# Judicial oversight for sales in execution of residential property and the National Credit Act*

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**OPSOMMING**

**Geregtelike toesig by eksekusieverkope van residensiële eiendom en die Nasionale Kredietwet**

Praktiese uitvoering word gegee aan 'n hofbevel wanneer 'n huis in eksekusie verkoop word. Verkope in eksekusie stel 'n party in staat om 'n hofbevel teen 'n skuldenaar af te dwing. So 'n afdwinging is belangrik vir regswerking. Die Nasionale Kredietwet 34 van 2005** is uitgevaardig om (meestal) prosedurele beskerming te bied aan skuldenaars, terwyl sake soos *Jaftha v Schoeman* en *Gundwana v Steko Development* verg dat howe geregtelike toesig het by bevele wat lei tot verkope van huise in eksekusie. Die pad tot hier was lank en soms deurmekaar. Howe het geworstel met die vraag of 'n bevel om 'n huis te verkoop in eksekusie sonder 'n hofbevel inbreuk maak op die grondwetlike reg tot toegang tot genoegsame behuising. Verskillende howe het tot verskillende gevolgtrekkings gekom. Alhoewel die probleem meestal opgelos is deur die *Jaftha* en *Gundwana* beslissings, is die sake waarin die howe met die vraagstuk geworstel het steeds belangrik om in die toekoms die howe te help om 'n balans te vind tussen die regte van die skuldeiser om haar hofbevel af te dwing, en die skuldenaar se grondwetlike regte.

In die artikel word die impak van die Nasionale Kredietwet op die skuldeiser se vermoë om 'n hofbevel te bekom teen 'n skuldenaar, sowel as die mees belangrike sake tot *Gundwana* wat handel oor die skuldeiser se vermoë om so 'n bevel af te dwing, bespreek. Die fokus is op hoe die hof die mededingende regte moet opweeg.

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** 'n Nie-amptelike vertaling van die Nasionale Kredietwet 34 van 2005 is beskikbaar by http://www.vra.co.za/index.php?option = com_content&view = category&layout = blog&id = 3&Itemid = 3 (red).

# 1 Introduction

Practical effect is given to the terms of a court order through the process of execution. When property is sold in execution, there must be a preceding judgment and an attachment in execution of that judgment.[1] Execution is therefore the procedure whereby a successful litigant (called the judgment creditor) can follow to enforce a judgment against the judgment debtor, and is regarded as crucial to the legal process.

During the past decade, this process has become more intricate with the introduction of the National Credit Act[2] (NCA) and the judgements of *Jaftha v Schoeman; Van Rooyen v Stoltz*[3] and *Gundwana v Steko Development CC*.[4] This article will start by highlighting the procedural and substantive protection a debtor receives in terms of the NCA when a home is sold in execution, after which the process before the *Jaftha* judgment will be explained. A chronological discussion of the cases from *Jaftha* to *Gundwana* will follow. In conclusion the interaction between the NCA, *Gundwana* or *Jaftha* will be explained.

The purpose of this article is to discuss the most important cases in chronological order and to highlight what each case added to the issue.[5] Even though most of the uncertainties surrounding execution in terms of the high court rules were mooted by *Gundwana v Steko Development CC*,[6] the cases leading up to *Gundwana* would serve as guidelines as to when a court can declare immovable property executable.

# 2 The National Credit Act

The NCA was enacted:

> [t]o promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient,

1 *Campbell v Botha* 2008 ZASCA 126.
2 34 of 2005.
3 2005 2 SA 140 (CC).
4 2011 8 BCLR 792 (CC).
5 This article will not discuss the possible theoretical explanations or validations for the courts' decisions. This has been done elsewhere. See Van der Walt "Property, social justice and citizenship: property law in post-apartheid South Africa" 2008 *Stell LR* 325 (drawing on Fox's study on the "home interest of occupiers", where, in terms of a new organising framework in property theory, it should be possible to balance the home interest of occupiers with the commercial interest of the creditors); Davis & Klare "Transformative constitutionalism and the common and customary law" 2010 *SAJHR* 403 (on the fundamental changes that *Jaftha* made to common-law understandings).
6 2011 8 BCLR 792 (CC).

> effective and accessible credit market and industry, and to protect consumers.[7]

The NCA covers various credit agreements and their contents, including a mortgage agreement,[8] and aims to prevent over-indebtedness of consumers.[9] This is done by forcing credit providers to evaluate the creditworthiness of a prospective consumer before extending credit. If credit was granted, and the consumer is unable to pay her debts, the NCA further provides that such a consumer may apply for debt review and a rescheduling of debts.[10]

Section 86 of the NCA provides for instances where a consumer may apply for debt review before a notice of default was given to her by the credit provider. The debt councillor then does an extensive review and evaluation of the consumer's obligations to determine whether she is over-indebted.[11] In terms of section 86 such a counsellor can come one of to three conclusions.[12] Firstly, the counsellor can reject the application because the consumer is not over-indebted.[13] Secondly, the counsellor can find that although the consumer is not over-indebted, she is experiencing problems in paying her debts punctually.[14] In this case the counsellor can recommend a voluntary agreement between the parties to reschedule the debt or, if that fails, make a recommendation to the magistrate's court.[15] The court can then either declare the agreement reckless or order rearrangements of the debts. Thirdly, if the counsellor finds that the consumer is over-indebted, the counsellor can either recommend to the magistrate's court[16] that one or more of the

7 S 3 NCA. Although the NCA was assented to by the President in 2006, it came into operation in bits and pieces. The sections relevant to this paper came into operation on 2006-06-01. In *Firstrand Bank v Seyffert* 2010 6 SA 429 the court made it clear that the NCA does not create a "debtor's paradise" (par 10). In *Firstrand Bank Limited v Maleke; Firstrand Bank Limited v Motingoe; Peoples Mortgage Ltd v Mofokeng; Firstrand Bank Limited v Mudlaudzi* 2010 1 SA 143 (GSJ) the court made it clear that consumer legislation introduced new forms of protection for debtors in South Africa. This should help to balance the inequalities in bargaining power between large credit providers and credit seekers. The NCA further provides assistance and protection for previously disadvantaged individuals in the property market by trying to level the playing field.

8 S 1 NCA.

9 Otto & Otto *The National Credit Act Explained* (2010).

10 Otto & Otto 11.

11 According to *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) the credit counsellors fulfils a statutory function and must therefore answer all the court's questions. See Otto "Die oorbelaste skuldverbruiker: die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399 402.

12 Otto & Otto ed 61.

13 S 86(7)(a) NCA.

14 S 86(7)(b) NCA.

15 S 87 NCA. See Otto & Otto 62 for a discussion on the section.

16 The magistrates' courts' jurisdiction is unlimited in this instance. See *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP).

agreements be declared reckless,[17] or that one or more of the consumer's obligations be rescheduled.[18]

If the consumer is in arrear and a credit provider wishes to enforce the agreement, the consumer must first be notified of her default and informed that she should seek advice. Only after the lapse of a certain period, will the credit provider be allowed to take legal steps.[19] If the credit provider takes legal steps and ends up in court, one of three things can happen. Firstly, the contract may be cancelled due to the consumer's breach and the goods will be sold and the outstanding debt be paid with the proceeds. Secondly, the court can find that reckless credit was granted and either suspend the agreement or part of the agreement or set aside the consumer's obligations. And lastly, the court may find that the consumer is over-indebted and may make an order to reschedule the debt.[20]

Over-indebtedness occurs when a consumer is unable to fulfil her obligations in terms of all her credit agreements on time, with regard to her financial means, prospects, obligations and history of debt repayment.[21] Debt review can be initiated either by the court in any court proceedings where it is alleged that the consumer is over-indebted,[22] or by the consumer herself.[23]

A section 86 application may not be made once the credit provider takes steps to enforce the credit agreement in terms of section 129 of the NCA.[24] Once the credit provider notifies the consumer of her default in terms of a section 129 notification, the credit provider must wait 10

17 S 86(8)(b) NCA.
18 S 86(7)(c)(ii) NCA.
19 S 129; Otto & Otto 12.
20 For a discussion on over-indebtness see Otto 2010 *TSAR* 399.
21 S 79 NCA. See Otto & Otto 59.
22 S 85 NCA. See Otto & Otto 59 for a discussion on the section.
23 S 86 NCA. See Otto & Otto 59 for a discussion on the section.
24 S 86(2) NCA. There was an initial dispute whether the debtor's application for debt review in terms of s 86 NCA was stayed at the moment when the credit provider informs the debtor of her default in terms of s 129(1)(a) NCA or when summons is issued in terms of s 129(1)(b) NCA. See Otto *National Credit Act Explained* (2006) 85 fn 25; Boraine & Renke "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005: (Part 2)" 2008 *De Jure* 9; Otto "Over-Indebtedness and Applications for Debt Review in Terms of the National Credit Act: Consumers Beware – Firstrand Bank Ltd v Olivier Case" 2009 *SA Merc LJ* 272 277; Coetzee The impact of the National Credit Act on Civil Procedural Aspects relating to Debt Enforcement (LLM dissertation 2009 UP) 85-88; Roestoff *et al* "The Debt Counselling Process – Closing the Loopholes in the National Credit Act 34 of 2005" 2009 *PER* 247 260; *Firstrand Bank Ltd v Olivier* 2009 3 SA 353 (SEC). For a different opinion, see *Standard Bank of South Africa Ltd v Hales* 2009 3 SA 315 (D). The matter was however settled in *Nedbank v National Credit Regulator* 2011 3 SA 581 (SCA) where the court ruled that once a s 129(1)(a) NCA notice was delivered in terms of a specific credit agreement, the consumer cannot apply for debt review for that specific agreement anymore, due to s 86(2) NCA.

business days before it can enforce the agreement (provided that the consumer was in default for more than 20 days).[25]

In terms of section 129(1)(a) a credit provider may[26] inform the consumer of her default before it can enforce[27] the agreement. The mode of service of such a notice can be elected by the consumer.[28] The constitutional court ruled that section 129(1) requires that such a notice must be properly delivered to the consumer (for example with registered mail and proof that it was delivered at the relevant post office for collection).[29]

Once at least 10 business days have lapsed[30] and the consumer has not responded to the notice or responded to the notice by rejecting it and the consumer has not surrendered the goods herself,[31] the credit

25 S 130(1)(a) NCA. See Otto & Otto 103 for a more in-depth discussion. If the consumer applied for review in terms of s 86 NCA, the credit provider can only apply for the termination of such debt review after 60 days. If, after such termination, the credit provider seeks to enforce the agreement in terms of ss 129-133 NCA, the magistrate's court hearing the matter may order for the review to resume on the conditions that the court deems just in the circumstances in terms of s 85(10) NCA. In *Collett v Firstrand Bank Ltd* 2001 4 SA 508 the court ruled that if an application was made for a debt review in terms of s 86 NCA, a credit provider may only terminate the debt review in terms of s 86(10) NCA if the consumer is in default. In this case the credit provider can also not enforce the agreement, because the consumer is not in default. Should the consumer be in default, the credit provider can enforce the agreement by complying with ss 129, 130 NCA, provided that the consumer did not make application for debt review in terms of s 86(1) NCA.

If you are confused by now, you are in good company. Willis J in *Firstrand bank v Seyffert supra* stated that "[a] court is forced to go round and round in loops from subsection to subsection, much like a dog chasing its tail".

26 See Otto & Otto 103 for a discussion of the word "may" in s 129(1)(a) NCA. The court in *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D) par 35 stated that the notice was a prerequisite before legal proceedings could be instituted. See also *Standard Bank v SA Ltd v Van Vuuren* 2009 5 SA 557 (T).

27 For a discussion of the word "enforce" see Otto & Otto 103. For purposes of this paper "enforce" would refer to the credit provider enforcing *any* of its remedies and not just payment of money or an obligation in terms of the agreement. In *ABSA Bank Ltd v De Villiers* 2009 3 SA 421 (SEC) the court held that s129(1)(b) NCA only gives the credit provider the right to commence with legal proceedings to enforce an agreement unless it complied with the notice requirement of s 129(1)(a) NCA and the requirements of s 130 NCA.

28 S 65(2) NCA provides that in the absence of a prescribed mode of delivery, the consumer can choose. It can either be in person at the credit provider's business premises; at any other place designated by the consumer; by ordinary mail (R 1 GN 489 *GG* 28864, 2006-05-31 provides for delivery by registered mail – see Otto & Otto 103, 105.); by fax; by email; by printable web-page.

29 *Sebola v The Standard Bank of South Africa* CCT 98/11 Date of Hearing: 2012-02-14,

30 Provided that it is more than 20 days after the consumer defaulted.

31 This refers to goods sold in terms of an instalment sale, secured loan or lease.

provider may approach the court.[32] Unlike the case of an instalment agreement, secured loan or a lease, if a credit provider wishes to enforce its rights in terms of a mortgage agreement, the credit provider may approach the court for an order to enforce the remaining obligations if the net proceeds from the sale did not discharge the consumer of all her financial obligations.[33]

The NCA therefore added some procedural guards before a consumer's house can be sold in execution, in that a credit provider must first notify the consumer of her default and her right to consult with a debt counsellor. It also provides that an over-indebted consumer herself can apply for debt review to possibly ward off any legal action a bank may otherwise have. This may well, in some situations, prevent the house from being sold in execution, giving the consumer a second chance. A councillor can declare a consumer over-indebted if the information available at the time indicates that the consumer will be unable to satisfy (in a timely manner) the obligations under all her credit agreements. Whether this is the case is determined by reference to the consumer's financial means, prospects and obligations as well as the consumer's tendency to pay her debts under all her credit agreements as indicated by her history of debt repayment.[34] This is a substantial inquiry.[35]

When the debtor is not successful in terms of the NCA the creditor can ask that the agreement be enforced and the house sold in execution. This is done in either a magistrate's court or a high court.

## 3 Executions Before *Jaftha* and *Gundwana*[36]

Section 66(1) of the Magistrates' Courts Act[37] provides that when a magistrate's court gives judgment, and that judgment has not been complied with, then a warrant of execution may be issued for the delivery of property or the payment of money, or for ejectment.[38] When the order is for the payment of money, there are several remedies available to the judgment creditor.[39] This article will focus on the remedy of property attached and sold in execution, more specifically, immovable property.[40] Section 66(1)(a) of the Magistrates' Courts Act[41] provides that

32 S 130(1) NCA.
33 Van Heerden in *Guide to the National Credit Act* (ed Scholtz) (2008) 12-29.
34 S 79(1) NCA.
35 See Otto 2010 *TSAR* 399 for cases on over-indebtness before 2009.
36 *Gundwana v Steko Development CC* 2011 8 BCLR 792 (CC).
37 32 of 1944
38 R 36(1) Magistrates' Courts Rules.
39 See in general chapter IX Magistrates' Court Act 32 of 1944.
40 S 66(1) NCA. Certain categories of property are protected from such a sale, such as necessary beds and furniture, food for one month etc. "Property" in terms of s 65J, 72 Magistrates' Courts Act 32 of 1944 (MCA) includes certain incorporeals.
41 32 of 1944

a warrant of execution may be issued against movable property and in certain circumstances against immovable property of the judgment debtor that may in turn be sold in execution.

In terms of section 66(1)(a)[42] of the Magistrates' Courts Act,[43] the Sheriff will call to the home of the judgment debtor and attach movable property to settle the debt. If there is not sufficient movable property, the Sheriff issues a *nulla bona* return to state that there is not enough movable property to settle the debt. Before *Jaftha*,[44] the clerk of the court was then obliged to issue a warrant of execution against the immovable property if she was satisfied that there are insufficient movables to satisfy the judgment.[45]

Rule 36 of the Magistrates' Courts Rules dealt with the situation where the judgment in the plaintiff's favour was not satisfied. The judgment creditor's attorney would prepare a warrant that is issued and signed by the clerk of the court and addressed to the Sherriff who then attached and sold the property in execution.[46]

Where the original judgment was entered into by consent or default, the court was not involved in the process of issuing a warrant. In other cases, execution was only issued with leave of the court, sought at the same time as the granting of the judgment. The effect of the old rule 36(7) of the Magistrates' Courts Rules was that judicial oversight only occurred at the initial hearing, since the application of the process of execution occurred with the granting of the judgment.[47]

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42 S66(1)(a) MCA states: 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 against the immovable property of the party against whom such judgment has been given or such order has been made.

43 32 of 1944.

44 *Jaftha v Schoeman; Van Rooyen v Stolz* 2005 2 SA 140 (CC).

45 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 16. Once the property is sold, the judgement debtor can either vacate the premises voluntarily, or stay on. If the judgement debtor chooses to remain on the premise, she will be "holding over" and the new owner would have to evict her in terms of the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE).

R 36(1) Magistrates' Courts Rules provided, before *Jaftha* that "[t]he process for the execution of any judgment for the payment of money, for the delivery of property whether movable or immovable, or for the ejectment shall be by warrant issued and signed by the clerk of the court and addressed to the sheriff".

46 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 15. If a warrant is obtained and the occupier remains in the house, the occupier will be deemed an unlawful occupier that must be evicted in accordance with PIE.

47 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 15.

From the aforementioned rules the following needs to be noted. In terms of the old section 66(1) of the Magistrates' Courts Act[48] and rule 36(1) of the Magistrates' Courts Rules, once a *nulla bona* return is issued or at a judgment by consent of default, the clerk of the court was the only person involved in issuing a warrant of execution against the immovable property of the judgment debtor. It should also be noted that such a sale in execution could take place once the judgment creditor complied with all the formalities, with no guarantee that the judgment debtor was actually aware that such a sale was imminent. It is mainly these two problems that caused some constitutional concerns with the execution of immovable property.

Rule 45(1) of the high courts' Uniform Rules of Court, is the equivalent of section 66(1)(a) of the Magistrate's Courts Act.[49] It provides that, unless the immovable property was specially declared executable by the court, or in a judgment granted in terms of rule 31(5) by the registrar, a *nulla bona* return is required before immovable property can be executed.[50] Therefore, if a home was executed based on a default judgment or a *nulla bona* return, no judicial oversight took place. These sections created problems and the questions arose whether the judgment debtor's right to adequate housing is not infringed in the process.

# 4 Case law

## 4 1 *Jaftha v Schoeman; Van Rooyen v Stoltz*

*Jaftha v Schoeman; Van Rooyen v Stoltz*[51] was the first case to question the constitutionality of the execution of residential (immovable) property acquired with state subsidy without judicial oversight. In the *Jaftha* case[52]

48 32 of 1944.
49 *Idem*.
50 Where immovable property is sold in execution certain publicity principles must be adhered to. The execution creditor must, after consulting the sheriff, prepare a short description of the property (such as where it is situated) along with the date and time of the sale. The creditor must then publish this notice in a newspaper in the district where the property is situated, as well as in the *Government Gazette* (r 43(6)(c) Magistrates' Courts Rules). This must be done between 5 and 15 days before the sale.
In certain circumstances a sale in execution can be impugned even after delivery of movables or registration of immovable properties to sales made "in good faith and without notice of any defect" – s 70 Magistrates' Courts Act 32 of 1944 (MCA). Once immovable property is sold in execution, the sheriff is empowered to take the necessary steps to effect registration of transfer (S 68(4)-(5) MCA). A judgment debtor can in such instances ask to impeach the sale in execution if he can show that the purchaser acted in bad faith or the purchaser had knowledge of the defect at the time of purchase. Also, if the principle of legality is violated, the sale in execution will be null and void because the sheriff had no authority to transfer ownership to the purchaser. *Campbell v Botha supra*; *Menqa v Markom* 2008 2 SA 120 (SCA).
51 2005 2 SA 140 (CC).
52 *Idem*.

the two appellants incurred a small debt at a local shop.[53] Not having enough movables to satisfy the debt, the sheriff sold their houses in execution.[54]

Jaftha and Van Rooyen launched proceedings in the Cape High Court asking that the sales in execution be set aside and to get interdicts to prevent the transfer of the houses in the purchasers' names. The *crux* of their argument was that sections 66(1)(a) and 67 of the Magistrate's Court Act[55] was unconstitutional.[56]

The High Court dismissed the argument stating that once the sheriff issued a *nulla bona* return, then the clerk of the court *had* to, in terms of rule 36, issue and sign a warrant of execution against the immovable property.[57]

On appeal the appellants argued that the State and private parties had a duty not to interfere unjustifiably with their existing right to adequate housing as guaranteed in section 26(1) of the Constitution.[58] For the same reason they argued section 66(1)(a) of the Magistrate's Court Act[59] was unconstitutional as it allowed for the unjustifiable removal of their right to access to adequate housing. A person who acquired a house by state subsidy and whose house is sold in execution is prejudiced in that they will be barred from receiving such assistance in future again.[60]

The respondents in turn argued that the measures were reasonable and justified because section 66(1)(a) was part of a scheme and that sections 62 and 73 provided sufficient protection for debtors who wanted to avoid their homes being sold in execution.[61]

The court per Mokgoro J found that section 26(1) of the Constitution contains a negative obligation to not interfere to the right to access to housing, and that this applies to private parties (such as banks) as well.[62] A measure that permits the deprivation access to adequate housing obviously limits the rights in section 26(1).[63] Such a deprivation to the right to adequate housing cannot easily be justified in terms of section 36 of the Constitution since "[i]t is difficult to see how the collection of

53 The debts were not more than R250. Reference is also made to Ms Jaftha's poor health, poverty and very basic education (par 3), and Ms van Rooyen's lack of education and unemployment status.
54 *Jaftha v Schoeman; Van Rooyen v Stolz supra* parr 4, 5.
55 32 of 1944.
56 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 6.
57 *Ibid* par 13.
58 *Ibid* par 17.
59 32 of 1944.
60 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 18. They also attacked s 67 MCA on the grounds that it recognises basic necessitates that is needed for survival, but that it does not provide similar protection for the protection of the judgment debtor's house.
61 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 19.
62 *Ibid* par 31.
63 *Ibid* par 34.

trifling debts in this case can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated".[64]

That being said, *Jaftha* does not mean that *every* sale in execution arising from a small debt will be unreasonable and justifiable,[65] and therefore it is important to consider the facts of each case to ascertain the reasonableness of the execution.[66] If the hardship caused by the execution outweighs the advantage to a creditor, it will be unreasonable. Of course, the reverse can also be true. The "consideration of the legitimacy of a sale in execution must be seen as a balancing process".[67] What is laid on the scales are, on the one hand, that the judgment creditor obtains payment and on the other hand, the judgment debtor's interest in security of tenure of his home. If the sale in execution would leave the judgment debtor homeless, the balancing process must be even more careful.[68]

The court listed factors that should be taken into account when balancing the interest of the parties. These factors are[69] the size of the debt;[70] the circumstances in which the debt arose;[71] the financial situation of the parties;[72] whether the debtor is employed or has another source of income to pay the debt;[73] and the availability of alternative methods of debt recovery.[74]

The court, unable to set down the situations where such a sale in execution would be justifiable or not,[75] ruled that judicial oversight over the execution process in the magistrate's court is needed.[76] This will allow the magistrate to consider all the relevant circumstances of a case in order to decide where there are good reasons to order execution. This does not need prompting by a debtor.[77] To provide for this judicial oversight, the court ordered that "a court, after consideration of all relevant circumstances, may order execution" be read into section 66(1)(a) before the words "against the immovable property of the party".[78]

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64 *Ibid* par 40.
*65 Idem.*
66 *Ibid* par 41.
67 *Ibid* par 42.
68 *Ibid* par 56.
69 This is not a closed list, see *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 56.
70 *Ibid* par 57.
71 *Ibid* par 58.
72 *Ibid* par 60.
*73 Idem.*
74 *Ibid* par 59.
75 *Ibid* par 53.
76 *Ibid* par 55.
77 *Idem.*
78 See Menqa v Markom supra for the possible implication of the fact that this order also applies retrospectively. In Menqa Zondi J held that the declaration of invalidity of s 66(1)(a) MCA in *Jaftha* applied retrospectively and that a warrant of execution obtained prior to *Jaftha* without judicial oversight was

The implication of *Jaftha* is that if the Sheriff has issued a *nulla bona* return, the judgment creditor needs to approach the court to seek an order to permit execution against immovable property.[79]

The facts of *Jaftha* (losing a home to a small debt) makes it easy for one to accept that in such circumstances the courts should have judicial oversight to protect the debtor's right to adequate housing. It is clear that the right of adequate housing in this instance weighs more than the right of the creditor to enforce his (small) debt.

After *Jaftha* the question arose: what to do in circumstances where a bank issued summons against borrowers that defaulted on repayment of loans voluntarily entered into? This situation is different because judgment debtors in this case wilfully give the bank a limited real right (of security) in their property.[80]

## 4 2 *Body Corporate of Sunninghill Park v Nobumba*

A few months after *Jaftha*, the Eastern Cape High Court was asked to review a decision by a magistrate that refused to authorise a warrant of execution against immovable property where a body corporate obtained judgment against Nobumba for arrear levies.

Plasket J distinguished this case from *Jaftha* on the bases that in *Jaftha* the debts were very small and that the appellants would lose their homes (acquired through state subsidy),[81] and that if they sold their sectional title unit and the debt paid to the body corporate, they would still be able to buy another dwelling with the residue. *In casu* the body corporate's

78 invalid. It is for the reason that the warrant of execution issued by the clerk of the court, without judicial oversight, was invalid. Since the sale in execution was invalid, title could not pass to Manqa, and Markom could for that reason recover his property by way of the *rei vindication* (par 12).
A further question in the High Court was whether the sale could be impeached based on s 70 MCA which provides that "[a] sale in execution by the messenger shall not, in the case of movable property after delivery thereof or in the case of immovable property after registration of transfer, be liable to be impeached as against a purchaser in good faith and without notice of any defect". S 70 is restricted to defects at the time of purchase, and not between the time of purchase and transfer (par 16). Further, if the sale in execution was a nullity, then it did not serve to pass title to the purchaser (or successors in title), which means that the judgement debtor as owner can claim back the property using the *rei vindication* (par 9).

79 *Jaftha v Schoeman; Van Rooyen v Stolz supra* par 64.

80 Property is secured by a mortgage bond when the mortgagor contracts with the mortgagee to pass a mortgage bond over specified immovable property in favour of the mortgagee. The mortgagee then acquires a real right in the property of the mortgagor, allowing it to sell the immovable property in execution to recover outstanding moneys should the mortgagor not pay her debts. See Badenhorst, Pienaar & Mostert *Silberberg and Schoeman's Law of Property* 5 ed (2006) 361.

81 The judge also felt that the respondents had enough time to raise the issue of access to adequate housing but failed to do so.

interest in enforcing the debt outweighs the interest of the respondents (to not have judgment against them).[82]

The case illustrate how the court, when applying the *Jaftha* balancing test, will look at the interest of both parties. The court also made it clear, without saying it in so many words, that the right to access to housing does not mean *any* housing, but *adequate* housing. Since Nobumba could still buy a decent house with the residue of the sale of the sectional title unit, the court felt that this did not infringe on his right to housing.

### 4 3 *Standard Bank of SA Limited v Snyders*

In *Standard Bank of SA Limited v Snyders*[83] the 9 defendants all owe money to the bank in terms of a bond.[84] Standard Bank served summons on each of the defendants, and in all nine cases the defendant did not give notice to defend, in some Standard Bank filed a written application with the registrar for a default judgement in terms of rule 31(5)(a) of the Uniform Rules.[85] The registrar however claimed not to have the power to grant an order declaring the immovable property executable because of *Jaftha*. Standard Bank then enrolled the matters in the High Court.[86] *In casu* the court had to rule on the situation pertaining to default judgements under rule 31,[87] and secondly whether defendants should have been made aware of their rights in terms of section 26 of the Constitution.

The court did not feel it necessary to declare rule 31 invalid, since, according to the Cape High Court, "[a]ll that is required is that it be interpreted in a practical and sensible manner".[88] This, the court found, is inline with the purpose of the rules of the court, namely "to expedite the business of the courts". Rules must therefore be interpreted "to enable litigants to resolve their differences in as speedy and inexpensive a manner as possible".[89] The court found that rule 31(5) did not exclude the powers of the court and that the court can deal with the matter if referred by the registrar or the defendant.

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82 *Body Corporate of Sunninghill ParPark v Nobumba* 2005 ZAECHC 9 par 33.
83 2005 5 SA 610 (C)
84 *Standard Bank of South Africa Ltd v Snyders and eight similar cases* 2005 5 SA 610(C) par 2
85 *Ibid* par 3.
86 *Ibid* par 4.
87 "Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the Registrar a written application for judgment against such defendant: Provided that when a defendant is in default of delivery of a plea, the plaintiff shall give such defendant not less than 5 days' notice of his or her intention to apply for default judgment"
88 *Standard Bank of South Africa Ltd v Snyders and eight similar cases supra* par 12.
89 *Idem*.

The second issue is whether the defendants should have been notified of their rights under section 26 of the Constitution.[90] Standard Bank argued that these cases can be distinguished from *Jaftha* because the mortgage bonds signed by the debtor contains a specific clause where the debtor agrees that his property may be declared executable should they default on the payment.[91] The court ruled that, before the Constitution an order to declare property executable was simply a procedural step, but due to *Jaftha* and the Constitution this "is no longer simply a matter of procedural law".[92] Section 26(3) introduced a pre-requisite for granting such an order, by placing an obligation on the courts to now consider all the relevant circumstances in a case.[93] The court solved the matter in terms of the general principles of pleading. This entails that the bank must comply with section 26 of the Constitution, and in the summons show that the facts alleged by the bank will justify an order in terms of section 26 of the Constitution.

In the *Snyders* case the Cape High Court added the requirement that the plaintiff must, in its summons, contain a suitable allegation to the effect that the facts alleged by it are sufficient to justify an order in terms of section 26(3) of the Constitution. It also ruled that if the execution order is asked in terms of section rule 31 (default judgment) no judicial oversight is needed, since expediency of the process is important.

### 4 4 *Nedbank v Mortinson*

Joffe J did not agree with the *Snyders* case. In the Witwatersrand local division *Nedbank v Mortinson*[94] rule 45(1) of the Uniform Rules was challenged. After Mortinson defaulted on his bond payments, Nedbank applied for execution of his home in terms of a default judgment.[95] Since the registrar was aware of the *Jaftha* case, he doubted his competence to declare the hypothecated property executable and required that the matter be set down for a hearing in court.[96]

The court stated that not in all instances the question of violation of section 26 will be relevant as commercial property is sometimes hypothecated as security. The court accepts without going into it that a declaration to execute residential property in terms of rule 31(5) is a limitation of section 26 constitutional rights,[97] and went on to consider

90 The summons in this case made no reference to s 26(3) Constitution.
91 For this the plaintiff relied on *Jaftha* where the one factor that could be taken into account was whether the defendant willingly put his house up as security for the debt (par 17).
92 *Standard Bank of South Africa Ltd v Snyders and eight similar cases supra* par 22.
93 *Idem.*
94 2005 (6) SA 462 (W)
95 *Nedbank v Mortinson* 2005 6 SA 462 (W) parr 1-2.
96 *Nedbank v Mortinson supra* par 3.
97 *Ibid* par 22.

whether this is a justifiable limitation in terms of section 36(1) of the Constitution.[98]

In answering the question the court noted that "the smaller the amount the greater the need for careful scrutiny and the more compelling the reasoning in the *Jaftha* judgment that the limitation is not reasonable and justifiable".[99] This implies that the cases in the magistrates' courts probably warrant more careful scrutiny.

The second distinction the court made between the facts *in casu* and *Jaftha* is that the sale in execution of hypothecated property should be treated differently because "the debtor has participated in a commercial transaction and has willingly utilised his or her immovable property as security and thus put it at risk".[100]

Thirdly, the court found that the Uniform Rules as opposed to the Magistrates' Courts Rules have a safeguard to protect the debtor, since, the court can reconsider a judgment or direction given by the Registrar within 20 days after the concerned party acquired knowledge of the judgement or direction.[101] The debtor should be aware of this rule because he "who participate in economic activity to the extent of hypothecating immovable property" would in normal circumstances have access to legal advice.[102] For those instances where such an assumption would not be true, the court found that a rule of practice that prescribes to the Registrar to include the provisions of rule 31(5)(d) should suffice.[103]

The court had no difficulty to find, based on the above, that where a debtor specifically hypothecated his immovable property and there is no abuse of court procedure, that the limitation on one's access to housing is justifiable in terms of section 36(1) of the Constitution. The court found that rules of practice to alert the Registrar to assist him to determine

98 *Ibid* par 23.
99 *Nedbank v Mortinson supra* par 24.
100 *Ibid* par 25.
101 *Ibid* par 26. Such an order must be brought to the attention of the court that will consider the default judgment *de novo* without the *onus* on the debtor.
102 The court finds it impractical that 300 to 400 applications for default judgements of this nature be heard in open court. In this context the court re-iterates that "[w]here the judgement debtor willingly puts his or her house as security for a debt, a sale in execution should ordinarily be permitted, absent to abuse of court procedure" (par 28).
103 *Ibid* par 27. The court also regarded the view that "summons should contain a suitable allegation to the effect that the facts alleged by it […] are sufficient to justify an order in terms of s 26(3) of the Constitution" to be "no more than allegations relating to the existence of the loan, that the full amount of the loan has become repayable by virtue of the debtor's default and the loan has been secured by immovable property which has been specially hypothecated". These facts, the court found, is the same that is used in a non-excipiable summons for this relief (par 32).

abuses and to refer those applications to the consideration by the court.[104]

On rule 45(1) and the issue of writs after immovable property has been declared executable by the Registrar the court ruled that if the Registrar declared immovable property executable, then the writ may be issued. If the writ was issued after the movables were insufficient to satisfy the debt, then the *Jaftha* judgment is applicable as there is no basis on which the judgement can be distinguished.[105] To remedy this defect the words "and a court, after consideration of all relevant circumstances, has authorised execution against the immovable property" must be inserted after "movable property" in rule 45(1).[106]

The court attached a lot of weight to the debtor's presumed knowledge of the law – if the debtor can enter into mortgage agreement, he must be able to participate and bear the consequences of such agreement. The Johannesburg court ruled that even if the amount falls within the jurisdiction of the magistrate's court, the Registrar must refer all cases where hypothecated property is sought to be declared executable to be heard in the open motion court.[107] Magistrate court's execution requires careful scrutiny because the debts will be relatively low most of the times, while in the High Court the debtor seems to be protected by the Uniform Rules. According to *Mortinson*, therefore, default judgments does not require judicial oversight, while executions based on a *nulla bona* return, will be bound by *Jaftha*.

## 4 5 *Standard Bank of South Africa Limited v Saunderson*

*Standard Bank of South Africa Limited v Saunderson*[108] gave the Supreme Court of Appeal the opportunity to clarify the situation in the High Court. In *Saunderson* Standard Bank requested the payment of the outstanding bond amounts. The debtors did not respond to the summons and Standard Bank applied for default judgement, requesting the Registrar to order the immovable properties executable.

The court from the outset made it clear that a mortgage bond might be treated differently from the *Jaftha* scenario by emphasising that it is an agreement that is entered into freely through which the borrower

104 Par 33.

105 *Nedbank v Mortinson supra* par 38. In *Nedbank Limited v Mashiya* 2006 4 SA 422 (T) the defendants owed R17,379.10 in terms of mortgage bonds. Nedbank claimed payment and an order to declare the property executable. In light of *Mortinson*, the application was referred by the Registrar for consideration in terms of r 31(5)(b)(vi) Uniform Rules. Bertelsmann J made it clear in this judgment that the information in the affidavit based on the requirements set down in *Mortinson* needs to be reliable (par 52).

106 *Ibid* par 39.

107 *ABSA Bank Ltd v Ntsane* 2007 3 SA 554 (T) confirmed this.

108 2006 2 SA 263 (SCA)

compromise their rights of ownership.[109] This curtailment of the right of property "penetrates the rights of ownership", and the "bond-holder's rights are fused into the title itself".[110]

The court placed a lot of emphasis on the mortgage bonds as instrument of security and the fact that the law will give effect to its terms. The purpose of a mortgage bond is to allow the secured creditor to ask the court to execute against immovable property immediately.[111]

The court highlighted that *Jaftha* does not imply that section 26(1) would be compromised in every case where execution is levied against residential property, but that only a writ of execution that deprives a person of "adequate housing" (a relative concept, according to the court)[112] would violate section 26(1) and would therefore need justification in terms of section 36(1).[113] In cases where poor people are evicted from their state subsidised homes, this answer seems obvious, but the question is whether every threat of ownership of a house would constitute an infringement of section 26(1). Just because the court in *Jaftha* found this to be the case, not all residential property will be protected by section 26(1).[114] The court found that, unlike in *Jaftha,* in *Saunderson* "the property owners […] 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".[115] The defendants should therefore show that the execution order would infringe their right to adequate housing, and only then the bank would have to justify the grant of orders. The court also emphasised that just because the property is residential property does not automatically mean that there was an infringement of section 26(1).[116]

The court held that the registrar is entitled to dispose of the application for orders of execution in terms of a default judgment.[117] The defendant can then raise the alleged infringement of section 26(1) that the plaintiff will then have to justify. When the defendant raises a defence (formally or informally), the registrar is in any case in terms of rule 31(5) obliged

109 The court started with an explanation of why "[t]he mortgage bond is an indispensable tool for spreading home ownership", and highlighting the fact that loans secured by mortgage bonds amounted to almost R500 billion in Aug 2005 (par 1).

110 *Standard Bank of South Africa Ltd v Saunderson* 2006 2 SA 263 (SCA) par 2.

111 *Ibid* par 3.

*Ibid* par 16.

113 *Ibid* par 15.

114 *Ibid* par 17.

115 *Standard Bank of South Africa Ltd v Saunderson supra* par 18. The court also accepts (without deciding) that execution against mortgaged property could conflict with s 26(1) Constitution, but that such a conflict would be the exception. For this the court again rely on a comment made in *Jaftha* that "in the absence of abuse of court procedure […] a sale in execution should ordinarily be permitted against even a home bonded for the debt sought to be reclaimed" (par 19).

116 *Ibid* par 20.

117 *Standard Bank of South Africa Ltd v Saunderson supra* par 21.

to refer it to a judge sitting in an open court.[118] However, the court as a "safety net" ordered that the defaulting debtor (of an execution based on mortgage) should be informed, when action is initiated, that his section 26(1) rights might be infringed.[119]

In *Saunderson* the Supreme Court made it clear that the sanctity of contract (mortgage agreements voluntarily entered into) and the fact that a mortgage bond is so closely linked to the title of the house that the execution orders (based on a default judgment) do not need judicial oversight. Rule 31(5) that allows for matters to be referred to a judge in an open court, as well as informing a debtor at the summons of his section 26(1) rights, provides sufficient protection of such a debtor's section 26(1) rights.

## 4 6 *ABSA Bank Ltd v Ntsane*

In *ABSA bank Ltd v Ntsane*[120] the bank applied for default judgment against the defendants, claiming the sum of R62 042,43 being the principle sum under a mortgage bond registered over the immovable property of Ntsane. At date of application the defendants were only R18,46 in arrears.[121] Based on the *Mortinson* judgment, the court heard the application to declare the property executable in the open motion court.[122] From the outset the court made clear that the "decision to enforce the bond appeared morally and ethically questionable".[123]

118 *Ibid* par 23.

119 *Ibid* par 24. In reaction to *Saunderson*, in *Campus Law Clinic v Standard Bank of South Africa* 2006 6 BCLR 669 (CC), the Campus Law Clinic approached the Constitutional Court in the public interest to clarify the circumstances in which a court or court official will permit a creditor to sell immovable property to recover money owed to it in terms of a mortgage bond. The Campus Law Clinic questioned the constitutionality of s 27A Supreme Court Act 59 of 1959 and r 31 Uniform Rules, none of which was before the High Court or the Supreme Court of Appeal. The Constitutional Court did not grant the Campus Law Clinic leave to appeal because the challenge involved statutory provisions and rules of the court, and the record of appeal was not enough for a full consideration of all the issues relevant to the matter. Central to the inquiry was what precautions must be taken to ensure that the right of access to adequate housing is taken into account at the execution of immovable property. The court did acknowledge that there was uncertainty about the situation created by the *Jaftha* and *Saunderson* judgments (par 18), as well as the different directives and judgments of the high courts, but did not rule on it since the appeal was dismissed on different grounds.

120 2007 3 SA 554 (T).

121 The court later refers to the arrears amount as "piffling, particularly when the status of the plaintiff as part of a multi-billion Rand international financial conglomerate is taken into account". *ABSA Bank Ltd v Ntsane supra* par 18.

122 *ABSA Bank Ltd v Ntsane supra* parr 1-10.

123 *ABSA Bank Ltd v Ntsane supra* par 22. The court compared the actions of the bank to the likes of William Shakespeare's Shylock character in *The Merchant of Venice*.

Bertelsmann J noted that "[a]djudication between conflicting interest in a society that is governed by a democratic constitution involves the continuous weighing up of competing rights". The rights *in casu* were the bank's right to commercial activity (and to enforce agreements) versus the right to access to adequate housing.[124] During such a weighing up process the proportionality of the harm against the judgment debtor must weighed against the harm the bank may suffer if the agreement is rendered "commercially ineffective" (what was protected in *Saunderson*).[125] *In casu* the court was of the opinion that the arrear amount was so trifling that the bank in effect lost its right to accelerate the bond upon non-payment. This is also because alternative means were available to pay it (such as execution against movable assets),[126] or plaintiffs selling the house on the open market.[127] The court may, in such instances, refuse to grant execution against an immovable property if the result will be "iniquitous or unfair" for the homeowner.[128]

The *Ntsane* judgment, like with *Jaftha*, makes it easy to accept that judicial oversight in some instances leads to fairer results. Here was a clear abuse of the court procedure (preferring execution to alternative means of recovering a trifling debt). It was a modest home executed for a small debt. The fact that Ntsane is not a first time owner means that he will not qualify for state subsidy of a house and that the sale of his house will therefore limit his access to adequate housing.[129]

## 4 7 *Firstrand Bank Limited v Maleke; Firstrand Bank Limited v Motingoe; Peoples Mortgage Ltd v Mofokeng; Firstrand Bank Limited v Mudlaudzi*

In *Firstrand Bank Limited v Maleke; Firstrand Bank Limited v Motingoe; Peoples Mortgage Ltd v Mofokeng; Firstrand Bank Limited v Mudlaudzi*[130] the Registrar referred the matters to an open court in terms of rule 31(5)(b)(vi) and the *Mortinson* judgment. All four applications dealt with a situation where the amount claimed fell within the jurisdiction of the Magistrate's Court but was placed before the Registrar of the high court.[131] All the defendants further averred that they complied with sections 129 and 130 of the NCA.

124 *Ibid* parr 69-70.
125 *Ibid* par 71.
126 *Ibid* par 72.
127 *Ibid* par 83.
128 *Ibid* par 8.
129 Cleaver J in *First Rand Bank Limited v Swarts* 2010 ZAWCHC 35 relied on *Saunderson*'s emphasis on a right to *adequate* housing, and the emphasis *Saunderson* placed on the property owner that willingly bonded their property to the bank for capital (par 3). The court also found that over-indebtness was not proved (par 7).
130 2010 1 SA 143 (GSJ).
131 *Firstrand Bank Limited v Maleke; Firstrand Bank Limited v Motingoe and Another; Peoples Mortgage Ltd v Mofokeng and Another; Firstrand Bank Limited v Mudlaudzi supra* par 2.

All the defendants were historically disadvantaged individuals.[132] The bonds were paid in instalments on relatively small loans and had been paid regularly for the past 13 + years. The arrears were relatively minor. The section 129 letters of demand that were sent did not expressly warn the defendants that their homes could be sold in execution (and that they might lose it and be evicted) if they did not respond, since this was not required by the act.[133]

The court considered the fact that the defendants paid their instalments regularly and dutifully, and that, should their homes be sold in execution, the banks would benefit from their capital grown while the arrears were relatively minor. The fact that the defendants may have received the excess of the outstanding balance when the property was sold did not protect the execution debtor, since the credit provider had no incentive to sell the property for more than the outstanding debt. There was also no guarantee that the excess would be enough to enable the debtor to purchase a new home.[134]

Instead, the court found that the defendants were ideal candidates for debt councillors in terms of section 85(a) of the NCA. The problem in this case was that, with default judgments there are normally no allegations of over-indebtness before the court. Thus, when a court is considering credit agreements in terms of rule 31(5) in the absence of the debtors it cannot apply the remedies provided in section 85. Section 86(2) actually prevents a referral to a debt counsellor once the credit provider instituted steps in terms of section 129 of the NCA. This not being done in the *Maleke* case, the court could not assist the defendants in protecting their homes in terms of the NCA. The only manner in which the defendants could be afforded protection would be if the matters were re-instituted in the Magistrate's Court.[135]

In *Maleke* the court weighed the interest of the bank in obtaining judgment with the prejudice the debtor may suffer if the house was sold. The fact that the debts were relatively small, that the bank would benefit from the capital growth of the house and that the house would probably not be sold at market value all played on the court's decision.

The court's comments about the role which the NCA plays in the process is also interesting. The court started off to emphasise that the NCA specifically aims at protecting previously disadvantaged individuals. It explicitly mentions that the section 129 notice does not warn a debtor

132 *Firstrand Bank Limited v Maleke; Firstrand Bank Limited v Motingoe and Another; Peoples Mortgage Ltd v Mofokeng and Another; Firstrand Bank Limited v Mudlaudzi supra* par 3. This is relevant since the NCA in its preamble and s 3 makes it clear that it is "designed to render assistance and protection to the previously disadvantaged section of the population who wish to enter the property market".

133 *Ibid* par 5.

134 *Ibid* par 8.

135 The court deems this a possibility based on *Jaftha* and in terms of s 73(1) Magistrate's Court Act 44 of 1945.

of the possible infringement to the right to adequate housing. Lastly, the court in effect warned banks that if the problem can be solved by appointing debt councillors and making alternative arrangements for repayment that the banks must do that.

## 4 8 *Changing Tides 17 (Pty) Ltd v Scholtz*

*Changing Tides 17*[136] was also an application for summary judgment where the plaintiff sought judgement for the payment of a sum of money, and an order to declare certain immovable property executable. Scholtz, however, applied for debt review in terms of section 86 of the NCA, and was found to be over-indebted.[137] Four months later the plaintiff gave notice in terms of section 86(10)[138] to terminate the debt review process. The debt counsellor issued an application in the Port Elizabeth Magistrate's Court. At the time of the High Court application, the matter was still pending in the Magistrate's Court. Three months later, the plaintiff issued summons.[139] Scholtz raised the defence that, in terms of section 86(11) of the NCA even if a credit provider gave notice to terminate a review and continue to enforce an agreement, the Court can still order that the debt review process resume.[140]

The court considered the nature of the debt review process and concluded that during the entire process the Magistrates' Court must provide judicial oversight.[141] The court also emphasised the credit provider's (plaintiff's) right to terminate the review process after at least sixty days had lapsed.[142] Should the credit provider apply for such a termination, the Magistrate's Court may order it to resume if it is just in the circumstances. In this case the court ruled that it was only the Magistrate's Court that provided judicial oversight over the debt review process that could make such and order, since it had all the information required to exercise such discretion.[143]

The court then considered the question whether an order declaring the property hypothecated executable would be justified in light of the *Jaftha* judgement.[144] Scholtz did not place any information in front of the court pertaining to the nature of the residence. The court mentioned that the fact that Scholtz was declared over-indebted may in certain circumstances show that such an order would not be justified, but felt that due to the haste of declaring Scholtz over-indebted and the lack of evidence before the court, that a summary judgement was justified.[145]

136 *Changing Tides 17 (Pty) Ltd v Scholtz* 2010 SAECPEHC 3 par 1.
137 *Ibid* par 3.
138 Of the NCA.
139 *Changing Tides 17 (Pty) Ltd v Scholtz supra* par 4.
140 *Ibid* par 6.
141 *Ibid* parr 9-13.
142 *Ibid* par 15.
143 *Ibid* par 16.
144 *Ibid* par 23.
145 *Ibid* par 24.

*Changing Tides 17* is important because it shows how the NCA overlaps with declaring a house executable. Here the debtor had the initial protection of the NCA (by being declared over-indebted). That protection fell away when the creditor applied for termination of the debt review process which led for the application of an execution order. If the debtor, at the granting of the execution order, wanted added protection in terms of *Jaftha*, he had to put the necessary facts in front of the court to convince the court that his right to access to housing would be infringed. Mere over-indebtedness would not be enough.

## 4 9 *Gundwana v Steko Development CC*

*Gundwana v Steko Development CC*[146] is the case the clears up most of the confusion regarding selling residential property in execution in terms of the Uniform Rules. In *Gundwana* the Constitutional Court had to decide whether the Registrar, in the course of ordering default judgement under rule 31(5)(b) of the Uniform Rules, may grant an order to declare mortgaged property specially executable. Gundwana contended that the power of the registrar was constitutionally invalid.[147]

In 2003, the registrar granted default judgment against Gundwana's property after she had failed to make payments on her bond, and declared the property executable. A writ of attachment was issued to give effect to the execution order.[148] The bank, however, did not act on this and Gundwana continued to make (irregular) payments. In August 2007 the applicant learned that her property would be sold in execution. Upon hearing this, she contacted the bank and promised that she would pay the outstanding moneys and made a payment.[149] The house was nonetheless sold in execution[150] to Steko Development and the property was registered into Steko's name. Gundwana sought rescission of the 2003 default judgement.[151]

The Bank argued that neither the person of the applicant nor her property fell within the *Jaftha* protection. The court rejected this argument on the grounds that "the constitutional validity of the rule cannot depend on the subjective position of a particular applicant ... [i]t is either objectively valid or not".[152] The court also found that it was impossible to determine whether the applicant fell into that category based on the summons alone.[153]

146 2011 8 BCLR 792 (CC)
147 *Gundwana v Steko Development CC* 2011 8 BCLR 792 (CC) par 2.
148 *Ibid* par 5.
149 *Ibid* par 6.
150 With the 2003 writ.
151 *Gundwana v Steko Development CC supra* par 9. She also approached the court for leave to appeal against an eviction order granted to Steko.
152 *Gundwana v Steko Development CC supra* par 42.
153 *Ibid* par 43.

The bank then argued that, unlike in *Jaftha*, the applicant voluntarily placed herself at risk by entering into a mortgage agreement.[154] The court rejected this argument by questioning whether such an applicant also accepted that the mortgage debt may be enforced without a court sanction;[155] waived her right to access to adequate housing or eviction in terms of sections 26(1) and (3) of the Constitution; had the mortgage enforced even in bad faith.[156] This could only be remedied by an evaluation of the facts of each case, which must be done by a court.

The court rejected the bank's argument that the registrar can set the matter down in an open court, or for either of the parties to set the matter down for reconsideration based on the premise that execution of a person's home all require evaluation.[157] With this the court overturned the judgements of *Saunderson* and *Mortinson* but commented that the practical directions given in both cases were valuable.[158]

The court found that in light of constitutional considerations judicial oversight was needed but cautioned that these considerations did not mean that the judgment creditor was no longer entitled to execute upon the assets of a judgement debtor (especially to satisfy a judgement sounding in money). It means that when it does execute against immovable property, due regard should be taken of the impact that this can have on a debtor's right to access to adequate housing. This is especially so "[i]f the judgment debt can be satisfied in a reasonable manner without involving those drastic consequences" then "that alternative course should be judicially considered before granting execution orders".[159]

The court in conclusion acknowledged that execution was part of normal economic life, but that the "disproportionality between the means used in the execution process" to get the payment for the debt and "other available means" might lead to problematic results.[160] "If there are no other proportionate means to obtain the same end," the court concludes, "execution may not be avoided".[161]

To remedy this, the court ordered amendment to the rules (retrospectively) to provide that a writ may only be issued once a court considered all the relevant circumstances.[162]

154 *Ibid* par 42.
155 *Chief Lesapo v North West Agricultural Bank* [1999] ZACC 16 already ruled that the judicial process guaranteed in s 34 Constitution also applies to the attachment and sale of a debtor's property.
156 *Ibid* par 44.
157 *Ibid* par 50.
158 *Ibid* par 52.
159 *Ibid* par 53.
160 *Ibid* par 54.
161 *Idem*.
162 *Ibid* par 55.

In *Gundwana* the Constitutional Court settled the situation in the High Courts by emphasising that the Constitution requires a weighing of interests. These interests can only be weighed by a court. It is then the court's task to look at all the relevant factors to decide whether granting an execution order will infringe on a debtor's right to adequate housing, and whether this restriction is justifiable.[163] This is possible by balancing the interest of the parties. Such "judicial scrutiny in every case should hold no terrors [since] [t]he level of enquiry will vary from case to case and will always be dependent on the circumstances".[164]

## 5 Conclusion

What does all this mean? Say for instance, D enters into a mortgage agreement with B, and falls behind with her instalments. Her first step will probably be to apply for the safeguards in the NCA, where she can be declared over-indebted. If she is unsuccessful and B then wishes to enforce the agreement, B must first send a section 129 notice. If they end up in court, one of three options is that the court can cancel the contract and order that the goods be sold.[165] Only once the contract is cancelled and B obtains an execution order, does the possibility of infringing a right to adequate housing occur.

*Jaftha* set the path of what factors a court can take into account when considering whether the right of access to adequate housing is unjustifiably infringed. *Body Corporate Sunninghill* made it clear that it is only a right to *adequate* housing. *Snyders* indicated that the practicalities in high courts do not require the same oversight as in *Jaftha*, but that in the pleadings the creditor must at least show how, by obtaining an execution order, the right to adequate housing will not be infringed. *Mortinson* felt that the high court rules provide adequate protection to a debtor in cases of default judgments, but that in the case of a *nulla bona* return, *Jaftha* applies. In *Saunderson*, the Supreme Court of Appeal made it clear that mortgage agreements willingly entered into will be enforced, and that since the debt in such a case is infused with the title of the property the right to housing is not infringed. *Ntsane* emphasised that the question of infringement is more a weighing of rights, and that if the debts are trifling, the creditor should try and recover it by alternative means first. *Maleke* build on this by stating that in some instances debt counselling should be encouraged. *Changing Tides 17* showed that when a previously declared over-indebted person's house is sold in execution, the fact of over-indebtedness is not enough to convince the court that the right to adequate housing is infringed. In the end the Constitutional Court in *Gundwana* made it clear that whether the right to housing is infringed

163 This was confirmed in *Mkhize v Umvoti Municipality* 2012 1 SA 1 (SCA).
164 *Mkhize v Umvoti Municipality* 2012 1 SA 1 (SCA) par 25.
165 In this context it is important to remember that s 130(2) NCA states that if a house is sold in execution and it does not cover all the outstanding debts, the creditor is not allowed to attach more property to recover the outstanding debt.

unjustifiably can only be determined by a court. The Constitutional Court also made it clear that the fact that a debtor voluntarily placed their house at risk does not mean that the debtor consented to having the house sold in execution without judicial oversight or waive their section 26 rights. Acknowledging the role that execution plays in the economic life, the court made it clear that execution may only take place if there is no other proportionate means to obtain the payment of the moneys.