THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 628/2010

In the matter between:

STIPHEN MKHIZE	**Appellant**
and	
UMVOTI MUNICIPALITY	**First Respondent**
NALINI KHAN	**Second Respondent**
NAVIN CHETTY	**Third Respondent**
VUSI CORNELIUS DLAMINI	**Fourth Respondent**
DAPHNE HLENGIWE DLAMINI	**Fifth Respondent**
NEL & STEVENS	**Sixth Respondent**
THE SHERIFF OF THE MAGISTRATE'S COURT UMVOTI	**Seventh Respondent**
REGISTRAR OF DEEDS	**Eighth Respondent**

Neutral citation:	***Mkhize v Umvoti Municipality* (628/2010) [2011] ZASCA 184 (30 September 2011)**
Coram:	Navsa, Lewis, Snyders, Malan JJA and Meer AJA
Heard:	**8 September 2011**
Delivered:	**30 September 2011**

Summary: Right to adequate housing in terms of s 26(1) of Constitution –

interpretation of judgment and order in *Jaftha v Schoeman & others; Van Rooyen v Scholtz & others* 2005 (2) SA 140 (CC)

ORDER

On appeal from: Kwa-Zulu-Natal High Court, Pietermaritzburg (Wallis J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

MALAN JA (NAVSA, LEWIS, SNYDERS JJA and MEER AJA concurring)

[1] This appeal concerns the construction of the judgment and order of the Constitutional Court in *Jaftha v Schoeman & others; Van Rooyen v Scholtz & others*.[1] The question is whether the order made in *Jaftha* in respect of s 66(1)(a) of the Magistrates' Court Act 32 of 1944 requires judicial oversight in all cases of execution against immovable property or only in those where the debtor can establish an infringement or potential infringement of the right of access to adequate housing as protected by s 26(1)[2] of the Constitution. In the court below Wallis J found

[1] *Jaftha v Schoeman & others; Van Rooyen v Scholtz & others* 2005 (2) SA 140 (CC). *Jaftha* has been construed by several courts, including the court below (*Mkhize v Umvoti Municipality & others* 2010 (4) SA 509 (KZP)): *Reshat Schloss v Gordon Taramathi & others* Case 2657/2005 (C) 10 October 2005; *Standard Bank of South Africa Ltd v Saunderson & others* 2006 (2) SA 264 (SCA); *ABSA Bank Ltd v Ntsane & another* 2007 (3) SA 554 (T); *Standard Bank of South Africa v Adams* 2007 (1) SA 598 (C); *Nedbank Ltd v Mashiya & another* 2006 (4) SA 422 (T); *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W); *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 (5) SA 610 (C); *First Rand Bank Ltd v Folscher & another and similar matters* 2011 (4) SA 314 (GNP); *Nedbank Ltd v Fraser & another and four other cases* 2011 (4) SA 363 (SGJ) and recently, *Gundwana v Steko Development & others* 2011 (3) SA 608 (CC).

[2] Section 26 of the Constitution provides: 'Housing.—(1) Everyone has the right to have access to adequate housing.'

that the order in *Jaftha* was made in a particular factual context, that is where it could be demonstrated[3] that the sale concerned execution against peoples' homes in circumstances that could impair their existing or potential access to adequate housing.[4]

[2] In *Jaftha* the Constitutional Court held that s 66(1)(a) was unconstitutional in some respects. It remedied the defects by reading in words into the subsection providing for judicial oversight of the process of execution against immovable property. The order of unconstitutionality made in *Jaftha* was not qualified and is retrospective from the date of commencement of the Constitution.[5] The relevant events giving rise to this case all occurred before the judgment in *Jaftha* was delivered.

[3] The order made in *Jaftha* reads 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 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".'

[4] With the words read in s 66(1)(a) provides as follows:

'**Manner of execution** — (1) (a) Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then *a court, after consideration of all relevant circumstances, may order execution* against the immovable

[3]Para 13.
[4]Para 20.
[5]*Menqa & another v Markom & others* 2008 (2) SA 120 (SCA) para 10; *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC) paras 25-30; *Mvumvu & others v Minister of Transport & another* 2011 (2) SA 473 (CC) para 44 and see s 172(1)(b)(i) of the Constitution.

property of the party against whom such judgment has been given or such order has been made.' (The words read in are in italics.)

[5] Wallis J held that the order in *Jaftha* was ambiguous because it was capable of two constructions, that is as being applicable to all cases of execution against immovable property, and as being applicable only to execution against immovable property infringing the debtor's right of access to adequate housing in terms of s 26(1) of the Constitution.[6] Because the order was wide and affected also sales in execution which did not suffer from any constitutional defect, he construed it as applying only to cases where the immovable property in respect of which execution is sought is the debtor's home.[7] He considered that the court in *Jaftha*, by reading in the words referred to into s 66(1)(a), did not address the precise constitutional problem before it but went further and thereby transgressed on the terrain of the legislature and infringed the principle of the separation of powers.[8]

[6] The plaintiff in this matter, Mr Stiphen Mkhize, who is the appellant before us, relied on three different claims, that is a main claim and two alternative claims. The main claim and the second alternative claim were abandoned. The first alternative claim remained and was separated in terms of Rule 33(4) from an alternative claim for damages. The cause of action of the first alternative claim is that the sale in execution of the plaintiff's immovable property was invalid because the warrant authorising execution was issued by the clerk of the Magistrates' Court and without the judicial supervision required by *Jaftha*, and, consequently, was a breach of the plaintiff's right to adequate housing in terms of s 26(1). The first alternative claim came before the court below by way of a stated case.

[7] The plaintiff and his late wife, who were married in community of property, owned the immovable property which is the subject of the action. They had purchased it in 1998 for R25 000. It was vacant land at that time but they built a house on it although they did not complete it. The plaintiff's wife passed away in 2000 and the plaintiff was the sole heir of her estate. The plaintiff never resided in

[6]Para 40.
[7]Paras 22, 37, 38 and 41 relying inter alia on *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) para 7 and *Ex parte Women's Legal Centre: In re Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 1288 (CC) para 11.
[8]Para 37.

the house but lived in another house also owned by him. He also owned other properties. The plaintiff was indebted to the first respondent, the Umvoti Municipality, in respect of rates and other charges relating to the immovable property. The Municipality instituted action against the plaintiff who did not defend the action. Judgment by default was entered against the plaintiff by the clerk of the Magistrates' Court for the district of Umvoti for the sum of some R14 593 with costs and interest. A warrant of execution was issued against his movable property leading to a *nulla bona* return of service. The clerk thereupon issued a warrant to execute against immovable property, the property was attached and the sale in execution advertised.[9]

[8] On 12 December 2003, the property was sold in execution by the Sheriff to the second defendant (the second respondent) as a 'principal for the benefit of a third party' for R8 000. It was subsequently transferred to the third defendant (the third respondent), who is the brother of the second defendant. At the material times the second defendant was employed as a credit controller by the Municipality. On 28 August 2004, the third defendant sold the property to the fourth and fifth defendants (the fourth and fifth respondents) for R350 000 and it was subsequently transferred to them. The proceeds of the sale to the fourth and fifth defendants were, at the request of the third defendant, paid to the second defendant. The fourth and fifth defendants made improvements to the house built on the property. The plaintiff made payments to the Municipality and their attorneys before the sale in execution in order to reduce his debt.

[9] It was contended on behalf of the plaintiff that the judicial oversight envisaged in *Jaftha* was required in all cases of execution against immovable property in the magistrates' court. That, the plaintiff submitted, was the position whether or not the right to adequate housing was impaired. In support of this contention the plaintiff relied on the judgment of the Constitutional Court in *Gundwana*.[10] On the other hand, the submission on behalf of the Municipality and the other defendants was that

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[9]The clerk of the court acted pursuant to rule 36(1) of the Magistrates' Courts Rules of Court first published under *GN* R1108 in *RG* 980 of 21 June 1968. These rules were replaced by the Rules regulating the Conduct of Proceedings in the Magistrates' Courts of South Africa *GN* 33487 in R740 of 23 August 2010. Rule 36(1) of the new rules is worded the same as the original rule 36(1).
[10]*Gundwana v Steko Development & others* 2011 (3) SA 608 (CC).

Jaftha and *Gundwana* were concerned only with cases where the right to adequate housing was impaired or potentially impaired. The words read in into s 66(1) should therefore be confined to cases where execution is sought against immovable property and the property constitutes the home of the person concerned. They submitted that the requirements set in *Jaftha* did not have to be complied with because the plaintiff did not reside on the property. The fourth and fifth defendants further relied on the fact that they were purchasers of the house in good faith. The plaintiff thus contended that the sale in execution as well as the subsequent sales should be set aside and the house transferred to the plaintiff. The defendants asked for the dismissal of the plaintiff's claim. The parties have agreed that should the court find for the plaintiff, but hold that he is entitled to damages only, an inquiry into such damages should stand over for later adjudication.

[10] In construing the judgment and order in *Jaftha*, the court below[11] proceeded on the basis that, given the factual context, they admitted of an ambiguity. Following the judgment of this court in *Saunderson*,[12] Wallis J held that the approach to be adopted was to focus on the issue that was raised in *Jaftha* and to construe its judgment and order in view of that issue.[13] Section 26(1) of the Constitution is not compromised in every case where execution is levied against immovable property:[14]

'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.'

[11] The two applicants in *Jaftha* were unemployed women who occupied homes purchased with the assistance of a State housing subsidy. They owed relatively small debts that were not related to their purchase of their homes. Judgment was taken against them and, when execution against their movables proved to be

[11]See paras 17 ff of the judgment.
[12]*Standard Bank of South Africa Ltd v Saunderson & others* 2006 (2) SA 264 (SCA) paras 15 and 17 and also *Menqa & another v Markom & others* 2008 (2) SA 120 (SCA) paras 8, 21 and 29.
[13]Para 40.
[14]Para 40.

unsuccessful, their homes were attached and sold in execution. It was clear that if they were evicted because of the sales in execution they would have been left with no adequate accommodation. Wallis J, after referring to certain passages in the judgment, found that *Jaftha* was concerned with s 66(1)(a) in a particular factual context requiring a 'fact-bound inquiry' to ascertain whether s 26(1) rights were compromised.[15] The conclusion of *Jaftha* that s 66(1)(a) was unconstitutional was therefore a limited one applicable only to execution against peoples' homes.

[12] In considering whether the order in *Jaftha* was unconstitutional, Wallis J discussed the purposes of the constitutional remedies of reading in, reading down, severance or notional severance and concluded that it always took place within the context of the separation of powers:[16]

'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 are 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.'

The dominant inquiry, he continued, is whether the chosen remedy is an unconstitutional intrusion in the domain of the legislature. Reading in must conform and be consistent with the Constitution and its fundamental values and should interfere as little as possible with the laws adopted by the legislature. Words should not be read in unless a court can define with sufficient precision how the statute ought to be extended. Deference to the legislature and restraint are called for to avoid a court's engagement in law-making.[17]

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[15] Para 41. See paras 56 to 59 of *Jaftha* and *Standard Bank of South Africa Ltd v Saunderson & others* 2006 (2) SA 264 (SCA) para 17; *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W), [2006] 2 All SA 506 (W).

[16] Para 30.

[17] Paras 30 ff and see *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) paras 61 ff; *S v Manamela & another (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) paras 54 ff; *Satchwell v President of the Republic of South Africa & another* 2002 (6) SA 1 (CC) paras 27 ff; *Zondi v MEC for Traditional and Local Government Affairs & others* 2005 (3) SA 589 (CC) paras 121 ff.

[13] Because the right of the plaintiff to adequate housing was not compromised or engaged in the matter Wallis J declined the relief sought. He came to essentially the same conclusion as the court in *Sauderson* where Cameron and Nugent JJA stated:[18]

'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. … 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).'

I agree with these observations. This is also the understanding of the effect of *Jaftha* in several judgments including that of the court below,[19] and is confirmed by the amendment, made pursuant to the Rules Board for Courts of Law Act 107 of 1985, to Rule 46 of the Uniform Rules. The amended Rule 46 is in effect a legislative interpretation of *Jaftha* demonstrating the policy of the legislature.[20] The effect of *Jaftha* is discussed also in *Campus Law Clinic, University of KwaZulu-Natal v Standard Bank of South Africa Ltd & another*[21] where the Constitutional Court upheld the argument that –

'the procedure provided for by s 66 of the Magistrates' Courts Act 32 of 1944 for the issue of a warrant of execution against immovable property was unconstitutional. It empowered the clerk of a magistrate's court to issue a warrant of execution against immovable property without any consideration of whether the effect of that warrant would be to deprive a person unjustifiably of their right of access to housing as protected by s 26(1) of the Constitution.'

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[18] *Standard Bank of South Africa Ltd v Saunderson & others* 2006 (2) SA 264 (SCA) para 15.

[19] Cf the cases cited in fn 1 above.

[20] Rule 46(1) as amended reads: 'No writ of execution against the immovable property of any judgment debtor shall issue until – (i) a return shall have been made of any process which may have been issued against movable property of the judgment debtor from which it appears that the said person has not sufficient movable property to satisfy the writ; or (ii) such immovable property shall have been declared specially executable by the court or, in the case of a judgment granted in terms of rule 31(5), by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property.' For further commentary see H J Erasmus and D E van Loggerenberg *Superior Court Practice* (Service 37, 2011) by D E van Loggerenberg and P B J Farlam (current authors) at B1-335 ff and, for example, Appendix V to the Practice Manual for North Gauteng High Court (25 July 2011) and *First Rand Bank Ltd v Folscher & another and similar matters* 2011 (4) SA 314 (GNP).

[21] *Campus Law Clinic, University of Kwazulu-Natal v Standard Bank of South Africa Ltd & another* 2006 (6) SA 103 (CC) paras 7-8.

This is stated in so many words in *Jaftha* where a consideration of the protection of s 25(1) of the Constitution[22] was specifically left open:[23]

'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.'

[14] In *Gundwana*,[24] the Constitutional Court overturned the decision in *Saunderson* to the extent that it was found in *Saunderson* that the Registrar of the High Court was competent to make execution orders when granting default judgment in terms of Rule 31(5)(b) of the Uniform Rules. The Constitutional Court did not inquire whether the understanding of the import or effect of *Jaftha* by the Supreme Court of Appeal in *Saunderson* was correct. It said that it was leaving that question open.[25] The order made in *Gundwana*, however, specifically states that '[i]t is declared unconstitutional for a Registrar of a High Court to declare immovable property specially executable when ordering default judgment under rule 31(5) of the Uniform Rules of Court to the extent that this permits the sale in execution of the home of a person.'[26] The effect of *Jaftha* and *Chief Lesapo v North West Agricultural Bank,*[27] a matter concerning s 34 of the Constitution, was summarised in *Gundwana* as follows:[28]

'The combined effect of these two cases is that execution may only follow upon judgment in a court of law. And where execution against homes of indigent debtors who run the risk of losing their security of tenure is sought after judgment on a money debt, further judicial oversight by a court of law of the execution process is a must.'

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[22]Para 22 and also *Gundwana* para 51.
[23]Para 52. See also paras 50, 55, 56, 57, 58 and 62.
[24]*Gundwana v Steko Development & others* 2011 (3) SA 608 (CC) para 52. *Gundwana* is discussed by Lisa Mills 'Judges, not Registrars, to Declare Homes Executable' 2011 *De Rebus* June 2011 50. *Jaftha* also attracted considerable academic attention. See eg Eric C Christiansen 'Adjudicating Non-justiciable Rights: Socio-economic Rights and the South African Constitutional Court' *Columbia Human Rights L Rev* (2007) 38 at 371 ff; A J van der Walt 'Property, Social Justice and Citizenship: Property Law in Post-Apartheid South Africa' 2008 (19) *Stellenbosch L Rev* 325 at 328 ff.
[25] Para 42.
[26]And see paras 34, 41, 49, 50, 58 and 59 of *Gundwana*. See n 20 above for the amended Rule 46.
[27]*Chief Lesapo v North West Agricultural Bank* 2000 (1) SA 409 (CC).
[28]Para 41.

[15] The facts in *Gundwana* need not be repeated. The circumstances of the applicant in that case were very similar to those of the applicants in *Jaftha*.[29] However, the applicant in *Gundwana* had passed a bond in favour of a bank in order to purchase her home. Froneman J dealt with the contention of the bank that neither the person of the applicant nor her property fell within the *Jaftha* protection (to which he referred as 'the fact-bound argument'). A related argument was that mortgaged property is not affected by *Jaftha* because mortgagors are willing to accept the risk of losing their property when entering into the mortgage loan agreement. The second contention, based on *Saunderson*,[30] was rejected.[31]

[16] As far as the fact-bound argument is concerned, Froneman J gave two reasons why it should not succeed: 'The first is that the constitutional validity of the rule cannot depend on the subjective position of a particular applicant. It is either objectively valid or it is not.'[32] The second is that, although a preceding enquiry is necessary to determine whether a matter is of the *Jaftha* kind, it requires more than a mere checking of the summons to see whether a cause of action is disclosed. The summons in *Gundwana* did not indicate 'whether the applicant was indigent or whether the mortgaged property was her home.'[33] The effect of *Gundwana* was thus to overturn the judgment in *Saunderson* to the extent that it was found that the Registrar was constitutionally competent to make execution orders when granting default judgment in terms of Rule 31(5)(b).[34] It also, as I have said, held that a mortgagee is in the same position as other creditors. To this extent, it did not in fact leave open the question as to whether *Saunderson's* interpretation of *Jaftha* was correct.

[17] It was accepted in *Gundwana* that the order in *Jaftha* operated retrospectively but Froneman J stated that this did not entail that all transfers subsequent to invalid

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[29]Read with Rule 45(1).
[30]See paras 42 and 44 ff. In *Saunderson* para 18 it was said: '[T]he 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 of the property. The effect of s 26(1) on such cases was not considered in *Jaftha*.'
[31]Para 44.
[32]Para 43. See *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC) para 26; *Chief Direko Lesapo v North West Agricultural Bank & another* [1999] ZACC 16; 2000 (1) SA 409 (CC) para 7.
[33]Para 43.
[34]Para 52.

sales in execution were automatically invalid. The sales in execution as well as the transfers would still have to be set aside and this required an explanation for not bringing the rescission application earlier.[35] He added:[36]

'[I]t follows that a just and equitable remedy following upon a declaration of unconstitutionality should seek to ensure that only deserving past cases benefit from the declaration. I consider that this balance may best be achieved by requiring that aggrieved debtors who seek to set aside past default judgments and execution orders granted against them by the registrar must also show, in addition to the normal requirements for rescission, that a court, with full knowledge of all the relevant facts existing at the time of granting default judgment, would nevertheless have refused leave to execute against specially hypothecated property that is the debtor's home.'

Any alleged abuse of the execution process may well play a role in determining whether rescission should be granted.[37]

[18] In their discussions of *Jaftha* and *Sauderson* Max du Plessis and Glenn Penfold[38] make the following observations:

'The real question is whether the defendant is likely to be deprived of "access" to adequate housing should he or she be deprived of the property in question – that is, whether he or she is likely to be left homeless as a result of the execution. … Of course, the Supreme Court of Appeal [in *Saunderson*] is correct when it says (giving the example of a luxury or holiday home) that not all cases of execution of immovable property will have this effect. But how is one to know whether the registrar is dealing with a holiday home or the family's only home? As the Constitutional Court stressed in *Jaftha*, the only way to determine whether s 26(1) will be breached is on a case-by-case basis; hence the need to ensure judicial oversight of the process in *all* cases. The Supreme Court of Appeal's reliance on the fact that the properties were subject to mortgage bonds is also open to doubt. The Constitutional Court stressed in *Jaftha* that where property was put up as security for a debt, execution would "ordinarily" be appropriate, provided that there had been no abuse of the process. But again, we submit that the only way to determine whether a case is ordinary or extraordinary and to determine whether there was an abuse is to provide judicial oversight in *all* cases – including when the property has been put up for security.'[39] (My emphasis.)

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[35]Paras 57 and 58 and see *Menqa & another v Markom & others* 2008 (2) SA 120 (SCA); *Campbell v Botha & others* 2009 (1) SA 238 (SCA).
[36]Para 59.
[37]Para 61.
[38]'Bill of Rights Jurisprudence' 2005 *Annual Survey of South African Law* 27 at 77 to 81 and 2006 *Annual Survey of South African Law* 45 at 83 to 93.
[39] 2005 *Annual Survey* 87.

'Judicial oversight is therefore constitutionally required so that the judicial officer can "engage in a balancing process" and "consider all the relevant circumstances of a case" to determine whether there is good cause to order execution against the immovable property concerned (see *Jaftha* paras 42-3 and 55). At no point in its reasoning did the Constitutional Court suggest that this constitutional duty only arose when there was formal opposition from the defendant. Nor did it allow application for such orders that were not opposed to continue to take place before the registrar. Instead, it required judicial oversight in *all* cases to ensure that the orders being granted did not violate s 26 (1) of the Constitution. (My emphasis.)

In any event, the idea of formal opposition as the trigger for constitutional justification appears to miss the point. There are many reasons why a defendant may not formally or informally oppose such an order, not least of which may be a lack of funds and a lack of knowledge about the legal process – something the Constitutional Court averted to in *Jaftha*. In our view there are also undoubtedly circumstances in which a court would, despite the lack of opposition, be fulfilling its constitutional duty by refusing to grant such an order. One such example would be where the debt is for a disproportionately small amount of money relating to the value of the home that will be lost.'[40]

[19] The purpose of reading in as a constitutional remedy is to render the legislation compliant with the provisions of the Constitution.[41] A court is not vested with any general legislative capacity merely by virtue of the fact that it has found a particular statutory provision not in compliance with the Constitution. The function of the court is to find a means to remedy the constitutional defect but, at the same time, remain consistent with the legislative scheme. Courts should go only as far as is required to protect the entrenched right. Carol Rogerson made the following observation:[42]

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

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[40] 2006 *Annual Survey* at 89-90.

[41] See above para 12 where the passage from the judgment of the court below is cited.

[42] Carol Rogerson 'The Judicial Search for Appropriate Remedies under the Charter: The Examples of Overbreath and Vagueness' in Robert J Sharpe (ed) *Charter Litigation* (1987) 233 at 288 cited with approval in the Supreme Court of Canada in *R v Schachter* [1992] 10 CRR (2d) 1 at 13-15 (followed in eg *Tighe v McGillivray Estate* 1994 CanLII 4126 (NS CA); 127 NSR (2d) 313; 112 DLR (4th) 201; 20 CRR (2d) 54 and *Christie v British Columbia* 2006 BCCA 59 (CanLII); [2006] 3 WWR 437; 48 BCLR (4th) 322) as well as in South Africa in eg *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (2) SA 1 (CC) paras 69 ff and in the court below paras 31 to 33.

which serves desirable social purposes may give rise to entitlements which themselves deserve some protection.'

The question arising from *Jaftha* was thus not whether the court ventured into the legislative domain, as the court below approached the matter, but whether the order, that is the specific constitutional remedy employed to protect the entrenched right to adequate housing, is necessary for that protection. It should go no further. There is considerable force in the argument of Du Plessis and Penhold that the only way to determine whether the right to adequate housing has been compromised is to require judicial oversight in all cases of execution against immovable property on a case-by-case basis. This oversight is required also in the absence of formal opposition and where the debtor is in default or where he or she is ignorant of his or her rights. Seen from this perspective the order in *Jaftha* is neither ambiguous nor too wide. But it does not follow that the absence of judicial oversight will render the procedures followed, eg the issue of a warrant for execution and the subsequent sale in execution, invalid in all cases. The purpose of the judicial oversight ordered in *Jaftha* is to protect the right to adequate housing. Where, as in this case, the right to adequate housing is not engaged, invalidity does not necessarily follow. This is so because the judgment and subsequent sale in execution stand until set aside.[43] The plaintiff did not bring an application to rescind the default judgment entered against him.

[20] But more importantly, it is so because the order made in *Jaftha*, as the context of the judgment shows, is aimed at preventing the infringement of the right to adequate housing. This is the sole purpose of requiring judicial oversight in all cases of execution against immovable property. Rule 46 of the Uniform Rules, as amended, is consistent with the order in *Jaftha* construed in this manner.

[21] In the matter under consideration, the plaintiff's right to adequate housing was not engaged or compromised, as the court below found. I agree. The stated case allows for no other conclusion: the immovable property concerned was not the plaintiff's home, nor was it suggested that he did not have access to adequate housing or that his right to adequate housing was compromised. In the result the appeal should be dismissed.

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[43] See para 17 above.

The appeal is dismissed with costs.

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F R MALAN

JUDGE OF APPEAL

NAVSA and SNYDERS JJA (MEER AJA concurring):

[22] We have read the judgment of our colleague Malan. We deem it necessary to briefly state our own reasons for agreeing with his conclusion. We do so for the sake of clearing up the confusion arising out of the complexities that other courts have found in the application of *Jaftha*. In our view *Jaftha* established a mechanism to save s 66(1)(a) from constitutional invalidity, namely judicial oversight of the execution of immovable property in all cases, the object of which is to determine whether s 26(1) rights are implicated. Courts cannot *ante omnia* decide whether s 26(1) rights have been implicated without conducting a proper investigation in discharging its oversight role.

[23] The reasoning of Wallis J is set out in our colleague's judgment and it is not necessary to repeat it, save to refer to para 40, in which the following appears:

'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.'

[24] We detect no ambiguity in the order in *Jaftha.* In that case and later in *Gundwana* the Constitutional Court made it clear that in all cases of execution against immovable property judicial oversight is required. Confusion was caused by a multitude of judgments seeking to come to terms with *Jaftha*. Determining whether

s 26(1) rights are implicated is a fact based enquiry. In *Gundwana* Froneman J said the following:

'Some preceding enquiry is necessary to determine whether the facts of a particular matter are of the *Jaftha*-kind.'[44]

Only once that enquiry has been undertaken can the question asked by Wallis J, in the latter part of the quotation in para 23 above, be answered. The principle as described in our opening paragraph has already clearly been established in *Jaftha*.

[25] It is clear from *Gundwana* that insisting on judicial scrutiny in every case should hold no terrors.[45] The level of enquiry will vary from case to case and will always be dependent on the circumstances. As was pointed out in *Gundwana* the rule established in *Jaftha* 'caution[s] courts that in allowing execution against immovable property due regard should be taken of the impact that this may have on judgment debtors who are poor and at risk of losing their homes'.

[26] The object of judicial oversight is to determine whether rights in terms of s 26(1) of the Constitution are implicated. In the main a number of cases grappling with *Jaftha* sought to arrive at that determination without accepting that judicial oversight was required in every case. How, it must be asked, can a determination be made as to whether s 26(1) rights are implicated, without the requisite judicial oversight?. We are unable to understand the difficulty of applying the principle that it is necessary in every case to subject the intended execution to judicial scrutiny to see whether s 26(1) rights are implicated. To not undertake such an enquiry would in fact render the procedure unconstitutional. Following that simple principle would have avoided the confusion caused by a number of judgments.

[27] As stated by our colleague, applying *Jaftha* does not mean that all past executions in which there was no enquiry are rendered invalid. Once again, the validity of such executions will depend on the circumstances of each case.

[28] Had the principle established in *Jaftha* been properly applied in the court below the extended analysis of a judicial reading-in exercise resorted to by it would have

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[44] Para 43.

[45] See para 43.

been wholly unnecessary. Likewise, the discussion about the separation of powers, was superfluous. In any event, we have grave doubts about the propriety of a reading-in into an earlier reading-in by a higher court. Furthermore the Constitutional Court has the last say on the constitutionality or otherwise of legislation and this also applies to such remedies as are fashioned by it.

[29] In the present case, judicial scrutiny of the common cause facts as set out in the stated case leads to the compelling conclusion that s 26(1) rights are not implicated. The court below was therefore correct in its ultimate conclusion. It is for these reasons that we agree that the appeal should fail.

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M S NAVSA

JUDGE OF APPEAL

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Y S MEER

ACTING JUDGE OF APPEAL

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