

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

**REPUBLIC OF SOUTH AFRICA**



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

(1) REPORTABLE: NO  
(2) OF INTEREST TO OTHER JUDGES: NO  
(3) REVISED.

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**K.E. MATOJANE**

**06 DECEMBER 2021**

**CASE NUMBER: 2020/11582**

In the matter between:

**SOLOMON SEGALO**

Applicant

and

**JOACHIM HENDRIK BOTHA N.O.**

First Respondent

**DANIEL SANDILE NDLOVU N.O.**

Second Respondent

(In their capacities as the joint liquidators of  
Blue Flame Advertising and Marketing (Pty)  
Ltd (In liquidation) (Registration no: 2001/014553/07)

**FIRSTRAND BANK LTD**

Third Respondent

**THE MASTER OF THE HIGH COURT OF SOUTH  
AFRICA, GAUTENG LOCAL DIVISION  
JOHANNESBURG**

Fourth Respondent

**THE MINISTER OF TRADE AND INDUSTRY**

Fifth Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL  
DEVELOPMENT**

Sixth Respondent

**CASE NUMBER: 2019/44572**

In the matter between:

**JOACHIM HENDRIK BOTHA N.O.** First Applicant

**DANIEL SANDILE NDLOVU N.O.** Second Applicant

[In their capacities as the joint liquidators of  
Blue Flame Advertising and Marketing Proprietary Limited  
(In Liquidation), Registration Number: 2001/014553/07)

and

**NOKHUPHIWA RITA SEGALO** First Respondent  
(Identity Number: [...])

**LINDA BALOYI** Second Respondent

**JOSE NHABANGA** Third Respondent

**THE CITY OF JOHANNESBURG  
METROPOLITAN MUNICIPALITY** Fourth Respondent

**THE MASTER OF THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA** Fifth Respondent

***Delivered:** This judgment was handed down electronically by circulation to the parties and/or their legal representatives by email, and by uploading same onto CaseLines. The date and time for hand-down is deemed to be have been on 06 December 2021.*

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**JUDGMENT**

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**MATOJANE J:**

[1] The primary issue in this matter is whether s 386 of the Companies Act 61 of 1973 is unconstitutional and invalid as it fails to provide for judicial oversight over sales of residential immovable properties of the liquidated companies Apple.

[2] The applicants seeks the following relief:

- ales
- 2.1 An order declaring that the failure to provide judicial oversight over s  
of residential immovable properties of  
liquidated companies is  
unconstitutional and invalid.
- to
- 2.2 An order declaring it unconstitutional for a Master of the High Court  
authorise under s386 of the 1973 Companies Act the sale of immova  
ble  
property, or any portion thereof, to the extent that this permits the  
sale  
of a home of a person.
- y to
- 2.3 An order declaring it unconstitutional for a liquidator of a compan  
ble  
have the power under the 1973 Companies Act to sell any immova  
property of the company by public auction, public tender or pri  
vate  
contract and give delivery thereof, to the extent that this permits the  
sale  
of a home of a person.
- the
- 2.4 An order to remedy the defect by reading certain words into s386 of  
1973 Companies Act.
- the
- 2.5 An order declaring that the application of rule 46 is not limited to  
able  
immovable property of natural persons but also includes the immov  
property of all persons (including companies).

[3] The respondents oppose this application and contend that Section 386 of  
the  
Companies Act 61 of 1973 is not unconstitutional and invalid in the resp  
ects  
pleaded by the applicant for the following reasons, among other things:

- 3.1 The protection afforded by Rules 46 and 46A of the Uniform Rules

of

Court regarding execution against homes does not apply where a juristic person owns the property.

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3.2 The rights conferred by sections 26(1) and 26(2) of the Constitution do not vest in the juristic entity which owns the property;

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3.3 The natural person's rights under sections 26(1) and (2) of the Constitution are not threatened or breached by the sale of the property concerned.

### **Background**

[4] The applicant ("Mr Segalo") and his family reside in the property which is owned

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by Blue Flame Advertising and Marketing (Pty) Ltd (in liquidation) ("Blue Flame"). Mr Segalo was the sole director and shareholder of Blue Flame. Blue Flame purchased the property for R16.5 million.

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[5] FirstRand Bank Limited is the bondholder in respect of the property and the

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only secured creditor in the winding up of Blue Flame. Blue Flame was provisionally liquidated on 13 August 2018 and finally liquidated on 5 December 2018.

[6] On 26 August 2019, the second meeting of the creditors of Blue Flame

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held, and resolutions were adopted in terms of which the liquidators, the first and second respondents, were authorised by the company's creditors to dispose of Blue's assets Flame, including its property.

[7] The liquidators brought an application for order amongst others, extending their

sell powers in terms of section 386 of the Act authorising them to take steps to  
the assets of Blue Flame and marketing and selling the immovable property  
y by public auction, public tender or private contract.

[8] The liquidators issued an application for the eviction of Mr Segalo and  
any persons claiming occupation through or under him from the property on the  
date to be determined by the Court in terms of Section 4(8) of the Preventio  
n of Illegal Eviction from unlawful Occupation of Land Act 19 of 1998 ("PIE Act").

[9] An order for the eviction of Mr Segalo was duly granted on 22 October 20  
19 (under Case Number: 2019/9147). Mr Segalo agreed to and was ordered  
to vacate the property by 14 February 2020. Mrs Segalo failed to vacate  
the property, and on 5 March 2020, the liquidators obtained an order in term  
s of s4(2) of the PIE Act authorising service of the notice on Mrs Segalo and h  
er employees. Mrs Segalo delivered a notice in terms of rule 16A and a coun  
ter application in which she seeks the same order that Mr Segalo seeks in t  
his application.

[10] The applicant seeks an order to intervene in his wife's eviction applic  
ation (under Case Number: 2019/44572) and seek the aforementioned orders.  
As the two matters share a factual background and the same issues of law  
and fact arise, it is convenient to all the parties and the Court to grant an applic  
ation by Mr Segalo for the consolidation of the two matters.

[11] It bears mentioning that no payments have been made by Mr and Mrs Seg  
alo ("the applicants") to the third respondent ("FirstRand Bank Limited") or t  
o the Johannesburg City Council since the provisional liquidation of Blue Flame  
on 13 August 2018. The judgment debt has escalated to an amount exceed  
ing R17 500,000.00. The outstanding rates, taxes, and utilities owed to  
the municipality exceed R600 000.00. In his replying affidavit, Mr Segalo st

ates

that he can afford to pay between R80 000.00 to R100 000.00 per month as a rental to the liquidators.

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## Legal Framework

[12] Section 386(3) read with subsection 4 provides that in a winding-up of a company by the Court, with authority granted by meetings of creditors and members or contributories or on the directions of the Master given under section 387, the liquidators shall have the powers to sell any movable and immovable property of the company by public auction, public tender or private contract and to give delivery thereof and to perform any act or exercise any power for which he is not expressly required by this Act to obtain the leave of the Court.

[13] Section 387 deals with the exercise of liquidator's powers in winding-up by Court and provides:

(1) ...

(2) In regard to any matter which has been submitted by the liquidator for the directions of creditors and members or contributories in general meeting, but as to which no directions have been given or as to which there is a difference between the directions of creditors and members or contributories, the liquidator may apply to the Master for directions and the Master may give or refuse to give directions as he may deem fit.

(3) Where the Master has refused to give directions as aforesaid or in regard to any other particular matter arising under the winding-up, the

liquidator may apply to the Court for directions.

(4) Any person aggrieved by any act or decision of the liquidator may apply to the Court after notice to the liquidator, and thereupon, the Court may make such order as it thinks just.

### **Right of Access to Courts**

[14] The applicants rely on section 34 of the Constitution, which provides that:

"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."

[15] The applicants cite as authority for this proposition three judgments: *Lesapo*,<sup>1</sup> *Zondi*,<sup>2</sup> and *First National Bank*.<sup>3</sup> These cases deal with a completely different factual matrix where legislation authorised self-help.

<sup>1</sup> *Chief Lesapo v North West Agricultural Bank* 2001 (1) SA 409 (CC).

<sup>2</sup> *Zondi v MEC for Traditional and Local Government Affairs and Others* 2005 (3) SA 589 CC.

<sup>3</sup> *First National Bank of SA v Land and Agricultural Bank of SA* 2000 (3) SA 626.

[16] In *Lesapo*, the Court found that section 38(2) of the North-West Agricultural Bank Act 14 of 1981 infringed s 34 of the Constitution and breached the rule of law by sanctioning self-help, the bank being permitted thereby to be the judge in its cause.

[17] In *Zondi*, the applicant sought confirmation of an order of the High Court declaring invalid certain provisions of the Pound Ordinance 32 of 1947, KwaZulu-Natal. The challenged provisions gave landowners and poundkeepers power to seize and impound livestock found trespassing on the land. They also gave power to the poundkeepers to sell the impounded animals t

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recover the pound fees. All of this occurred without a court order. The Court held that the combined effect of certain provisions among those challenged created an impounding scheme that, from seizure of the animals to execution of their sale, did not involve the judicial process and did not provide for notice to livestock owners where they could, with reasonable diligence, be identified. The Court also held that one of the provisions discriminated against black people, landless black people in particular, on the basis of colour and landownership and therefore violated the constitutional right to equality.

[18] *First National Bank* concerned a statute that authorised a bank to attach and sell a debtor's property in execution without recourse to a court of law. The constitutional Court confirmed an order that the provisions of the Land and Agricultural Bank of South Africa to attach and sell a debtor's property in execution without recourse to a court of law were unconstitutional.

[19] On the applicants' interpretation of section 34 of the Constitution, items of value such as property and equipment which a liquidated company owns could not be sold without prior judicial oversight of their sales.

[20] The applicants have failed to show that any of their section 34 rights have been limited by the Companies Act. The PIE Act affords them protection in that a court "may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled persons and households headed by women."<sup>4</sup>

## **Right to Housing**



[21] The applicants, relying on *Jaftha*,<sup>5</sup> contends that lack of judicial oversight over the sale of a primary residence owned by a company violates their right to housing enshrined in section 26 of the Constitution.

[22] In *Jaftha*, execution was levied against a judgment debtor's home without judicial oversight, unlike the present case where the property is owned by a juristic person. The Court found that section 66 of the Magistrates' Courts Act 32 of 1944 permits a person to be deprived of existing access to adequate housing, thereby limiting the rights protected in section 26 of the Constitution.

[23] Again in *Gundwana*,<sup>6</sup> the Constitutional Court held that where execution against the primary residence of debtors, who owns the property and run the risk of losing their security of tenure is sought after judgment on a money debt, judicial oversight of the execution process is a must.

[24] The Supreme Court of appeal in *Saunderson*<sup>7</sup> said the following about the execution of residential property:

"But *Jaftha* did not decide that the ownership of all residential property is protected by s 26(1); nor could it have done so bearing in mind that what constitutes 'adequate housing' is necessarily a fact-bound enquiry. One need only postulate executing against a luxury home or a holiday home to see that this must be so, for there it cannot be claimed that the process of execution will implicate the right of access to adequate housing at all."

[25] The Constitutional Court explained in *Jaftha* that judicial oversight has the effect

of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act.

[26] The high court rule 46(1)(a)(ii) was amended from 24 December 2011 (see GN R981 (19 November 2010) to require judicial oversight over the sales of debtor's homes.

[27] The new rule 46A now provides:

"46A Execution against residential immovable property

(1) This rule applies whenever an execution creditor seeks to execute against the residential immovable property of a judgment debtor.

<sup>5</sup> *Jaftha v Schoeman and Others; Van Rooyen v Stottz and Others* 2005 (2) SA 140 (CC) (2005 (1) BCLR 78).

<sup>6</sup> *Gundwana v Sleko Development CC and Others* C 2011 (3) SA 608 (CC).

<sup>7</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 at 274B.

(2) (a) A court considering an application under this rule must-  
(i) establish whether the immovable property which the execution creditor intends to execute against is the primary residence of the judgment debtor; and  
(ii) consider alternative means by the judgment debtor satisfying the judgment debt, other than execution against the judgment debtor's primary residence.

(b) A court shall not authorise execution against immovable property, which is the primary residence of a judgment debtor, unless the Court, having considered all relevant factors, considers that execution against such property is warranted.

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(c) The registrar shall not issue a writ of execution against t  
residential immovable property of any judgment debtor unless  
court has ordered execution against such property..."

[28] The protection is aimed at poor people who own and occupy the prope  
rty  
sought to be executed without proper consideration of their circumstances.  
The  
Constitution does not require judicial oversight when the property belongi  
ng to  
a company is sold.

[29] In *Mokebe*,<sup>8</sup> the full Court of this division held that a preliminary enquir  
y is  
necessary to establish whether the judgment debtor is indigent and whethe  
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property is their home. The Court held that the constitutional consideratio  
ns do  
not challenge the judgment creditor's right to execute but instead ca  
utions  
courts to have due regard to the impact that this may have on 'judgment deb  
tors  
who are poor and at risk of losing their homes.

[30] In *Fraser*,<sup>9</sup> the Court held that Rule 46A applies to individuals and natu  
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persons only. That immovable property owned by a company, a clo  
se  
corporation or a trust, of which the member, shareholder or beneficiary is  
the  
beneficial owner, is not protected by the rule even if the immovable proper  
ty is  
the shareholder's, member's or beneficiary's only residence.

[31] In *Mkhize v Umvoti Municipality & others*,<sup>10</sup> the Supreme Court of Appeal  
said  
that the object of judicial oversight is to determine whether rights in terms  
of s  
26 of the Constitution (the right to adequate housing) are implicated. Bei  
ng a  
juristic person, Blue Flame has no right of access to adequate housing un  
der  
section 26 of the Constitution and is not a bearer of the right to human dig  
nity.

<sup>8</sup> *Absa Bank Ltd v Mokebe and Related Cases* 2018 (6) SA 492 (GJ).

<sup>9</sup> *Investec Bank Ltd v Fraser No and Others* 2020 (6) SA 211(GJ).

<sup>10</sup> 2012 (1) SA 1 at para 26.

## Order

[32] In the premise, I make the following order:

1. The First Respondent's counterclaim (under Case Number: 2019/44572) is dismissed with costs;
2. Ejecting and evicting The First to Third Respondents (under Case Number: 2019/44572) and any person/s claiming occupation through or under the First to Third Respondents from the property more fully described as Portion 1 of Erf [...] Bryanston, Johannesburg which corresponds to [...], Bryanston, Johannesburg, Gauteng ("the property") before the 5 January 2022 in terms of Section 4(8) of the Prevention of Illegal Eviction From and Unlawful Occupation of Land Act 19 of 1998 ("the Act");
3. The sheriff is authorised and directed to eject and evict the First to Third Respondents ( Case Number: 2019/44572) and any person/s claiming occupation through or under the First to Third Respondents from the property before the 5 January 2022 in terms of Section 4(8) of the Act, in the event that the First to Third Respondents (and any person/s claiming occupation through or under them) have not vacated the property on the date referred to in paragraph 2 above; and
4. The Respondents including Mr Segalo to pay the costs, jointly and severally.

**Heard:** 30 August 2021  
**Judgment:** 06 December 2021

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**CASE NUMBER: 2020/11582**

**For Applicant:** S.S. Cohen (with A.F. Ashton)  
**Instructed by:** Larry Marx Attorneys  
**For First to Third Respondents:** J.E. Smit  
**Instructed by:** Werksmans Attorneys

**CASE NUMBER: 2019/44572**

**For Applicants:** J.E. Smit  
**Instructed by:** Werksmans Attorneys  
**For First to Third Respondents:** S.S. Cohen (with A.F. Ashton)  
**Instructed by:** Larry Marx Attorneys  
**For Fourth Respondent:** S Jackson  
**Instructed by:** Moodie & Robertson Attorneys



