

**THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

Reportable

CASE NO: 358/05

In the matter between :

**THE STANDARD BANK OF SOUTH AFRICA
LIMITED**

Appellant

- and -

RUDIGER MARSHALL SAUNDERSON

First Respondent

RICHMOND HEERENHUIS CC

Second Respondent

HENRY TREVOR ADONIS

CAROL ANN ADONIS

Third respondents

Before: HOWIE P, CAMERON, NUGENT, JAFTA & MLAMBO JJA

Heard: 23 NOVEMBER 2005

Delivered: 15 December 2005

Summary: Execution against mortgaged property – whether mortgagee required to justify order constitutionally.

J U D G M E N T

CAMERON and NUGENT JJCAMERON and NUGENT JJA:

[1] The mortgage bond is an indispensable tool for spreading home ownership. Few people can buy a home immediately: by providing security for a loan, the mortgage bond enables them to do so. There can hardly be a private residence in this country that has not at one time or another been mortgaged, nor a home-owner who has not at some time been a mortgagor. We were told by the appellant bank that in August 2005 loans secured by mortgage bonds on residential property in this country amounted to almost R500 billion.

[2] A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property, that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later when wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid. The right to continued ownership, and hence occupation, depends on repayment. The mortgage bond thus curtails the right of property at its root, and penetrates the rights of ownership, for the bond-holder's rights are fused into the title itself.

[3] The value of a mortgage bond as an instrument of security lies in confidence that the law will give effect to its terms. That confidence has been shaken by a recent decision of the Cape High Court that is the subject of this appeal. The decision must be seen against the background of the ordinary legal process for recovering debts. When judgment is given against a debtor and the debtor fails to satisfy the judgment debt the process for recovery of the judgment

debt is by execution against the judgment debtor's belongings. It is a long-standing practice of our courts that execution must be directed first against the debtor's movable property and only thereafter, if the movables are insufficient, against immovable property,¹ but a court may alter that sequence. This occurs when the debt is secured by a mortgage bond for the secured creditor will then ordinarily ask the court in advance

'...to dispense with the circumlocution of having to take execution against the movable property first and only on that property failing to realize the money sum, then to have recourse against the immovable property. When an order is granted declaring executable the property specially hypothecated that order permits the grantee, the creditor, to take his execution straightaway against the immovable property.'²

[4] In the cases now before us the bank issued summons against nine borrowers who defaulted on their loans. In each case the debt was secured by a mortgage bond. In its summonses the bank asked for judgment against each of the debtors for the amount of their respective debts and, in accordance with the ordinary procedure, for ancillary orders declaring the mortgaged property to be executable. Eight of the defendants failed to defend the actions and in accordance with Rule 31(5) the bank applied to the registrar of the court for judgment by default. The Deputy Judge President instructed that such matters not be disposed of by the registrar until further notice and they were enrolled for hearing in open court. In the ninth case the defendant entered an appearance to

¹ Van Zyl *The Judicial Practice of South Africa* 2ed 205-208; *Gerber v Stolze* 1951 (2) SA 160 (T) 171-173; *Sandton Finance (Pty) Ltd v Clerk of the Magistrate's Court, Johannesburg* 1992 (1) SA 509 (W) 511B-C.

² *Gerber v Stolze*, supra, 172F-G.

defend whereupon the bank applied for summary judgment and that application was set down for hearing together with the applications for default judgment.

[5] The court below (Blignault J) granted judgment in each case for the amount of the outstanding debt but declined to order the mortgaged properties to be executable. Relying on the decision of the Constitutional Court in *Jaftha v Schoeman*³ he concluded that the summonses were deficient in that they lacked sufficient allegations to show that orders for execution were constitutionally permissible.

[6] With the leave of the court below the bank now appeals against the refusal to grant orders for execution in three of the applications for default judgment. (The summary judgment matter has fallen away.) Hundreds of similar cases come before the courts each year and this is a test case. None of the defendants opposed the appeal but Mr A Katz, Mr AM Stewart, Mr M du Plessis and Mr S Budlender, led by Mr G Marcus SC, generously responded to our request to act as *amici curiae*. Their able and helpful assistance has been indispensable to a proper consideration of the matter. We are also appreciative of the manner in which Mr Wallis SC, assisted by Mr FSG Sievers, presented the case for the bank.

[7] Because the court below based its conclusions on the judgment of the Constitutional Court in *Jaftha* it is as well at the outset to examine how that case arose and what was decided. Mrs Jaftha lived in a modest house in Prince Albert, built by the state as part of a national housing scheme, which she

³ 2005 (2) SA 140 (CC).

acquired with a state subsidy. She incurred a modest debt that was not secured and was unrelated to her property. This she was unable to repay and her creditor took judgment against her by default in the magistrates' court. When her house was sold in execution and she was left homeless her case received the attention of the Cape High Court⁴ and later the Constitutional Court.⁵

[8] The process for execution in the magistrates' courts is similar to that in the high courts. Once judgment has been granted (in undefended actions for a liquidated debt it may be granted by the clerk of the court)⁶ and the judgment debt is not paid the judgment creditor is entitled to execute against the debtor's property in satisfaction of the judgment. We have drawn attention to the practice that requires execution to be levied first against movables before proceeding against immovable property unless a court orders otherwise. That practice is embodied in s 66(1)(a) of the Magistrates' Courts Act 32 of 1944, the material portions of which (before the decision in *Jaftha*) read 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... , or the court, on good cause shown, so orders, then against the immovable property of the party against whom such judgment has been given ...'

[9] The process of execution is initiated when the clerk of the court issues a writ of execution, which authorises the sheriff to attach and sell property of the

⁴*Jaftha v Schoeman; Van Rooyen v Stoltz* 2003 (1) BCLR 1149 (C).

⁵ The circumstances in which that occurred are set out fully in the judgment of the High Court and need not be repeated.

⁶ Rule 12(1)(c).

defendant.⁷ In keeping with s 66(1)(a) of the Act, the writ will at first be confined to movables and only once it is shown that they are insufficient will a writ be issued for execution against immovable property. Before the decision in *Jaftha* an ordinary judgment creditor (one whose claim is not secured by a mortgage bond – as was the case there) was entitled as of right to a writ of execution against immovable property once the debtor had insufficient movables to satisfy the debt, and the clerk of the court had no discretion to refuse the writ. It was in those circumstances that the clerk issued the writ in *Jaftha* and it became the focus of the subsequent controversy.

[10] After Mrs Jaftha's house was sold in execution she applied to the Cape High Court for orders setting aside the writ and the consequent sale and for an order preventing her eviction. Simultaneously she applied for various forms of relief aimed at declaring parts of the Act – and in particular that part of s 66(1) (a) entitling a judgment creditor to a writ of execution against immovable property without a prior court order once insufficient movables have been found to satisfy the judgment debt – to be inconsistent with the Constitution and invalid.⁸ With the consent of the parties the court set aside the writ and the sale in execution and granted an interdict against eviction.⁹ What remained was whether parts of the Act were unconstitutional and invalid.

[11] The high court in *Jaftha*, after weighing the contested provisions of the Act against the rights protected by s 26(1), refused Mrs Jaftha the relief claimed,

⁷ Rule 36(1).

⁸ Judgment of the High Court para 21.

⁹ Judgment of the High Court paras 13 and 14.

but on grounds that fell within a narrow compass. The court held that the ownership of immovable property (in contradistinction to its occupation) is not encapsulated by the right of access to adequate housing and that in consequence the process of execution did not infringe that right.¹⁰ On that basis, the court continued,

‘... the consequences of the sale in execution and the transfer of the immovable property that constitutes the home of a person in terms of s 66(1)(a) [of the Magistrates’ Courts Act] do not conflict with the provisions of section 26. It follows logically that if a transfer pursuant to a sale in execution of such immovable property does not conflict with the right of access to adequate housing encapsulated in section 26, the issuing by the clerk of the court of a warrant of execution against such property, a fortiori, does not do so either ...’

[12] It was this decision that was taken on appeal to the Constitutional Court. The Constitutional Court found that s 26(1) of the Constitution, which enshrines ‘the right to have access to adequate housing’, embodies both a positive and a negative aspect. Positively, the provision obliges the state to take measures to achieve the progressive realisation of the right. In its negative aspect, the right operates horizontally: it obliges private parties not to interfere unjustifiably with any person’s existing access to adequate housing.¹¹ After considering what the negative component encompasses Mokgoro J, writing for the court, said that it was not necessary to delineate all the circumstances in which a measure will constitute a violation of that right but that

¹⁰ Judgment of the High Court para 47.

¹¹ Paras 31-33.

‘...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)’¹².

She added that such a measure may nonetheless be a reasonable and justifiable limitation of the right of access to adequate housing as contemplated by s 36(1). But whether or not the measure is justified in a particular case requires a balancing of various interests and it was because s 66(1)(a) of the Act did not provide the opportunity for a court to do that before execution ensued (because the provision entitled an ordinary judgment creditor to a writ as of right once no movables were found to satisfy the judgment) that the section was constitutionally objectionable. That was remedied by reading into s 66(1)(a) a requirement that a writ of execution against immovable property could issue only upon an order of the court after consideration of all relevant circumstances.¹³

[13] In the present case the court below considered that the Constitutional Court held that s 26 is compromised whenever it is sought to execute against residential property – irrespective of the nature of the property or the circumstances of the owner – and that in all such cases it must be shown that execution is justified under s 26(3) after taking account of all relevant circumstances. It referred to various factors that the Constitutional Court had considered to be relevant to the enquiry into justifiability (although the Constitutional Court was referring to justifiability under s 36(1) and was not

¹² Para 34.

¹³ Para 67.

referring to s 26(3)) and then went on to consider whether sufficient had been alleged to justify orders for execution. It concluded

‘that in order to comply with the ordinary principles of pleading, plaintiff’s summons should contain a suitable allegation to the effect that the facts alleged by it (which should be identified) are sufficient to justify an order in terms of s 26(3) of the Constitution. As presently formulated plaintiff’s summons in each of these matters lacks this essential allegation. Plaintiff’s prayers for orders permitting execution against the immovable properties of the defendants can accordingly not succeed.’

[14] What until now has been routine practice in the courts has thus become controversial because of uncertainty as to what must be alleged to justify an order for execution.¹⁴ In a letter requesting that preference be given to this appeal the appellant’s attorney recorded that ‘[i]n the Cape matters have all but ground to a halt with regard to applications for default judgment where an order is sought to declare immovable property executable’. In the light of the Cape decision, a similar case was considered by the full court in Johannesburg, in *Nedbank Limited v Mortinson*.¹⁵ In delivering the full court’s judgment, Joffe J assumed (but did not decide) that the rights conferred by s 26 would be compromised and would require justification whenever it was sought to execute against residential property. He disagreed, however, with Blignault J that the creditor’s summons must justify in advance any limitation on s 26 rights. He also disagreed with the conclusion that the registrar had no power to grant the order in question. The full court nevertheless issued practice directions for

¹⁴ See *Standard Bank of South Africa Limited v Adams* Case No 9007/05 26 October 2005; *Absa Bank Limited v Xonti* Case No 7013/2005 28 October 2005.

¹⁵ Case No 4183/05 23 August 2005.

guidance in future cases. The Natal High Court has similarly issued practice directions.

[15] In our view the way the court below interpreted the decision in *Jaftha* was misplaced. What was in issue in *Jaftha* was not s 26(3) of the Constitution but rather s 26(1) – which enshrines a right of access to adequate housing – and the impact of that right on execution against residential property. (Section 26(3), as elaborated by the legislature in the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, becomes relevant in the event of eviction consequent upon a sale in execution,¹⁶ and was not in issue in *Jaftha*.) 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.

[16] It must be borne in mind that s 26(1) does not confer a right of access to housing *per se* but only a right of access to ‘adequate’ housing; and this concept of necessity is relative (see *Government of the Republic of South Africa v Grootboom*).¹⁷ In *Jaftha* it seems never to have been disputed and was indeed accepted as self-evident by both the high court and the Constitutional Court that the forfeiture in question entailed a deprivation of ‘adequate housing’. The facts

¹⁶ *Bekker v Jika* 2003 (1) SA 113 (SCA).

¹⁷ 2001 (1) SA 46 (CC) esp paras 36 and 37.

before the Constitutional Court show why this was so.¹⁸ In the light of the high court's approach, what was contentious was whether a threat to ownership (as opposed to occupation) of a residence that constituted 'adequate housing' was itself invasive of s 26(1), and the Constitutional Court found that it was.

[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.

[18] The situation this case presents is thus radically different from that before the Constitutional Court in *Jaftha*. There, the sale in execution deprived the debtor of title to the home a state subsidy enabled her to acquire because she was unable to pay a relatively trifling extraneous debt, and no judicial oversight was interposed to preclude an unjustifiably disproportionate outcome. The judgment creditor in *Jaftha* was not a mortgagee with rights over the property that derived from agreement with the owner. By contrast, the property owners here have willingly bonded their property to the bank to obtain capital. Their debt is not extraneous, but is fused into the title to the property. The effect of s 26(1) on such cases was not considered in *Jaftha*. Observations were made in the judgment concerning mortgage bonds, but that was in the context of the kind

¹⁸ Those facts are outlined more fully in the judgment of the High Court.

of interests that might need to be considered once it was shown that s 26(1) was in fact compromised.

[19] The present case does not require us to decide whether s 26(1) may be compromised when the rights conferred by a mortgage bond are sought to be enforced in cases where the property concerned does in fact constitute ‘adequate housing’. But even accepting for present purposes that execution against mortgaged property could conflict with s 26(1) such cases are likely to be rare. It is particularly hard to conceive of instances where a mortgagee’s right to reclaim the debt from the property will be denied altogether; and it is therefore not surprising that the Constitutional Court noted in *Jaftha*¹⁹ that in the absence of abuse of court procedure – and none is alleged here – a sale in execution should ordinarily be permitted against even a home bonded for the debt sought to be reclaimed. Nor can the approach differ depending on the reasons the property owner might have had for bonding the property, or the objects on which the loan was expended. Mr Marcus for the *amici*, pointing out that the instruments before us are covering bonds (as mortgage bonds usually are), which observe no such distinctions, suggested in effect that execution should ‘ordinarily’ follow only where the bond was taken out to fund inessential lifestyle choices; but this gives no weight to the fact that in all cases the bondholder’s claim in its essence is against the property, and that its entitlement springs from a limitation in title the owner chose to accept in obtaining the loan.

¹⁹ Para 58.

[20] Though it is more easily possible to contemplate a court delaying execution where there is a real prospect that the debt might yet be paid, even in such cases the approach to pleading does not change. A plaintiff is called to justify an infringement of a constitutionally protected right only once it has been established that infringement has in fact occurred. As pointed out by Stuart Woolman in *M. Chaskalson et al Constitutional Law of South Africa* 12-2:

‘Constitutional analysis under the Bill of Rights takes place in two stages. First, the applicant is required to demonstrate that her ability to exercise a fundamental right has been infringed ... If the court finds that the law [or measure] in question infringes the exercise of the fundamental right, the analysis may move to its second stage. In this second stage ... the party looking to uphold the restriction ... will be required to demonstrate that the infringement is justifiable.’

Until the defendants in the cases before us could show that orders for execution would infringe s 26(1) the bank was not called on to justify the grant of the orders. The sole fact that the property is residential in character is not enough to found the conclusion that an infringement of s 26(1) will necessarily occur.

[21] None of the defendants have alleged, still less shown, that an order for execution would infringe their rights of access to adequate housing, and no reason presently exists to believe that it would. In those circumstances the appellant was not called upon to justify the orders it sought and the orders ought to have been granted.

[22] There are two further issues. The first is ancillary. That is whether the registrar of the high court was authorised to grant the orders declaring the

properties executable. Although it does not strictly arise in this appeal it is desirable that there should be certainty on that issue. In our view the registrar was entitled to dispose of the applications for orders of execution by default. The reason lies in what has already been decided. The present are not cases like *Jaftha*, where a writ of execution was sought from the registrar after an attempt to execute against movables, and where the Act, pre-*Jaftha*, assigned to the registrar a mechanical role in circumstances where the exercise of a judicial discretion after consideration of all relevant circumstances was essential. (Rule 45(1) of the High Court rules similarly permits a writ to be issued in such circumstances without judicial scrutiny but as the validity of that rule is not before us it is expressly left open.)

[23] The cases before us concern the performance by the registrar of a function that the court would otherwise perform – the grant of an order permitting immediate execution against immovable property. This Rule 31(5) permits the registrar to do.²⁰ We have already pointed out that a plaintiff will have to justify the grant of such a writ only where the defendant has contested its validity because of an alleged infringement of s 26(1). By definition, the question whether the grant of a writ is constitutionally justified can arise only in cases the defendant formally defends, or at least lodges an informal objection to grant of the order of execution – and in such cases Rule 31(5) in any event precludes the registrar from giving the order sought and requires the matter to be referred to a judge sitting in open court.

²⁰ A claim for an order for immediate execution is claim for a liquidated demand: *Entabeni Hospital Limited v Van der Linde; First National Bank of SA Ltd v Puckriah* 1994 (2) SA 422 (N) 424H-I.

[24] But in cases where the constitutional validity of an order of execution is not disputed, there can be no objection to the registrar entering judgment in accordance with Rule 31(5). We therefore cannot accept the submission of the *amici* that the registrar's performance of this function intrudes on the duties that the Constitution reserves to the judiciary. What is required of the registrar in such cases is neither the exercise of a judicial discretion nor the mechanical grant of an order in circumstances where that would be constitutionally impermissible. All that is required of the registrar is a formal evaluation of whether the summons discloses a proper cause of action – that is a task quite distinct from evaluation of the kind reserved for a court and does not involve the registrar in performing a judicial function. No doubt registrars ought in any event to be cautioned to refer matters for hearing in open court even where a defendant raises a constitutional objection informally by approaching the registrar and objecting to the order.

[25] We have pointed out that the application of the right of access to adequate housing in the case of bonded property has not yet been explored by our courts. Though it is not a question that is before us in this case it is possible that s 26(1) may be infringed by execution. Bearing in mind that in most cases where an order for execution is sought the defendant has no defence to the claim for payment, and is thus unlikely to seek or obtain legal advice, it seems to us desirable that the defaulting debtor should be informed, in the process of initiating action, that s 26(1) may affect the bond-holder's claim to execution. Should it be held that the negative obligation of s 26(1) binds even the bond-

holder, the debtor would have the right to invoke circumstances that may persuade a court to grant extenuation in the execution of the order (albeit that the bond-holder's summons need not attempt to justify in advance a possible constitutional infringement). Section 172 permits a court when deciding a constitutional matter to make an order that is 'just and equitable' and it is in our view 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. It is plainly desirable that this development should be prospective only, and it is as well to make clear that existing summonses are not invalid for want of reference to s 26(1).

[26] Since none of the defendants in the cases before us contested the constitutional validity of the orders the bank sought there were no proper grounds to withhold the orders and the registrar was entitled to have issued them. Since the summonses were not deficient the appeal must succeed.

[27] The order is as follows:

1. In each case the appeal is upheld and the order of the court below is supplemented with the following order:

'The property that is the subject of the mortgage bond is declared to be specially executable.'

2. There is a practice direction in the following terms:

The summons initiating action in which a plaintiff claims relief that embraces an order declaring immovable property executable shall, from the date of this judgment, inform the defendant as follows:

‘The defendant’s attention is drawn to section 26(1) of the Constitution of the Republic of South Africa which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the court.’

E. CAMERON
JUDGE OF APPEAL

R.W. NUGENT
JUDGE OF APPEAL

HOWIE P)
)
JAFTA J) CONCUR
)
MLAMBO J)