Special Rapporteur on the right to housing explores the financialization of housing and its detrimental impact on human rights, in particular, the right to housing. From mass forced evictions to make way for luxury developments, to nameless corporations purchasing real estate from remote boardrooms, to empty homes and people pushed out of their communities because they simply could not afford to live there, the repercussions have been felt across the globe.³ Increasingly viewed as a commodity, housing is most importantly a human right. Housing and real estate markets worldwide have been transformed by global capital markets and financial excess. Known as the financialization of housing, the phenomenon occurs when housing is treated as a commodity – a vehicle for wealth and investment rather than a social good. The Special Rapporteur calls for governments to ensure markets serve housing need rather than investment priorities, and reminds states that they are first and foremost accountable to human rights.

It is therefore important for Namibia to ensure that all legal safeguards are in place and aligned to our international human rights obligations. The SDG’s related to housing should also be kept in mind and the issue of “financialization” of housing should be carefully considered.

3. Legal Framework in Namibia:

3.1 In 2014 the High Court rules were amended and provide for judicial oversight with the sale of primary homes of persons. Legal practitioners have to approach the court on a separate application under Rule.⁴

3.2 The current Magistrate’s Court rules do not have a similar provision and therefore allow these warrants of execution to be issued by the Clerk of Court. The Magistrate’s Court rules should be amended to bring it in line with the rules of the High Court. The High Court rules have proven to be effective but a floodgate situation has been caused in the Magistrate’s Court where the rule has not been amended yet. The High Court rule was in the meantime declared *ultra vires* by the Supreme Court.

³ <https://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx>

⁴ See Annexure “A” hereto

3.3 In the case of *Standard Bank v Magdalena Shipala and 4 Others*⁵ delivered on July 6, 2018, the Supreme Court held that “the issue before the court *a quo* (the High Court) as well as on appeal was whether the provisions of Rule 108 of the Rules of the High Court apply in an application for an order declaring immovable property belonging to a judgment debtor specially executable”. The High Court ruled in favour of this submission

4. Proposed solutions:

4.1 The High Court Act, 1990 (as amended) be amended to create a substantive provision for the creation of a substantive rule in the form and format of Rule 108 (1)(a) and (b) of the Rules of the High Court;

4.2 The Magistrate’s Court Act, 1932 (as amended) be amended to create a substantive provision for the creation of a substantive rule in the form and format of a rule similar to Rule 108 (1)(a) and (b) of the Rules of the High Court;

4.3 The Rules Board for the Magistrate’s Court is still acting under a valid terms of appointment and should be directed to amend the rules accordingly. The courts should be endowed with the obligation to ensure that contractual terms were fair and if all options were exhausted before making an order for repossession and that the property in question is not the primary residence of the execution debtor. The Republic of South Africa has introduced similar amendments with great success.

4.4 The Law Society of Namibia and perhaps the Ministry of Lands (Deeds Office) should be asked to introduce an additional measure when transfers take place between family members, or where the transfer takes place within a short span of time with a significant increase in price. These institutions should be more involved especially where transfers take place simultaneously (on the same day). It is further suggested that these sales be subjected to additional tax burdens in order to avoid exploitation.

4.5 Commercial banks, under the regulation of the Bank of Namibia, should consider introducing an assistance scheme where a person who proves that he/she is left without any income or has lost his/her employment is allowed a time period of at least six (6) months of “payment holiday” where no additional interest is added to the home loan amount and no instalments are expected. The contract will then be extended with six months but will provide some leeway for the owner to come up with a beneficial plan. Banks should also be compelled to do client awareness on the issue of non-payment of loans.

⁵ Case No.: SA 69/2015.

4.4 The UN Global Housing Strategy⁶ should be our guide in coming up with a solution to the repossession problem as the rights of the owners versus the rights of the financiers (banks) should be carefully considered.

4.5 The contractual terms of financing agreements should be tested for fairness and reasonableness.

4.6 The tendency of “fire-sell” by owners who cannot meet their obligations should be investigated and the effects evaluated.

4.7 Legislating the rights and duties of parties in this context of debt management might be necessary (taking into account the amended High Court Rule). South Africa has the National Credit Act⁷ that regulates the repossession of goods, including houses.

4.8 Any proposed legislation should cater for more transparent processes of auctioning. The sale in execution process should be very transparent and just. The legislation should also provide for a reserve price to be a prerequisite of any authorized sale. This is a standard practice in many countries.

4.9 Public education and awareness is key to the solutions. The members of the public do not understand the system and they do not understand the repercussions of their non-payment of bonds and loans. Municipalities and Local Authorities are also important role players in the process of education and awareness as they are often execution creditors for non-payment of municipal accounts. Families moving into one another’s houses, especially those of older persons, and not taking responsibility of municipal accounts are also contributing to this problem.

5. Conclusion:

The rights of all interested parties must be protected and promoted, but the States has a duty to protect and promote the human rights of all citizens, especially the most vulnerable in our societies. An opportunity has presented itself to rectify injustices of the past; we must use this opportunity optimally.

⁶ Habitat III

⁷The National Credit Act (Act 34 of 2005)

