REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT,
PIETERMARITZBURG
REPUBLIC OF SOUTH AFRICA

CASE NO.8701/06

In the matter between:

STEPHEN MKHIZE	Plaintiff
and	
UMVOTI MUNICIPALITY	First Defendant
NALINI KHAN	Second Defendant
NAVIN CHETTY	Third Defendant
VUSI CORNELIUS DLAMINI	Fourth Defendant
DAPHNEY HLENGIWE DLAMINI	Fifth Defendant
NEL & STEVENS	Sixth Defendant
THE SHERIFF OF THE MAGISTRATES' COURT UMVOTI	Seventh Defendant
REGISTRAR OF DEEDS	Eighth Defendant

J U D G M E N T

Delivered on 21 May 2010

WALLIS J

[1] This is a dispute about the ownership of a property in Greytown. The fourth and fifth defendants, Mr and Mrs Dlamini, live in the house on the property. Originally Mr Stephen Mkhize, the plaintiff, owned the property but it was sold in execution of a judgment in favour of the first defendant, the Umvoti Municipality, and Mr and Mrs Dlamini bought it from the purchaser at the sale in execution. Mr Mkhize contends that the sale in execution was void and seeks a declaratory order to that effect. In addition he seeks an order setting aside the subsequent sale to Mr and Mrs Dlamini and an order that the property be re-transferred to him.

[2] Although Mr Mkhize advanced his case on the pleadings on three different grounds, described as a main claim and two alternative claims, the main claim and the second alternative claim were abandoned at the outset of the trial. The first alternative claim remained and was separated in terms of Rule 33(4) from an alternative claim for damages. For the purpose of determining this claim the parties agreed a stated case and furnished me with a bundle of documents, which they agreed are what they purported to be. The case then proceeded by way of argument on the legal issue raised in the stated case.

[3] The background as set out in the stated case can be sketched shortly. On 18 June 1998 Mr and Mrs Mkhize purchased the property, which was then undeveloped, for R25 000.00. They caused plans to be prepared and approved and built a house although it was not completely finished. Mrs

Mkhize died in September 2000 and her interest in the property passed to her husband by way of inheritance. At no stage did Mr and Mrs Mkhize, or after her death, Mr Mkhize, live in the house on the property. Mr Mkhize owned another property where he and his wife lived and where he remained after her death. Other people were permitted to occupy the house and the property although the stated case does not deal with their identity or the basis of such occupation. Presumably it was either a tenancy or some form of gratuitous occupation.

[4] Mr Mkhize fell into arrears with the rates and other charges due to the Umvoti Municipality. Judgment was taken against him in the Magistrates' Court, Greytown. Although the judgment debt was relatively small execution against movables did not satisfy it and on 19 August 2003 the sheriff rendered a *nulla bona* return. Thereafter in terms of s 66(1)(a) of the Magistrates' Courts Act 32 of 1944 ('the Act') the clerk of the court issued a warrant of execution against immovable property. The property was attached and was then sold in execution on 12 December 2003. The purchaser was the third defendant and, on 28 August 2004, he sold the property for R350 000 to Mr and Mrs Dlamini. They took transfer on 15 November 2004 and it is now their home. They have effected improvements to the building and encumbered it with a mortgage bond in the amount of R500 000 in favour of the Standard Bank of South Africa Limited. The bank was joined as a party to these proceedings but has not intervened.

[5] All the steps in respect of the sale in execution of the property were taken before the judgment of the Constitutional Court in *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others*. Prior to that decision a sale in

execution of immovable property consequent upon a judgment in the magistrates' court was a routine matter with the relevant steps in the process being undertaken by the clerk of the court in terms of s 66(1)(a) of the Act. The relevant portion of s 66(1)(a) reads as follows:

'Whenever a court gives judgment for the payment of money … such judgment, in case of failure to pay such money forthwith … shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment … then against the immovable property of the party against whom such judgment has been given …'

Under the section the judgment debtor would apply to the clerk of the court in terms of rule 36(1) of the rules of the magistrates' court for the issue of a warrant of execution. The warrant would initially lie against movable property alone. However if the sheriff found insufficient movable property to satisfy the judgment the clerk of the court would re-issue the warrant for execution against immovable property. That is what occurred in the present case.

[6] In *Jaftha* the Constitutional Court declared that s 66(1)(a) is unconstitutional and invalid in certain respects. It remedied the defect by reading words into the section providing for judicial oversight of the process of execution against immovable property. The precise scope and effect of the declaration of invalidity and their remedial order is at the heart of the dispute in these proceedings. Mr Mkhize contends that the Court held that judicial oversight is a pre-requisite to a valid sale in execution under s 66(1)(a) and because the sale of his property took place without such judicial oversight – hardly surprisingly bearing in mind that it took place prior to the judgment in *Jaftha* – the sale was void from inception. On that basis he

seeks to have it set aside.

[7] Whilst at first blush it may seem surprising to suggest that the sale in execution can be avoided in consequence of a judgment delivered after the sale took place, it was held by the Supreme Court of Appeal in *Menqa and another v Markom and others* that this is the effect of *Jaftha*. The SCA reached that conclusion because an order of constitutional invalidity, unless held to be prospective only, speaks from the date of commencement of the Constitution. No such qualification was attached to the declaration of constitutional invalidity in *Jaftha's* case and accordingly any sale in execution in the magistrates' court covered by the decision in *Jaftha* was thereby rendered void from the date on which the sale occurred because it had taken place without the requisite judicial oversight. It is on that basis that Mr Mkhize contends that the sale in execution of his property was void and passed no valid title in the property to the third defendant and ultimately to the Dlaminis.

[8] The argument on behalf of Mr Mkhize is supported by a consideration of the language of the orders granted by the Constitutional Court in *Jaftha*. They read:

'1. The order of the High Court is set aside and replaced with the following order:

1.1 The failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in s 66(1)(a) of the Magistrates' Courts Act 32 of 1944 is declared to be unconstitutional and invalid.

1.2 To remedy the defect s 66(1)(a) of the Magistrates' Courts Act 32 of 1944 is to be read as though the words 'a court, after consideration of all relevant circumstances, may order execution' appear before the words 'against the immovable property of the party'.'

Read on their own and without regard to anything else these orders seem to

invalidate s 66(1)(a) and require it to be read for all purposes with the words set out in paragraph 1.2 of the order. Since that judgment was delivered both published sets of statutes as well as the leading text book on magistrates' court practice and procedure reflect s 66(1)(a) as containing the words prescribed by the Constitutional Court. In other words they print the text of the section as if Parliament itself had amended it in that fashion. Are they correct in doing so or does this overstate the effect of the orders in *Jaftha*?

[9] If the requirement of judicial oversight prescribed by the Constitutional Court as a remedy for the constitutional deficiencies of s 66(1)(a) applies to all sales in execution of immovable property under the Act there can be no doubt that the sale of Mr Mkhize's property was void. There was no judicial oversight in respect of the sale and the fact that it occurred prior to the judgment in *Jaftha* has been held by the SCA, in a judgment binding upon me, not to affect the issue. Thus if that is the true legal position Mr Mkhize is entitled at least to a declaration that the sale in execution was void. Whether he is entitled to the further relief he claims is not quite so clear. However, initially at least, it is the first question that must be addressed.

[10] The argument on behalf of the municipality is that *Jaftha* was not concerned with a situation such as the present one. It concerned cases where execution against immovable property could interfere with the constitutional right not to impair existing access to adequate housing in terms of s 26(1) of the Constitution. The Court considered the impact of s 66(1)(a) of the Act in that context and both its declaration of unconstitutionality and the order that words be read into the section should therefore, according to the municipality, be construed as being confined to the situation that was before

it. On that approach nothing that was said in *Jaftha* applies to this sale in execution because on the facts there is no question of any interference with Mr Mkhize's right of access to adequate housing.

[11] The municipality submits that to give the decision in *Jaftha* any wider effect, by treating the words read into s 66(1)(a) as being a generally applicable amendment of the section, infringes on the doctrine of the separation of powers embodied in the Constitution and is incorrect. In support of the approach that *Jaftha* must be construed and applied within the confines of its own particular factual context I was referred to the decision in *Standard Bank of South Africa Limited v Saunderson and Others.* In that case the SCA dealt with the implications of *Jaftha* for High Court orders declaring hypothecated property executable, pursuant to a judgment against the mortgagee on the mortgage debt. It said that it was necessary at the outset to examine how that case arose and what was decided. Whilst *Saunderson* did not involve s 66(1)(a), the municipality relies on that approach adopted by the SCA in support of its argument. It contends that the situation in *Jaftha* was wholly different from the present case, which does not involve the residence of the judgment debtor or his rights to adequate housing, and accordingly that the judgment is inapplicable.

[12] The municipality is undoubtedly correct in saying that whilst this case arises from the application of s 66(1)(a) of the Act it is markedly different on its facts from *Jaftha.* There is no question of the sale in execution infringing Mr Mkhize's right to have access to adequate housing. The agreed facts are that he and his wife always lived, and he continues to live, in another property that is owned by him. Other people occupy the disputed property

on an unspecified basis. In addition it is agreed that he owns other immovable property. It is not alleged in the pleadings that his rights in terms of s 26(1) of the Constitution were affected in any way by the sale in execution of this property. That is not his case. Nor is there anything in the statement of agreed facts to suggest that his rights under s 26(1) were infringed.

[13] Were the question in this case therefore whether the sale in execution of the property infringed Mr Mkhize's existing right to adequate housing in terms of s 26(1) of the Constitution, the answer would be in the negative. Mr Voormolen, who appeared for him, argued that it is feasible that Mr Mkhize intended to move into the house on the property and accordingly suggested that it is not possible to make a finding in this regard on the agreed facts. However, that overlooks the fact that it is for the plaintiff to establish that his constitutional rights have been infringed, not for the municipality to exclude the possibility of such an infringement. Mr Mkhize has never contended or sought to contend that the execution in this case infringed his constitutionally protected right to adequate housing or any other constitutionally protected right. Accordingly the case must proceed on the footing that execution did not infringe his constitutional rights and certainly not the right that was considered in *Jaftha*.

[14] Mr Mkhize's argument is that none of this matters. He says that the Constitutional Court ruled that s 66(1)(a) of the Act was invalid in the absence of judicial oversight and must be read as though the words 'a court after consideration of all relevant circumstances, may order execution' appear before the words 'against the immovable property'. He accordingly

contends that in all cases of execution against immovable property there is now a constitutional requirement of judicial oversight. That is so irrespective of whether the case is one where the debtor's rights to adequate housing are potentially affected by such execution. In other words, even though the reading in of these words in *Jaftha* arose from a finding that the section was unconstitutional 'to the extent' that it permitted a debtor to be deprived of their right to adequate housing without adequate justification in consequence of a sale in execution of their home, it is contended that the effect of reading in words requiring judicial oversight to cure that constitutional problem made that a requirement in respect of all sales in execution of immovable property under the provisions of s 66(1)(a) of the Act.

[15] The broad sweep of this submission is apparent. It means that sales in execution of residential property, even where such sales do not impact in any way on the judgment debtor's right of access to adequate housing, can only be effected under s 66(1)(a) after compliance with the requirement of judicial oversight. An example put to counsel in the course of argument was that of a block of flats owned by the debtor and leased to tenants as an income-producing asset. He submitted that such a property might only be sold in execution under s 66(1)(a) if a court has ordered execution against the property. It necessarily follows from this submission that even premises that are not residential in nature, such as commercial properties, vacant land or agricultural land, cannot be sold in execution of a judgment debt in the magistrates' court without an order being obtained from the court that such execution should be permitted. Not surprisingly the municipality argues for a more restricted interpretation of those orders.

[16] These conflicting contentions raise a question of the proper construction of the judgment and orders granted in *Jaftha*. The approach to be adopted was dealt with in a well-known passage from the judgment in *Firestone South Africa (Pty) Ltd v Gentiruco AG* where Trollip JA said:

'First, some general observations about the relevant rules of interpreting a court's judgment or order. The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. …Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary, qualify, or supplement it. Indeed, it was common cause that in such a case not even the court that gave the judgment or order can be asked to state what is subjective intention was in giving it … But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it.'

[17] I would only add that since that judgment was delivered it has been accepted that in the process of ascertaining the meaning of words in a document the court must pay regard to the whole factual matrix or context surrounding the use of those words and is not restricted to what was formerly described as 'background circumstances', with reference to 'surrounding circumstances' being limited. Also one does not start with some *a priori* view of the meaning but determines the meaning of the words in question in the light of the entire context. When a question of the

interpretation of one of its orders arose before the Constitutional Court, Kriegler J analysed the factual context in which the order was made and what points had been in issue on the papers and in the course of argument and said further:

"Proper interpretation of an order of court also entails determining the legal context within which the words were used.'

That then is the enquiry on which I must embark in order to resolve the dispute between the parties.

[18] I start with the factual context and the question of what the Constitutional Court was asked to decide in *Jaftha.* There can be little doubt about that because at the outset of her judgment on behalf of the court, Mokgoro J spelled out what the case was about. She said:

'[1] This matter is about the question whether a law which permits the sale in execution of peoples' homes because they have not paid their debts, thereby removing their security of tenure, violates the right to have access to adequate housing, protected in s 26 of the Constitution …

[2] Specifically, the case concerns the constitutional validity of s 66(1)(a) and s 67 of the Magistrates' Courts Act 32 of 1944 … which deal with the sale in execution of property in order to satisfy a debt.'

Having thus stated the problem before the court Mokgoro J went on to describe the facts. They showed that both of the applicants were unemployed women who occupied houses purchased with the assistance of a State housing subsidy. They owed relatively small debts and judgments had been taken against them in respect of those debts in the relevant magistrates' court. When execution against movable property proved unsuccessful their homes were attached and sold in execution. It was common cause that in the result they would be disqualified from obtaining other State-aided housing.

It was also common cause that if Mrs Jaftha and Mrs van Rooyen had been evicted because of the sales in execution they would have been left with no suitable alternative accommodation.

[19] Against that background Mokgoro J said:

'[17] The appellants rely on the right of access to adequate housing as protected under s 26(1) of the Constitution. They argue that in terms thereof both the State and private parties have a duty not to interfere unjustifiably with any person's existing access to adequate housing and that s 66(1)(a) of the Act is unconstitutional to the extent of its over-breadth in that it allows a person's right to have access to adequate housing to be removed even in circumstances where it is unjustifiable. This is particularly so in the circumstances of this case, they argue, where the debtor is a recipient of State-subsidised housing and such a person is barred from receiving such assistance in the future, if he or she loses a house pursuant to a sale in execution.'

Having held that s 26(1) of the Constitution imposes a negative obligation on both the State and private persons not to prevent access or impair existing access to adequate housing the conclusion on the question of constitutionality was expressed in the following terms:

'[34] It is not necessary in this case to delineate all the circumstances in which a measure will constitute a violation of the negative obligations imposed by the Constitution. However in the light of the conception of adequate housing described above I conclude that, at the very least, *any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in s 26(1)*.' (Emphasis added.)

The court then considered whether a limitation of the right could be justified under s 36 of the Constitution and concluded that it could not.

[20] These passages make it clear that *Jaftha* was concerned with s 66(1)(a) of the Act in a particular factual context. That context was the sale in execution of peoples' homes in circumstances that could impair their

existing access to adequate housing or prevent them from obtaining access to adequate housing in the future because, for example, as was the case there, the loss of their homes would preclude them from obtaining assistance from the State in order to replace what they had lost. The conclusion that s 66(1)(a) is unconstitutional was limited. It was summarised in the judgment as follows:

'[52] I have held that s 66(1)(a) of the Act is over-broad and constitutes a violation of s 26(1) of the Constitution *to the extent that it allows execution against the homes of indigent debtors, where they lose their security of tenure*. I have held further that s 66(1)(a) is not justifiable and cannot be saved to the extent that it allows for such executions where no countervailing considerations in favour of the creditor justify the sales in execution.' (Emphasis added.)

[21] This understanding of the decision in *Jaftha* accords with that of the Supreme Court of Appeal in *Saunderson.* Cameron JA and Nugent JA, who jointly gave the judgment of the court, noted that the lower court had held that s 26(3) of the Constitution is compromised whenever it is sought to execute against residential property, irrespective of the nature of the property or the circumstances of the owner. They said that this view was misplaced:

'What was in issue in *Jaftha* was … s 26(1) – which enshrines a right of access to adequate housing – and the impact of that right on execution against residential property … Nor did the Constitutional Court decide that s 26(1) is compromised in every case where execution is levied against residential property. It decided only that a writ of execution that would deprive a person of 'adequate housing' would compromise his or her s 26(1) rights and would therefore need to be justified as contemplated by s 36(1). The premise on which the court below proceeded was thus incorrect.'

The SCA pointed out that on the facts in *Jaftha* it had been accepted as self-evident that allowing execution against the applicants' homes would entail a deprivation of adequate housing. It went on to say:

'[17] 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.'

[22] There is not the slightest indication in the judgment in *Jaftha* that the Constitutional Court considered or contemplated the result for which Mr Mkhize contends. Nor is there the slightest indication that the court was intending to invalidate every sale in execution of immovable property in terms of s 66(1)(a) from the date of commencement of the Constitution until the date of the judgment in *Jaftha*. There must have been countless sales in execution of immovable property between 4 February 1997, which is the date of commencement of the Constitution, and 8 October 2004 when the *Jaftha* judgment was delivered. On Mr Mkhize's interpretation of the judgment, in the light of the decision in *Menqa v Markom, supra,* every such sale was void, because there was no judicial oversight of the decision to allow execution in respect of the property. If that is correct it has profound implications for subsequent purchasers, financial institutions that have lent money on the security of such property and businesses that have taken occupation of such properties on the assumption that the prior judicial process of execution was unimpeachable. I can find nothing in the judgment in *Jaftha* that suggests that the court intended to bring about such consequences and it is inconsistent with the approach it had adopted to similar problems in earlier cases.

[23] It is necessary in those circumstances to consider closely the basis upon

which the court in *Jaftha* made the orders that it did. Mokgoro J pointed out that once a judgment is obtained in the magistrates' court then, in terms of s 66(1)(a), the process of execution commencing with the attempt to execution against movables until the final stage of execution against immovable property is administered by officers of the court and the sheriff. It was against that background that the appellants contended that an appropriate remedy would be the provision of judicial oversight over the execution process. Where a person's right of access to adequate housing arose it would then be for the court to order execution if the circumstances of the case made it appropriate. There was no discussion of the implications of the suggested reading in for cases other than those the court was considering. Nor was there any general complaint of the absence of judicial oversight in the process of execution against immovable property. Judicial oversight was raised as a possible remedy not on the basis that its absence leads to constitutional invalidity.

[24] Mokgoro J accepted the submission that the provision of judicial oversight would properly address the constitutional problem and enable there to be a proper balancing of the interests of the creditor and the debtor. She said:

'Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. This 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.'

[25] The learned judge then went on to consider the implications of such a reading-in. She said that it would be unwise to set out all the facts relevant

to the exercise of judicial oversight but that some guidance was necessary. In her discussion of these issues she returned a number of times to the implications of execution on the judgment debtor's access to adequate housing. Thus she said that if there is no other reasonable way in which to satisfy the debt execution will ordinarily be issued unless that would be grossly disproportionate. Then followed these statements:

'This would be so if the interests of the judgment creditor in obtaining payment are significantly less than *the interests of the judgment debtor in security of tenure in his or her home, particularly if the sale of the home is likely to render the judgment debtor and his or her family completely homeless.'*

and:

'It might be quite unjustifiable for a person to lose his or her access to housing where the debt involved is trifling in amount and significance to the judgment creditor.'

and:

'If the judgment debtor willingly put his or her house up in some or other manner as security for the debt, a sale in execution should ordinarily be permitted …'

Lastly she said:

'A final consideration will be the availability of alternatives which might allow for the recovery of debt but do not require the sale in execution of the debtor's home.'

[26] It is apparent from these passages that in formulating the remedy for the constitutional over-breadth of s 66(1)(a) Mokgoro J's attention was firmly focused on the particular constitutional issue before the court. Throughout her judgment she stressed that the court was concerned with the question of the right of access to adequate housing under s 26(1) of the Constitution and concluded that it was 'to the extent that it allows execution against the homes of indigent debtors, where they lose their security of tenure' that the section was over-broad and a violation of s 26(1) of the Constitution. She

was not concerned with a general issue of legal oversight of the process of execution against immovable property in the magistrates' court, which would have engaged an entirely different constitutional guarantee, namely the right of access to courts in s 34. Mokgoro J was undoubtedly aware of that because she had written the judgment for the Court in a case dealing with the issue of the need for judicial oversight of the process of execution. By contrast *Jaftha* case dealt with the negative manifestation of the guarantee of access to adequate housing in terms of s 26(1) of the Constitution and nothing more. It did not deal with sales in execution of commercial, agricultural or mining land or even of residential property in circumstances that do not engage s 26(1) because, for example, the property is not the home of the debtor and is held for commercial or investment purposes. Why then should the orders granted by the Court not be treated as focusing on the possibility of people losing their rights of security of tenure and access to adequate housing in consequence of the process of execution? No other issue was before the court and no other issue was canvassed in the judgment. As it is suggested that the orders are broader than this and that the reading-in is of more general application it is helpful to examine when reading-in is an appropriate remedy.

[27] Reading-in was accepted as a constitutional remedy in the judgment of Ackermann J for the Constitutional Court in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*. The following principles emerge from that judgment. Where it is decided that a particular provision is unconstitutional the Court is obliged to grant an order declaring the provision invalid 'to the extent of its invalidity' and may make any order that is just and equitable in all the circumstances. It may simply

declare the entire provision invalid. However this potentially involves throwing the constitutional baby out with the unconstitutional bathwater. In appropriate circumstances the court can remedy the problem, without the drastic consequence of invalidating the provision in its entirety, by excising from the provision and striking down only those words that render it unconstitutional. Where the constitutional defect lies in an omission severance is inappropriate because one cannot logically sever an omission. Merely to make a declaration of partial invalidity may be ambiguous or ineffectual leaving the offending provision in place in its entirety as occurred in the court below in the *National Coalition* case. In these circumstances the remedy of reading-in may be appropriate. In principle there is no difference between a court rendering a statutory provision constitutional by severing part of it or by reading words into it. The only enquiry – and the risk of this is greater in the case of reading-in than in the case of severance – is whether the remedy chosen by the court constitutes an unconstitutional intrusion into the domain of the legislature. Ultimately the question is whether the reading-in is just and equitable and an appropriate remedy.

[28] Ackermann J summarised his conclusions in the following terms:

[74] The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and, secondly, that the result achieved would interfere with the laws adopted by the Legislature as little as possible. In our society where the statute books still contain many provisions enacted by a Parliament not concerned with the protection of human rights, the first consideration will in those cases often weigh more heavily than the

second.

[75] In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. Even where the remedy of reading in is otherwise justified, it ought not to be granted where it would result in an unsupportable budgetary intrusion. In determining the scope of the budgetary intrusion it will be necessary to consider the relative size of the group which the reading in would add to the group already enjoying the benefits. Where reading in would, by expanding the group of persons protected, sustain a policy of longstanding or one that is constitutionally encouraged, it should be preferred to one removing the protection completely.'

[29] That statement of the relevant principles was particularly focussed on a statutory provision conferring benefits upon certain persons and excluding those discriminated against. In other words it was concerned with a situation where the unconstitutional statutory provision was under-inclusive. However, reading-in is not confined to cases where it is necessary to remedy a provision that is under-inclusive. This emerges from the judgment in *S v Manamela (Director-General of Justice Intervening)* where it was said:

'We would add that reading in is not necessarily confined to cases in which it is necessary to remedy a provision that is under-inclusive. There is no reason in principle why it should not also be used as part of the process of narrowing the reach of a provision that is unduly invasive of a protected right. Reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision into conformity with the Constitution, and doing so carefully, sensitively and in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential. There is no single formula. In appropriate cases it may be

necessary to delete words from a provision and read in other words to make the provision consistent with the Constitution, where the deletion of the words alone would result in the declaration of invalidity to an extent greater than that required by the Constitution. The considerations referred to in the *Gay and Lesbian Immigration* case would then have to be borne in mind. But if they are met there is no reason why this should not be done.'

Lastly, in considering matters of principle, severance and reading-in are generally to be preferred to a declaration of complete invalidity in seeking to bring a law within acceptable constitutional standards.

[30] For present purposes the important point that emerges from these cases is that reading-in, as a remedy, always takes place within the context of the separation of powers that is a fundamental part of our constitutional order. Under the Constitution responsibility for legislation lies with the legislative bodies established in terms of the Constitution. Where a court interferes with legislation it does so within the ambit of its own constitutional responsibility for determining whether legislative provisions comply with the Constitution. Whether it applies a remedy of severance or one of reading-in or a combination of the two its sole aim and function is to render the legislation compliant with the provisions of the Constitution. It is not vested with any general legislative capacity merely by virtue of the fact that it has found a particular statutory provision not to comply with the Constitution. Its function is to frame an appropriate order that remedies the constitutional defect. It is for this reason that stress is laid on the court's obligation to endeavour to be faithful to the legislative scheme. As Ackermann J said:

'The other consideration a court must keep in mind is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the

facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature.'

[31] The need for courts to be sensitive not to trespass into the legislative sphere in formulating constitutional remedies was emphasised in a judgment by the Supreme Court of Canada relied on by Ackermann J. The case is *R v Schachter* where Lamer CJ said:

'Reading in is as important a tool as severance in avoiding undue intrusion into the legislative sphere. As with severance, the purpose of reading in is to be as faithful as possible within the requirements of the Constitution to the scheme enacted by the legislature. Rogerson makes this observation …:

"Courts should certainly go as far as required to protect rights, but no further. Interference with legitimate legislative purpose should be minimised and laws serving such purposes should be allowed to remain operative to the extent that rights are not violated."'

[32] Lamer CJ provided helpful guidance to courts in choosing the appropriate remedy to rectify constitutional inconsistency in a statutory provision. The first stage is to determine the extent of the constitutional inconsistency. A declaration of the inconsistency to the extent thereof must be made. Then in providing an appropriate remedy the court chooses between severance, reading-in or striking down the provision. Here there is a difference between severance and reading-in because in the case of severance the inconsistent part of the statutory provision that is to be severed can be defined with precision. The same cannot necessarily be said of reading-in. The constitutional analysis might not demonstrate with precision what needs to be read into the statute in order to remedy the constitutional inconsistency. Thus, for example, there may be a range of policy choices

available to remedy the problem. In that event the remedial task must be left to the legislature.

[33] The stress that the Canadian court laid on both the accurate identification of the constitutional inconsistency and the selection of a remedy precisely tailored to resolving that inconsistency has been echoed in our own jurisprudence. It is to be seen particularly in those cases where the Constitutional Court has declined to read words into a provision with a view to curing the constitutional inconsistency from which it would otherwise suffer. There is also a third factor that was identified by Lamer CJ. The court must ask itself whether a severance or reading-in would constitute an illegitimate intrusion into the legislative sphere because its effect on what remained thereafter would be to alter the significance of the non-offending portion of the provision so markedly that it would not be safe to assume that the legislature would have passed it in that form. If so it should not invoke these remedies. The same is true if the court is left uncertain as to the legislative purpose.

[34] Overall the court is ever mindful of the need to avoid placing itself into the shoes of the legislature. Ngcobo J made this clear in relation to the unconstitutional provisions of the Pounds Ordinance (KwaZulu-Natal) 32 of 1947,

'[126] The impounding scheme is put in place by ss 16(1), 29(1), 33, 34 and 37 of the ordinance which have been found to be inconsistent with s 34 of the Constitution and, in the case of s 29(1), to be inconsistent with s 9(3) of the Constitution. But, as found earlier, these provisions are an integral part of the impounding scheme of the ordinance. If any one of them is excised, the impounding scheme will become unworkable. And if

these provisions are severed from the ordinance, the remaining provisions of the ordinance will not give effect to the main objects of the ordinance. The main objects are the immediate impoundment of trespassing animals, assessment of damage caused by the trespassing animals and the sale by public auction of such animals to recover impounding fees and expenses. Without these provisions, therefore, the objects of the ordinance cannot be carried out.

[127] *In these circumstances, either reading-in or severance would require extensive interference with the impounding scheme of the ordinance as put in place by the impugned provisions. Indeed, to remedy the inconsistency would require this Court to engage in the details of lawmaking, a constitutional activity assigned to legislatures.*

[128] It would indeed be inappropriate for this Court to seek to remedy the inconsistency in the ordinance. The task of determining what impounding scheme must be put in place is primarily the task of the Legislature and should be undertaken by it. In the process of determining the appropriate impounding scheme, the Legislature will have to make certain policy decisions. For example, the Legislature will have to decide when and how there should be judicial intervention, who may assess damages for trespass, and how and when notification of trespass is to be communicated to stockowners. There is a range of options in this regard. A factor which cannot be ignored is the fact that the Department of Traditional and Local Government Affairs is in the process of drafting a provincial Act which will repeal the ordinance. In these circumstances, it is not desirable that this Court should attempt to revise the ordinance.' (Emphasis added.)

[35] Reading-in is a particularly appropriate remedy when its serves only to add an excluded group to those benefited by a statute, although where the inclusion of the excluded group would impose substantial financial burdens on the State that it might otherwise not have been willing to assume the court will ordinarily refrain from adopting that remedy. It can also be used to add a qualification to a provision that brings an otherwise unconstitutional provision within constitutional bounds or to moderate the content of a provision in order to render it constitutionally compliant. It

should not be used to deal with any matters other than those before the court at the time, even if closely related to them. That is impermissible as was said in the judgment in *Satchwell's* case, when in response to a contention that the Court should grant an order dealing with a matter not specifically raised in the papers, Madala J said that:

'A reading in cannot, however, be used as a "back door" to address issues that were not properly raised in argument about the content of the right.'

Lastly reading-in must be invoked with care to ensure that the line between judicial authority and legislative competence is not crossed.

[36] This approach is consistent with the doctrine of the separation of powers. Under that doctrine as embodied in our Constitution the responsibility for determining whether legislative provisions pass constitutional muster rests with the courts in which judicial authority is vested and ultimately the Constitutional Court. It is the function of the courts to ensure that the limits of public power are not transgressed; to ensure the appropriate division of powers among the various spheres of government and to determine the legality of government and executive action measured against the Bill of Rights. That authority empowers courts to determine the constitutionality of legislative provisions. When they determine that a provision is unconstitutional they are obliged to declare it to be unconstitutional to the extent of that unconstitutionality. In addition they are empowered to formulate a just and equitable remedy to address the unconstitutionality. The remedies of severance and reading-in are mechanisms whereby the courts can render an otherwise unconstitutional provision constitutionally compliant. However, it is at that point that the power of the court to interfere with legislation ends. The power to make

legislation is vested in the legislative bodies established under the Constitution being Parliament, the Provincial Legislatures and the authorities at local government level. Provided that the legislation that they enact passes constitutional muster the courts have no power to interfere therewith. Conceptually at least the dividing line between the judicial authority and the legislative power is clear. Legislative bodies may enact such legislation as they deem fit within their respective constitutional spheres of authority. Courts have no function in determining the content of such legislation. It is not for courts to involve themselves in the development of policy as that is the sphere of the executive. It is only when a provision in the legislation crosses the boundaries established by the Constitution and is declared unconstitutional and then only to the extent of such unconstitutionality, that the courts can influence its terms and those of the legislation of which it forms a part either by striking it down or by amending it through the processes of severance or reading-in.

[37] The factual and legal context of *Jaftha* shows that the issue before the Court was a narrow one. An important aspect of the decision is that the Court invoked the remedy of reading-in in order to resolve the constitutional problem it had identified in s 66(1)(a). The discussion of that remedy shows that when invoked by a court it is always tailored narrowly to the precise constitutional problem before the court as otherwise it involves the court trespassing on the terrain of the legislature. Yet the contention before me is that notwithstanding this the Constitutional Court's orders in *Jaftha* are to be construed as rendering unconstitutional in its entirety a provision that the Court said was unconstitutional only in a limited respect and amending the same provision in relation to matters in respect of which no constitutional

challenge was raised or considered by the Court. What is more in doing so the Court is said to have rendered void a number of sales in execution that suffered from no constitutional flaw and impinged on no constitutional right considered by the Court. That seems an unattractive proposition not least because it involves attributing to our highest court in constitutional cases a failure to heed its own injunctions as to the scope of its powers and the need to respect the constitutional separation of powers between courts and legislative bodies.

[38] That result can only flow from reading the orders made by the Court in isolation and detached from the live issues that were considered by the Court. The contention is that the plain meaning of the orders admits of no ambiguity and hence they must for better or worse be taken at face value. However ambiguity can arise not only because of imperfections or lack of clarity in the language used but also in consequence of reading words out of their relevant context and applying them to situations other than those contemplated by the user of the words. In a contractual context Miller JA said:

‘But it not infrequently happens that the parties use simple words, in themselves unambiguous, but which cannot readily or reasonably be applied in their literal sense to all the situations to which their agreement was directed. In such cases an element of ambiguity arises from the fact that 'an absolutely literal interpretation' may be wholly or substantially impracticable, or productive of startling results which could hardly have been intended. (See MacGillivray and Parkington (ibid para 1040 at 437 - 8).) 'Therefore', say the learned authors, 'some gloss on the words becomes essential and their surface plainness is seen to be illusory”.’

Likewise in the present instance the ambiguity arises not from the language used by Mokgoro J but from the context in which it was used and the

difficulty is created by the attempt to extend what she said to cases she did not consider and that were not before the Court.

[39] None of the academic writings in which *Jaftha's* case is discussed mention this problem. *Manqa*'s case was one involving the person's residence and it was accepted by the court that the sale in execution potentially interfered with his s 26(1) rights. Accordingly the present problem did not arise. The wider problem of a reading-in appearing to apply to circumstances other than those before the court that ordered it is not discussed in general terms in either of the leading South African textbooks on constitutional law. Nor have I been able to find any reference to this problem in discussions of reading-in as a remedy in textbooks from other countries. In other words it appears to be novel, untrammelled by authority and lacking guidance from academic writers.

[40] In those circumstances the question must be approached as one of principle. In my view the orders in *Jaftha* are ambiguous because they are capable of being construed as being generally applicable to all cases of execution against immovable property in the magistrates' court, whereas the case concerned only the possibility of such execution infringing the debtor's right of access to adequate housing in terms of s 26(1) of the Constitution. The proper approach to adopt is that which the SCA adopted in *Saunderson's* case namely to focus on the issue that was raised in *Jaftha* and to construe its judgment and the orders it made in the light of that issue. The SCA quite clearly said that the Constitutional Court did not 'decide that s 26(1) is compromised in every case where execution is levied against residential property'. The present is a case where it is not compromised or

even engaged. It would be wrong to construe the declaration made and reading-in decreed by the Constitutional Court as applying to sales in execution in the magistrates' court that it did not consider or hold to suffer from a constitutional defect. That would amount to saying that the Court has amended s 66(1)(a) in the absence of a constitutional foundation for doing so. Such a result would infringe the doctrine of the separation of powers that is fundamental to our constitutional order.

[41] In my view the orders made by the Constitutional Court should be construed as applying only when the immovable property in respect of which execution is sought is the debtor's home. That is a necessary inference from reading them in the context of the judgment as a whole. Whether they should be read even more narrowly because, as the SCA pointed out in *Saunderson*, the question whether a person's s 26(1) right is potentially affected by execution against residential property is a peculiarly fact-bound enquiry, is unnecessary for me to decide. If this inference is spelled out in words it is as if the orders read as follows:

'1. The order of the High Court is set aside and replaced with the following order:

1.1 The failure to provide judicial oversight over sales in execution against immovable property *constituting the homes* of judgment debtors in s 66(1)(a) of the Magistrates' Courts Act 32 of 1944 is declared to be unconstitutional and invalid.

1.2 To remedy the defect s 66(1)(a) of the Magistrates' Courts Act 32 of 1944 is *in such cases* to be read as though the words 'a court, after consideration of all relevant circumstances, may order execution' appear before the words 'against the immovable property of the party'.'

(The additional words are in italics.)

[42] In the present case, whilst the property in question is a residential

property, it was not and never has been Mr Mkhize's home. There was accordingly no constitutional requirement of legal oversight before the clerk of the court issued a warrant of execution in respect of that property pursuant to the judgment obtained by the municipality and the sheriff's *nulla bona* return in respect of his endeavours to execute against movable property. As no other attack on the validity of the sale in execution has been pursued the proper finding is that the sale was valid and Mr Mkhize's claim under this head must fail.

[43] That conclusion does not result in the final disposal of this action because there remains the third alternative claim, which is a claim for damages. The proper order to make is therefore one dismissing the first alternative claim and otherwise postponing the action *sine die*. That will enable the parties to consider their situation and determine the future of the balance of this action. For that reason I do not propose to deal with a notice of intention to amend delivered on behalf of the fourth and fifth defendants on the morning of the trial. Whether such an amendment is necessary can be considered in the light of this judgment.

[44] There remains only the issue of costs. As the action remains alive it is not appropriate at this stage to deal with any costs save those in relation to the present hearing and those consequent upon the aborted hearing last year when the trial had to be postponed in order to effect the joinder of the Standard Bank. Those costs can conveniently be dealt with at this stage, as it was the intention of the parties on that occasion to argue the point that has now been argued and determined by me. The failure to join the bank appears to have arisen by virtue of an oversight on the part of all the parties, none of

which recognised the need for such joinder in the light of the bank's potential interest in the relief being sought. In my view therefore it would be wrong to burden any one party with those costs merely because of their lack of success in arguing the point on the merits. I accordingly think that each party should bear his, her or its own costs in relation to the costs reserved when the trial was adjourned. The costs of the argument before me must follow the result.

[45] I accordingly make the following order:

(a) The plaintiff's first alternative claim is dismissed.

(b) The plaintiff is to pay the first defendants' costs of arguing the first alternative claim on the basis of a stated case, including the costs of preparation of the stated case and other costs of preparation occasioned thereby.

(c) Each party to the action is to pay his, her or its own costs occasioned by the adjournment of the trial on 11 May 2009.

(d) The remaining issues in the trial are adjourned *sine die.*

DATE OF HEARING	19 APRIL 2010
DATE OF JUDGMENT	21 MAY 2010
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