IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE - GRAHAMSTOWN)

REPORTABLE

In the matters between:

CASE NO'. 404/2011

(1) ABSA BANK LTD **PLAINTIFF**

and

NONIKI TRADING CC AND OTHERS **DEFENDANTS**

CASE NO: 405/2011

(2) ABSA BANK LTD **PLAINTIFF**

and

IKROZA ENTERPRISE SOLUTIONS CC AND OTHERS **DEFENDANTS**

CASE NO; 407/2011

(3) ABSA BANK LTD **PLAINTIFF**

and

HQUBELA TRADING CC AND OTHERS **DEFENDANTS**

JUDGMENT

KROON, J:

Introduction

[1] This judgment concerns the applications by the same plaintiff for summary judgment against some of the defendants sued in three separate actions. In case no. 404/2011 the defendants in question are Mr Ntambi (the 3rd defendant), Mrs

Ntambi (the 4th defendant, married in community of property to Ntambi), Mr Malla (the 5th defendant) and Mrs Malla (the 6m defendant, married in community of property to Malla). In case no, 405/2011 the same persons are involved as the 3rd to 6th defendants. In case no. 407/2011 the defendants in question are Malla and Mrs Malla (the 3rd and 4th defendants),

[2] In case no 404/2011 the plaintiff sought payment from the defendants, jointly and severally, of the sum of R356 210,60, together with interest thereon. In addition, the plaintiff sought, as against Ntambi and Mrs Ntambi, an order that three units of a sectional plan in a scheme situate in Bloemfontein, be declared executable. Similarly, the plaintiff sought, as against Malla and Mrs Malla, an order that certain immovable property situate in East London be declared executable. The costs of the action (on the scale as between attorney and client) were also claimed.

[3] In case no 405/2011 the plaintiff sought payment from the defendants, jointly and severally, of the sum of R248 245,92, together with interest thereon. In addition, the plaintiff sought, as against Ntambi and Mrs Ntambi, an order that the same property referred to in paragraph 2 above, be declared executable and, as against Malla and Mrs Malla, a similar order in respect of the same property referred to in paragraph 2 above. Costs were also claimed, on the attorney and client scale.

[4] In case no. 407/2011 the sum claimed, plus interest thereon, was R1 255 794,76. The property sought to be declared executable is the same property owned by Malla and Mrs Malla, referred to in paragraph 2 above. Again, attorney and client costs were claimed.

[5] It may be recorded at this stage that in each case the plaintiff's summons advised the defendants as follows:

> **Take further note that the defendants' 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 defendants claim that the order for execution will infringe that right it is incumbent on them to place information supporting that claim before the High Court,'**

[6] The applications for summary judgment in which the respective relief set out in paragraphs 2 to 4 above, was claimed, followed on the filing of notices of appearance to defend by attorneys acting on behalf of all the defendants in

question in each of the cases. The affidavits in support of the applications were in proper form.

[7] In case no. 404/2011 Malla filed an affidavit opposing the application on behalf of himself and Mrs Malla. Neither Ntambi nor Mrs Ntambi filed an opposing affidavit. I will revert to this aspect later. However, an opposing affidavit, deposed to by Ntambi, was filed on behalf of both of them in case no. 405/2011. Similarly, opposing affidavits deposed to by Malla on behalf of himself and Mrs Malla, were filed in cases no. 405/2011 and no. 407/2011. Malta's three affidavits and Ntambi's affidavit were virtually identical in wording.

Plaintiffs causes of action

[8] The relevant causes of action of the plaintiff in case no. 404/2011 were founded on the following allegations:

> (a) During 2008 the plaintiff and an entity styled Noniki Trading CC (the first defendant in the case) concluded a loan agreement in terms of which the plaintiff undertook to lend and advance moneys to the first defendant (hereinafter called the principal debtor).
> (b) On 11 April 2008 Ntambi and Mrs Ntambi signed separate deeds of suretyship in terms of which each bound himself or herself as surety and co-principal debtor in respect of the indebtedness of the principal debtor to the plaintiff. Each deed of suretyship referred to **'the repayment on demand of any sum or sums of money, which [the principal debtor] owes or may hereafter owe to the [plaintiff] from whatever cause arising, and the due fulfilment of all obligations of the [principal debtor] to the [plaintiff] in respect of such indebtedness'.** The deed of suretyship signed by Ntambi embraced a written consent thereto signed by Mrs Ntambi. Similarly, the deed of suretyship signed by Mrs Ntambi embraced a written consent thereto signed by Ntambi.
> (c) On 31 March 2009 Malla signed a deed of suretyship. The comments in subparagraph (b) above apply *mutatis mutandis* to this deed of suretyship and to a consent thereto by Mrs Malla.
> (d) On 5 May 2006 Ntambi and Mrs Ntambi caused a sectional first mortgage bond to be registered in favour of the plaintiff over the units referred to in paragraph 2 above. The bond was a continual covering bond in terms of which the sections were hypothecated as security for the due payment of indebtedness of the Ntambi's to the plaintiff in the sum of R500 000,00 plus an additional sum of R100 000,00, which

arose or would arise from time to time, from any cause whatsoever. On 19 May 2008 the Ntambi's passed a sectional second mortgage bond over the units to secure their indebtedness to the plaintiff in the sum of R300 000,00, plus an additional sum of R60 000,00, the terms of this bond being *mutatis mutatis* the same as the bond referred to above.

(e) On 5 April 2007 Malla and Mrs Malla caused a first mortgage bond to be passed in favour of the plaintiff over the East London property referred to in paragraph 2 above, the terms of the bond being *mutatis mutandis* the same as the bonds referred to in (d) above, the indebtedness of the Malla's to the plaintiff being recorded as being in the sum of R1 160 000,00, plus an additional amount of R232 000,00.

(f) The plaintiff lent and advanced moneys to the first defendant and debited it with interest and other bank charges, and its indebtedness to the plaintiff is in the said sum of R356 210,60 (evidenced by a certificate, as provided for in the relevant suretyship agreements and bonds).

(g) The first defendant is substantially in arrears in respect of its indebtedness to the plaintiff and, despite due demand, has failed to discharge the said indebtedness;

(h)The deeds of suretyship and the bonds each provided that where the plaintiff successfully sued thereon, costs on the attorney and client scale were recoverable.

[9] The relevant causes of action of the plaintiff in case no. 405/2011 were *mutatis mutandis* the same as those set out in paragraph 8 above, with reference to a loan agreement between the plaintiff and an entity styled Ikroza Enterprise Solutions CC (the first defendant in the case, and the principal debtor), similar deeds of suretyship signed by the Ntambi's on 11 April 2008 in favour of the plaintiff in respect of the principal debtor, similar deeds of suretyship signed by the Malta's on 31 March 2009, the same bonds passed by the Ntambi's and the Malla's in favour of the plaintiff, a similar principal indebtedness of the first defendant to the plaintiff in the sum of R248 245,92, and non-payment thereof, and similar provisions for costs on the attorney and client scale.

[10] The relevant causes of action in case no 407/2011 were also *mutatis mutandis* the same as those set out in paragraph 8 above, with reference to a loan agreement concluded on 26 August 2009 between the plaintiff and an entity styled Hqubela Trading CC (the first defendant in the case, and the principal debtor), a similar deed of suretyship signed by Malla on 31 March 2009 and

consented to by Mrs Malla, the same bond passed by the Malla's in favour of the plaintiff, a similar principal indebtedness of the first defendant to the plaintiff in the sum of R1 255 794,76, and non-payment thereof, and similar provisions for cost on the attorney and client scale.

Principles relating to summary judgment applications,

[11] Summary judgment proceedings are no longer regarded as extraordinary. The enquiry is simply whether on the papers the requirements for the grant of summary judgment are present[1] A defendant who chooses not to give security for the plaintiffs claim but instead to file an affidavit (or, with the leave of the Court, to tender oral evidence) in opposition to an application for summary judgment must fully disclose the nature and grounds of his defence and the material facts on which it is founded. The Court will then determine whether on the information disclosed the defendant appearsto have a defence which is both *bona fide* and good in law. If the court is so satisfied the application for summary judgment must be refused. In determining whether there has been sufficient disclosure by the defendant the Court does not require of the latter the precision apposite to pleadings, but at least sufficient particularity and completeness to enable the Court to decide whether a *bona fide* defence has been disclosed, is required.[2]

Absence of an opposing affidavit by two defendants in case no. 404/2011

[12] Ms *Beard* (for the plaintiff) submitted, in case no. 404/2011, that the failure of the Ntambi's to file any affidavit in opposition to the application for summary judgment meant simply that no defence had been raised and accordingly that there was no bar to the grant of summary judgment against them, Mr *Kalimashe* (who appeared for the Ntambi's and the Malta's) did not offer any argument to the contrary. But the earlier notice of appearance to defend reflected that it was being filed on behalf of the Ntambi's as well as the Malla's and one may speculate therefore that some oversight had occurred in the offices of the defence attorneys. However, even if one were to have regard to the contents of the affidavit of Ntambi filed in case no. 405/2011, then, for the reasons set out later, the result would be the same as that reached in case no. 405/2011.

[13] Suretyship is defined as an accessory contract by which a person (the

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1 *Joob Joob Investments (Pry) Ltd v Stocks Mavundla ZEK Joint Venture* 2009 (5) SA 1 (SCA) para 32,

2 *Maharaj Barclays National Bank Ltd\976 (I) & A* 418(A) at 425G-426; JoobJoob.nlJoobJoob.nl above para 32.

surety) undertakes to the creditor of another (the principal debtor), primarily, that the principal debtor, who remains bound, will perform his obligation to the creditor and, secondarily, that if and so far as the principal debtor fails to do so he, the surety, will perform it, or, failing that, indemnify the creditor.[3]

[14] The suretyship contract is accessory in the sense that it is of the essence of suretyship that there be a principal obligation onto which thesuretyship is grafted[4] (although, as will be shown below, it is not essential that the principal obligation be in existence at the time the suretyship agreement is concluded).

[15] Section 6 of the General Law Amendment Act 50 of 1956 requires that the essential terms of a suretyship agreement must be embodied in a written document signed by or on behalf of the surety. Accordingly, the identity of the creditor, of the surety and of the principal debtor, and the nature and amount of the principal debt must be capable of ascertainment by reference to the provisions of the written document (supplemented, if need be, by extrinsic evidence of these terms other than evidence by the parties, ie the creditor and the surety, as to their negotiations and consensus).[5]

[16] In cases where it might be impossible, impractical or inconvenient to reflect what the surety is undertaking except by an express statement of the name of the principal debtor and a definitive identification of the guaranteed debt, recourse to that course will constitute compliance with the requirements of s 6. The statute does not insist that a specific feature must be explicitly stated or exhaustively described.[6]

[17] It is not essential that the principal obligation exist at the time the suretyship agreement is entered into. In *Frysch*[7] the position was put thus:

> **'A suretyship may be contracted with reference to a principal obligation which is to come into existence in the future... Where the only principal obligation guaranteed by the suretyship is one to come into existence in the future, then the liability of the surety under his guarantee does not arise until the principal debt has been contracted...'**

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3 *Trust Bank of Africa Ltd v Frysch* 1997 (3) SA 562 (A) at 584F.

4 *Frysch,* n 3 above, at 5S4G; *African Life Property Holdings Ltdv Score Food Holdings ltd* 1995 (2) SA 230 (A) at 238F.

5 *Sapirstein and Others v Anglo African Shipping Co* (SA) Ud *1*978 (4) SA J (A) at 12B-D.

6 *Credit Guarantee Insurance Corporation of SA Ltd v Schreiber* 1987 (3) SA 523 (W) at 525B-C

7 N3above,at5S4G.

[18] In *de Villiers*[8] the following passage appears:

> **'A deed of suretyship stipulating an unlimited continuing guarantee for payment of all sums of money which the principal debtor may in the future owe to his creditors is, however, a valid deed of suretyship. In such a case extrinsic evidence will be admissible to prove that the principal obligation has come into existence, and to establish the amount of the obligation.**

The cases offered in opposition to the monetary claims

[19] The first submission raised by Mr *Kalimashe,* for all the defendants, in opposition to the applications for summary judgment, related to the enforceability of the respective deeds of suretyship signed by the defendants. The argument, if I understood it properly, proceeded along the following lines. Like any contract, a suretyship agreement required a *iusta causa* to be valid and enforceable. A *iusta causa* is constituted by a serious intention to be bound. That in turn requires consensus between the parties to the contract. Put differently, if the parties are not *ad idem* as to the terms of the contract no agreement arises and there is no serious intention to be bound. That was the case put up by the defendants, and it was a defence that raised a triable issue that required to be thrashed out during a civil trial in the normal course.

[20] The first relevant averment in the opposing affidavits on which this argument appeared to be based was contained in all three affidavits by Malla filed in the present proceedings, as well as in the affidavit of Ntambi filed in case no. 405/2011. It proceeded as follows:

> **The suretyship agreement signed by the .... defendants does not specify the debt to which the suretyship was grafted and thus lacked a causa. It was void."**

[21] The second averment (made in Malta's three affidavits and the affidavit of Ntambi) was worded as follows:

> **The .... defendants never intended to assume liability other than an accessory one since the loan which the plaintiff gave, it gave to the first defendant only, and thedefendants stood surety for the repayment of that loan which was in terms of the loan agreement'**

[22] The third averment, contained in Malta's three affidavits, but not in Ntambi's affidavit, read as follows:

> **The suretyship agreement of the -.- defendants was signed on the 31.03.2009 four months**

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8 *De Villiers* v *Nedfw Bank, A Division of Nedcor Bank Ltd* 1997 (2) SA 76 (E) at 81D-E-

before the debt could arise by the signing of the loan agreement which was signed on the 26 August, 2009,'

(It may be pointed out that the date 26 August 2009 was the date alleged by the plaintiff in case no. 407/2011 to be the date of the loan agreement in question. In the other two cases the date alleged was 'during 200S'. It would seem that the wording of the affidavit in case no. 407/2011 was simply followed in the other two cases, without adaptation).

[23] The first and third averments may be given short shrift. Copies of the relevant suretyship agreements were annexed to the respective combined summonses of the plaintiff. The wording of each annexure embraced the words quoted in paragraph 8(b) above. The defendants nowhere suggested, even obliquely, that that fact was in dispute, ie that the suretyship agreements contained the wording referred to.

[24] At best, as regards the first averment, the suggestion seemed to be that the (admitted) wording did not sufficiently identify 'the debt', as required by s 6 of the Act. There is no merit in any such suggestion. The reference to any **'sum(s) then owing,** or **which may become owing in the future, by the principal** debtor to **the plaintiff, from whatever cause arising',** demonstrates that there was adequate identification of the debts in question. Cf the passage from *Schreiber*[9] paraphrased in paragraph 16 above. Indeed, the matter is so clear, that the *bona fides* of the defendants in making the suggestion cannot be accepted. And certainly the suggestion does not pass muster in law.

[25] As regards the third averment (made only by Malla) counsel, while not questioning the principle that a future obligation could validly be the subject of a suretyship agreement, baldly stated in his heads of argument that **'the defendants (ie the Malta's) never knew they were guaranteeing a debt to arise in the future and this is not apparent *ex facie* the** suretyship **agreement'.** The answers to the point are short. First, again, the wording of the suretyship agreements, which was not placed in dispute, is clear: future debts were clearly included; and the statement that ex *facie* the agreements that fact was not apparent, can only have been based on a misreading thereof.

[26] In respect of the first part of counsel's statement, two material difficulties in law present themselves. The maxim applicable is *caveat subscriptor* No attempt

9 N**6** above.

was made by the defendants in question to excuse themselves from the operation of this maxim or to lay any basis for the agreements being interpreted as if they had been rectified. On the contrary, on a proper interpretation of Malla's affidavits, they did not state, in any way, that they were unaware of the stipulation in question (and, in fact it was impliedly conceded that the Malla's were so aware); instead, they contented themselves with obliquely contesting the enforceability of a suretyship agreement that refers to obligations yet to come into existence. In terms of the principles tabulated earlier, a defence along such lines is bad in law,

[27] The second averment (made by both Malla and Ntambi) was unhappily worded, but the argument that counsel sought to build thereon was in essence the following (possibly also invoking the third averment). The suretyship agreements invoked by the plaintiff were so widely framed that, instead of being restricted to indebtedness to the plaintiff that arose out of the conduct of the businesses of the respective principal debtors, for which businesses the finance in question had been sought, they were also *capable of* embracing indebtedness that was in no way related to the business of the principal debtor, such as **'the principal debtor's wife's car, clothes and manicures, [or] school fees for his children, if a business cheque is not honoured, ad *infinitum.'*** The defendants would not have entered into so widely couched an agreement, if the width thereof had been brought to their attention, and therefore could not have had an intention to do so. Accordingly, the defence was an absence of consensus and *iusta causa.*

[28] It should immediately be pointed out that counsel's example of a reference to the principal debtor's wife and schoolchildren was an unhappy one: the principal debtor in each case was a legal person,

[29] I am strongly inclined to the view that it would be unacceptably generous to the defendants to accept that the relevant allegation in the opposing affidavits embraced the argument that counsel presented (or even to accept that that could not safely be excluded). It would, for instance, have been very easy for the defendants to have simply added the allegation that the loan agreement referred to covered, or was intended to cover, only the business related expenses of the principal debtor in question, and accordingly the suretyships were similarly restricted in their operation. As set out earlier (paragraph 11 above) one of the principles applicable to summary judgment applications is that the defendant who seeks to resist same is required fully to set out the nature of his defence. However, for the purposes of what follows I will proceed on the premise that the

opposing affidavits were wide enough to proffer the stance that the defendants had not intended to agree, and had in fact not agreed, that indebtedness not related the principal debtor's business, would be the subject of their respective undertakings.

[30] In my judgment, there are two insurmountable obstacles in law why the defence cannot be entertained. First, I repeat that the wording of the suretyships is clear and unambiguous; specifically, they are unrestricted in their operation. The comments in paragraph 26 above in respect of the maxim *caveat subscriptor* and of the absence of any basis for an interpretation of the agreements as if they had been rectified, are again of application,

[31] Second, and more importantly, it is of no assistance to the defendants for counsel to argue that, as it were, *in theory* the suretyship agreements were capable of having the unrestricted meaning contended for, one not intended by the defendants. That the defendants had the serious intention to enter a suretyship agreement, and did so, was not, and could not have been, in dispute; and hence, some obligation, at least the restricted one accepted in argument by counsel, was undertaken by the defendants. To that extent there was consensus *ad idem,* and accordingly *iusta causa.* What was required of the defendants to defeat the applications for summary judgment was not the raising of hypothetical or theoretical defences. They had instead pertinently to raise the defence, if that was their *bona fide* intention, that the indebtedness on which the plaintiff sued was, at least partly, in respect of matters not related to the businesses of the respective principal debtors, and was therefore not claimable. That, they failed to do, or even to attempt to do, even on the premise referred to in paragraph 29 above. Again, no defence valid in law was invoked.

[32] It follows that the resistance to the applications for summary judgment, in so far as same related to the claims for payment of the capital sums in question and of costs on an attorney and client scale, has failed and must be dismissed.

[33] For the sake of completeness, it may be recorded that in case no. 407/2011 a further allegation made in Malla's affidavit read as follows:

> **'Furthermore, [the plaintiff] had cancelled the .... defendants' [ie the Malla's] participation in (the principal debtor] when it suggested that "there cannot be two bulls in one kraal, the one should buy the other out." The.....defendant [ie Malla] opted to be bought out, and [the plaintiff] facilitated another loan for [the second defendant, who**

was also sued as a surety and mortgager] representing the [principal debtor] alone.'

[34] What was intended by this allegation was, however, in no way elucidated, eg whether it was intended to convey, on some or other basis, that the plaintiff had released the Malla's from their suretyship undertaking in respect of the indebtedness of the principal debtor in case no. 407/2011. Counsel correctly addressed no argument based on this allegation.

The executability of the immovable properties in question

[35] Section 26(1) and (3) of the Constitution provides as follows:

> **'(1} Everyone has the right to have access to adequate housing.**
>
> **(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances, No legislation may permit arbitrary evictions.[1]**

[36] In *Jaftha'*[10] it was said that any measure which permits a person to be deprived of existing access to adequate housing limits the rights protected in s 26(1). Such a measure may, however, be justified under s 36 of the Constitution[11].

[37] *Jaftha* was concerned with the constitutionability of the then s 66(1)(a) of the Magistrates Courts Act 32 of 1944. The section provided *inter alia* that a judgment of the magistrate's court sounding in money shall be enforceable by execution against the movable property of the judgment debtor, and if sufficient movable property was not found to satisfy the judgment, or the court, on good cause shown, so orders, then against the immovable property of the judgment debtor or the party against whom such order was made. It will be observed that there was no qualification of the judgment creditor's entitlement to execution on the judgment debtor's immovable property in the event of there being insufficient movable property of the debtor found, and the clerk of the court had no discretion to refuse to issue a writ against the immovable property.

[38] Briefly stated, the facts in *Jaftha* were as follows. The homes of two indigent persons (the appellants), acquired by means of State subsidies, were sold in execution, pursuant to the provisions of s 66(1)(a), for modest debts of R250,00

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10 *Jaftha* v *Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) para 34.

11 The section provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including those tabulated in the section.

and R190,00, respectively. The debts were not secured and were unrelated to the properties. The appellants approached the High Court for orders setting aside the sales in execution, and certain ancillary relief. It was contended that the execution process provided for in the section was unconstitutional, and that contention founded a prayer for a declaration of unconstitutionality. Various other persons, in their private or-official capacities, intervened or were joined in the proceedings. By agreement, the court set aside the writ and sale in execution and granted an interdict against eviction. What remained was the issue of constitutionality of s 66(1)(a). Only the Minister of Justice and Constitutional Development remained as a party supporting the constitutionality of the provision. The High Court ruled against a declaration of unconstitutionality.

[39] The subsequent appeal to the Constitutional Court was successful and *inter alia* the following order was issued:

> **(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' Court 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 the relevant circumstances, may order execution' appear before the words 'against the immovable property of the party,'**

[40] Where an order that immovable property be declared executable will infringe the right to have access to adequate housing the Court, in considering whether or not to grant such order, will accordingly now be required to undertake a balancing of various interests.[12]

[41] The issue of execution against mortgaged property engaged the attention of the Supreme Court of Appeal in *Saunderson.*[13] The facts may be summarised as follows. The appellant bank was the mortgage bond-holder in respect of the properties of the respondents. The latter defaulted on repayments. The bank approached the High Court for judgment against each of the respondents, and ancillary relief declaring the properties to be executable. In each case the Court granted judgment for the amount of the outstanding debt but declined to issue the declarator sought. Relying on *Jaftha* the Court reasoned that the summonses were deficient for want of sufficient allegations to show that the orders for execution were constitutionally permissible. The bank appealed against the

12 L Cf *Jaftha,* n 10 above, paras 37 to 51; *Standard Bank ofSA Ltd v Sawderson and Others* [2006] 2 AO SA 382 (SCA) para 12. See also the amendment to rule 46(1) of the Uniform Rules of Court, referred to in paragraph 45 below.

13 N 12 above.

refusal of the declarators.

[42] The judgment of the Supreme Court of Appeal included the following dicta:

> (a) The effect of a mortgage bond (of the nature at issue in the case) 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.[14]
> (b) The value of a mortgage bond as an instrument lies in confidence that the law will give effect to its terms. It is long-standing practice of our courts that execution must first be directed against the debtor's movable property and only thereafter, if the movables are insufficient, against immovable property, but a court may alter the sequence, as when the debt is secured by a mortgage bond, for the **secured creditor** will ordinarily request the court in advance to dispense with the excussion of movable property, and declare the property specially hypothecated to be executable immediately.[15]
> (c) The High Court had misinterpreted *Jaftha,* namely by finding that it had 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 thatexecution is justified under s 26(3) of the Constitution, after taking into account all relevant circumstances, What was in issue in *Jaftha* was not s 26(3) 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 (although the former section would become relevant under PIE Act 19 of 1998 when eviction is sought pursuant to a sale in execution). Nor did *Jaftha* decide that s 26(1) is compromised in every case where execution is levied against residential property, only that a writ of execution that would deprive a person of 'adequate housing' would compromise s 26(1) rights, and would therefore have to be justified as contemplated by s 36(1).[16]

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14 ***Ibid,*** para [2],
15 ***Ibid,*** para [3].
16 ***Ibid,*** paras [13] and [15]

(d) Section 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. It was self-evident in *Jaftha* that the forfeiture in question entailed a deprivation of 'adequate housing', and it was held that a threat to
ownership (as opposed to occupation) of a residence that constituted 'adequate housing' was itself invasive of s 26(1).[17]

(e) 'But *Jaftha (supra)* did not decide that the ownership of all residential property is protected by section 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]

(f) The situation this case presents is thus radically different from that before the Constitutional Court in ***Jaftha (supra).*** **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 *J$fth&* 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 section 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 of interests that might need to be considered once it was shown that section 26(1) was in fact compromised.**[19]

[43] The judgment further contains the following *obiter* passage:

> **'The present case does not require us to decide whether section 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 section 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* 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**

17 ***Ibid,*** para [16].
18 ***Ibid,*** para [17].
19 ***Ibid,*** para ***[18].***

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 bond-holder'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.'[20]

[44] On the question of onus the judgment continued as follows:

'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 ef a*l *Constitutional Law of South Africa* at 12-2:

> **"Constitutional analysis under the Bill of Rights takes place in two stages. First, the applicant is required to demonstrate that her ability toexercise 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 section 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 section 26(1) will necessarily occur.**

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.'[21]

[45] It would be convenient at this stage to record that on 19 November 2010 rule

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20 Ibid para **[19].**

21 ***Ibid,*** paras [20]-[2l].

46(1) of the Uniform Rules of Court was amended by the substitution therefor of a new subrule (1), subparagraph (a) of which provides as follows:

> **'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 the 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 to be 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."**

[46] For the sake of completeness it may further be recorded that the Joint Rules of Practice for the High Courts of the Eastern Cape Province have also been amended by the introduction of rule 14A. This rule prescribes certain procedures to be followed in applications for default judgment where the creditor seeks an order declaring specially hypothecated immovable property executable, including specifically the filing of an affidavit on behalf of the creditor simultaneously with the application for default judgment, in which certain information concerning the property is to be set out. The present proceedings are, however, not applications for default judgment,

[47] In the present proceedings the first ground of resistance to a declarator that the property in question be executable, raised in the affidavits of Malla and the affidavit of Ntambi, was worded as follows:

> **'The.....defendants never signed any bond nor provided any real security relating to the debt on which the third defendants stood surety, being the debt of the first defendant, and provided no additional security to the personal security being the suretyship to secure the first defendant's debt.**
>
> **Consequently the..... defendants' property is not executable for the debt now at issue before this Honourable Court. Any other debt which the plaintiff might have sought to secure by calling for the signing of a deed of suretyship from the..... defendants was not according to the intention of all parties including the plaintiff and thus the.....defendants' property for this further reason not executable.'**

[48] It is understandable the counsel placed no reliance on this averment in his argument. First, it was, of course, not necessary for the defendants personally to

sign the bonds in question, and the defendants did not place in issue that they caused the bonds to be registered.

[49] Second, the remainder of the defendants' averment is not understood. It appears that the contention is that, while the defendants in each case stood surety for indebtedness of the principal debtor in each case, the bonds in question did not constitute additional, real, security in respect of that debt. However, as recorded in paragraphs 8(d), 8(e), 9 and 10 above the bonds secured the indebtedness of the mortgagers to the plaintiff, up to the amounts stated, however that indebtedness arose or would arise from time to time,from whatever cause whatsoever. The indebtedness of the defendants to the plaintiffs in terms of the suretyship agreements, albeit that it may subsequently have been incurred, is covered by that description. The contention is therefore bad in law.

[50] Each of Ntambi and Malla averred that he and his wife were living together in the same property **'as our fixed and permanent home'** and that **'[i]n proof of the ... defendants' constitutional rights to housing, it is asserted that the house mentioned in paragraph 1 above is a family home of the defendants and that these defendants have no alternative accommodation, nor place of residence.'** Malla added the following:

> **The ... defendants are husband and wife and have two minor daughters, one of whom is Vuyolwethu Malla, a 16 year old minor girl and attending school at Clarendon Girls High School, in East London, any order for the execution will infringe that constitutional right'**

[51] The position of the Ntambi's will be considered first. In paragraph 1 of his affidavit Ntambi states that he resides at No. 3 Warwick Court, King Street, East London, and his affidavit makes it clear that that is the family home he is referring to. However, it is not that property that the plaintiff wishes to be declared executable. The plaintiffs prayer refers to the three sectional title units in Bloemfontein referred to in paragraph 2 above. Whether those units constitute residential property does not appear from the papers (one unit is six square metres in extent and another, 19 square metres - possibly the three sections together comprise a composite unit). Be that as it may, the units are certainly not the primary residence of the Ntambi's.

[52] They have not alleged, still less shown, that an order for execution in respect of the units would Infringe their rights of access to adequate housing, and no reason exists to apprehend that it would. The plaintiff is accordingly not called

upon to justify the order it seeks.[22] Moreover, the comments in paragraph 19 of *Saunderson*[23] are *mutatis mutandis* of application: the claim of the plaintiff, as bond-holder, is in its essence against the property and its entitlement springs from a limitation in title the two owners chose to accept in incurring the indebtedness in question, and even if were the property to constitute 'adequate housing, an order for its execution would be proper.'

[53] In respect of the property of the Malla's counsel submitted that a relevant consideration was that the bond over the property was not passed to secure a loan granted by the plaintiff to any of the principal debtors in those proceedings, but in order to secure a loan to the Malla's themselves to enable them to buy a family home.

[54] The difficulty with the submission is that its latter part enjoys no foundation in the affidavits of Malla, although it is to be noted that the bond was passed before the relevant deeds of suretyships and loan agreements were concluded. But as will be shown below, it matters not if the statement by cpunsel were correct.

[55] That the property is residential in character is clear and, indeed, the Malla's have shown that the property is the primary residence of the Malla family. But as pointed out in *Saunderson,*[24] the mere fact that property is residential is insufficient to show that it is protected by s 26(1): whether it constitutes 'adequate housing' is a fact-bound enquiry-

[56] In essence, the Malla's have contented themselves with the comment that the property is their family home (to which they added that they have no alternative residence or accommodation). They have gone on to aver that their 'constitutional right **to** housing' **would** be compromised by an order for execution, but without a closer description of the property, it would appear that they have not established that it constitutes 'adequate housing'. Eg, is the property a luxury home, falling outside the concept of 'adequate housing'?

[57] However, I will precede on the premise, without deciding, 'that the property does constitute 'adequate housing'. Depriving the Malla's of theirexisting access to this 'adequate housing' would then limit their rights protected in s 26(1)[25]. The question then is whether the measure limiting that right, the Court's power to

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22 *Smmderson** para [44] above.
23 *Saunderson,* para [43] above.
24 Para [42] (e) above.
25 *Jaftha** para [34], paraphrased in paragraph [36] above,

order execution, based on the bond, is justifiable in terms ofs 36(1)[26].

[58] Whatever the reason why the Malla's wished to acquire the finance constituted by the indebtedness in question, the purpose of the bond was, and remains, the securing of that indebtedness. The interests of the bond-holder, whose rights are fused into the title to the property itself, and the policy considerations underpinning those rights, are not to be doubted.[27]

[59] On the other hand, it is not to be gainsaid that the Malla's have undoubted interests in the retention of their property. However, the Malla's contented themselves with the averment that they have no alternative accommodation or residence. What they did not say is that they are unable to acquire alternative accommodation, whether by way of purchase or lease -merely that as a fact they are at present not possessed of alternative accommodation, in short, they do not allege, or even suggest, that they do not have access to substitute adequate housing, or why other adequate housing should not be substituted for their residence.

[60] The principles in the obiter passage in *Saunderson* quoted earlier,[28] which have a strong persuasive force, and commend themselves for acceptance, come into play. In the light thereof the conclusion I reach is that the plaintiff has discharged the onus of showing that it would be proper, in all the circumstances, that the order declaring the property to be executable be issued.

Order

[61] In the result the following order will issue in each of cases no. 404/2011, 405/2011 and 407/2011:

> Summary judgment is granted as prayed, with costs on the scale as between attorney and client.

F. KROON
JUDGE OF THE HIGH COURT

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26 *Ibid*
27 *Saunderson,* paras [2] - [3], referred to in para [42] (a) and (b) above,
28 Para [43] above.

Date of hearing:	31 March 2011
Date of judgment:	7 April 2011
For plaintiff/applicant:	ML. Beard
	Instructed by Wheeldon, Rushmere &Cole
For defendants/respondents:	SL Kalimashe
	Instructed by Mili Attorneys