

## 1. Introduction

Many people fall into debt simply because they live in poverty and have no jobs so as to generate income. The majority of people who fall under the debt trap are the poor, being mostly black, and as a result cannot pay.

The proliferation of the Bill of Rights in many constitutions throughout all regions of the world has been well-documented. Nevertheless to date there has been no real attempt to examine the attachment of immovable property within the human rights context. This dissertation is a response to the omission. It will try to make an enlightened contribution to the transformative effect of South African law and the extent to which human rights have influenced the right to housing in the country.

## 2. Sequence of attachment of property

The process of execution in the magistrates' courts is similar to that in the high courts. Once judgment has been granted (in undefended actions for a liquidated debt it may be granted by the clerk of the court)<sup>1</sup> and the judgment debt is not paid the creditor is entitled to execute against the debtor's property in satisfaction of the judgment.

The process of execution is initiated when the clerk of the court issues a writ of execution, which authorises the sheriff to attach and sell property of the defendant.<sup>2</sup> In keeping with s 66(1)(a) of the Magistrates' Court Act,<sup>3</sup> the writ will at first be confined to movables and only once it is shown that they are insufficient will a writ be issued for execution against immovable property. Before the

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<sup>1</sup>In undefended actions for a liquidated debt it may be granted by the clerk of the court-Rule 12(1)(c).

<sup>2</sup>Rule 36(1).

<sup>3</sup>Act 32 of 1944.

decision in *Jaftha*<sup>4</sup> an ordinary judgment creditor [one whose claim was not secured by a mortgage bond – as was the case there] was entitled as of right to a writ of execution against immovable property once the debtor had insufficient movables to satisfy the debt, and the clerk of the court had no discretion to refuse the writ. It was in those circumstances that the clerk issued the writ in the *Jaftha* case which became the focus of the subsequent controversy.

Execution is usually made against movable property belonging to the judgment debtor. If, however, there is insufficient movable property to satisfy the judgment debt, then execution may be made against the immovable property of the judgment debtor.<sup>5</sup> The magistrate's court may also order that judgment be enforced by immediate execution against the immovable property of the judgment debtor on good cause shown.<sup>6</sup>

When the execution debtor declares to the sheriff, at the time attachment is made, that he has no movable property or only insufficient movable property to satisfy the warrant of execution and the sheriff is unable to find sufficient movable property to do so, the sheriff must ask the execution debtor to declare whether he has immovable property which is executable and enter the execution debtor's reply in the return of service endorsed on the warrant.<sup>7</sup>

The magistrate's court also has the power, on application by any interested party, to review and confirm, modify or settle the conditions of sale in respect of any immovable property to be sold

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<sup>4</sup> *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

<sup>5</sup> Paterson T. J. M 'Eckard's Principles of Civil Procedure in the Magistrates' Courts' 4<sup>th</sup> (2001) at 264.

<sup>6</sup> Paterson at 264. See section 66(1) of the Magistrates' Courts Act 32 of 1994.

<sup>7</sup> Section 66(8) of the Magistrates' Courts Act 32 of 1944.

in execution of any judgment of a division of the High Court of South Africa.<sup>8</sup>

Section 66(1) (a) of the Magistrates' Courts Act<sup>9</sup> reads:

'whenever a court gives judgment for the payment of money or makes an order for the payment of money in installments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay an installment at the time and in the manner ordered by the court, shall be enforceable by execution against movable 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.'

A very similar provision is contained in rule 45(1) of the Uniform Rules of Court. Consequently, unless the judgment debtor's immovable property has been specifically declared executable, it may be sold in execution only if his movable property is insufficient to satisfy the judgment. Furthermore, formalities which have to be complied with in connection with the attachment and sale in execution of immovable things differ considerably from those applying to the attachment and sale in execution.<sup>10</sup>

The attachment is effected by notice in writing by the sheriff served upon the owner of the property and upon the registrar of deeds or other officer charged with the registration of such immovable property.<sup>11</sup> If a person other than the owner of the property is in

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<sup>8</sup> Paterson T. J. M 'Eckard's Principles of Civil Procedure in the Magistrates' Courts' 4<sup>th</sup> (2001) at 264. See Rule 43(7)(b) of the Magistrates' Courts Act 32 of 1944.

<sup>9</sup> Act 32 of 1944.

<sup>10</sup> Rules 41-43 of the Magistrates' Courts Rules.

<sup>11</sup> *Van Winsen et al* at 391. See Rule 36(1) of the Magistrates' Court Rules of Court

occupation, the notice must also be served upon that person by means of a registered letter.<sup>12</sup>

Although the object of attachment is twofold, namely to found jurisdiction and to serve as security *judicatum solvi*, attachment will nevertheless be ordered even if the second object cannot be served thereby. The fact that the article sought to be attached is of very little value is no reason for refusing the attachment.<sup>13</sup> In various cases<sup>14</sup> it has been held that the court has no discretion at common law whether or not to grant an attachment. An applicant is entitled to it if he asks for it<sup>15</sup> and satisfy the requirements thereof.

However, an *incola* is not entitled as of right to an attachment of both the person and the property of a *perigrinus*, and the court has discretion as to the appropriate attachment it should order so as to found jurisdiction.<sup>16</sup> It is a rule of South African practice that attachment is to be refused as unnecessary where jurisdiction on other grounds exists.<sup>17</sup> If the object sought to be attached is in value considerably in excess of the amount of the claim, the court will usually order attachment of part of the property where that is possible, to allow the *peregrinus* to obtain the release of the property upon the payment as security of a sum approximately equal to the claim.<sup>18</sup>

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<sup>12</sup>Ibid.

<sup>13</sup>In *Ex-parte Seltzer* (1903) 20 SC 505 the court attached an engagement ring valued at £32 10s in order to found jurisdiction in a breach of promise action in which damages of £5 000 were claimed. Cf *Murphy v Dollas* 1974 (1) SA 793 (D) at 797.

<sup>14</sup>*Sowry v Sowry* 1953 (4) SA 629 (W) at 633; *Central African Airways Corporation v Vickers-Armstrong Ltd* 1956 (2) SA 492 (FC) at 494; *Mediterranean Shipping Co v Speedwell Shipping Co Ltd & Another* 1986 (4) SA 329 (D) at 335E-F; *Longman Distillers Ltd v Drop Inn Group of Liquor Supermarkets (Pty) Ltd* 1990 (2) SA 906 (A) at 914E-F.

<sup>15</sup>*Jackman & Others v Arkel* 1953 (3) SA 31 (T) at 34.

<sup>16</sup>*Preisig v Tattersall* 1982 (3) SA 1082 (C) at 1083G, applied in *Reilly v Benigno* 1982 (4) SA 365 (C) at 369C.

<sup>17</sup>*Jackman & Others v Arkel supra*.

<sup>18</sup>*Ex parte Daitz & Co* 1921 WLD 77.

The distinction between movable and immovable property is significant for a variety of reasons. Usually one's rights to movables are more attenuated than one's rights to immovable (or real property). A movable property can as the name implies easily be moved from one location to another.<sup>19</sup> Immovable is land and everything that is attached to land by natural or artificial means<sup>20</sup> “aard-of nagel-vast”.

### 3. Attachment of movables

When commanded to attach the goods of any person, the sheriff must proceed to the dwelling house, place of employment or business of the judgment debtor<sup>21</sup> and there demand<sup>22</sup> satisfaction of the writ and, failing this, demand that sufficient movable and disposable<sup>23</sup> property be pointed out.<sup>24</sup> If no such property is pointed out the sheriff must conduct a search for it.<sup>25</sup> Property pointed out or found must immediately be subjected to inventory and, unless the execution creditor has directed otherwise, taken into the custody of the sheriff.<sup>26</sup>

If satisfaction of the writ was not demanded from the judgment debtor personally, the sheriff must give written notice of the attachment and provide a copy of the inventory to the judgment debtor unless his whereabouts are unknown.<sup>27</sup> A return of the

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<sup>19</sup> Kleyn and Boraine *Silberberg and Schoeman's the Law of Property* 3<sup>rd</sup> (1992) at 32.

<sup>20</sup> “aard-of nagel-vast” at 32.

<sup>21</sup> Supreme Court Rules 45 (3). The judgment creditor may give different instructions regarding the situation of the assets, in which case the sheriff must follow these instructions. For service of the writ at a chosen *domicilium citandi et executandi*, See *Gerber v Stolze* 1951 2 SA 166 (T).

<sup>22</sup> *Reichenberg v Deputy Sheriff Johannesburg* 1992 (2) SA 381 (W).

<sup>23</sup> The meaning of the phrase “disposable property” was considered in *Rose-Innes & Co v Theron* 1928 CPD 181 and it means sufficient property.

<sup>24</sup> Rule 45(3).

<sup>25</sup> Rule 45(3)(c); *Ex parte Kaefer Insulation (Pty) Ltd* 1984 (3) SA 533 (W); *Nedbank Ltd v Norton* 1987 (3) SA 619 (N).

<sup>26</sup> Rule 45(3). This step is subject to the provisions of r 45(5).

<sup>27</sup> Rule 45(3) proviso ii. This was also outlined generally in *Reynolds Grofts (SA) Ltd v Wessels* 1977 (1) SA 583 (C).

process indicating what has been done must be filed with the registrar and a copy of the return and inventory must be furnished to the party responsible for the issue of the writ.<sup>28</sup> A debtor whose movable property has been attached may, together with a person of sufficient means as surety to the satisfaction of the sheriff, give a written undertaking that the property will be produced on the date of the sale.<sup>29</sup>

#### 4. Attachment of immovables

Immovable property subject to execution is that belonging to the judgment debtor. Where the property, though registered in the debtor's name, has in fact been donated or sold by him to a third party, the court will protect the donee or purchaser against the creditor and will not treat the latter as if he were the debtor's trustee in insolvency entitled to the property solely because it stands registered in the debtor's name.<sup>30</sup> It may be that the creditor can obtain satisfaction of his judgment in some other way, and this is a factor which will influence the court in deciding whether to allow execution to be levied against such immovable property.<sup>31</sup> Immovable property belonging to a peregrine defendant is attachable to found jurisdiction.<sup>32</sup>

A judgment creditor may not issue a writ against immovable property of the debtor until a writ has been issued against movable property and the return indicates that there is insufficient movable

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<sup>28</sup> Rule 45(4).

<sup>29</sup> Rule 45(5). The right accorded to the debtor in this rule is conditional upon the attachment not being legally removed, in which event the sheriff must leave the property where it was found.

<sup>30</sup> Van Winsen, *et al* 773; *Weeks & Another v Amalgamated Agencies Ltd* 1920 AD 218 at 236-7; *Aling v De Vries* (1906) 16 CTR 197 and *Van Niekerk v Fortuin* 1913 CPT 457.

<sup>31</sup> Van Winsen, *et al* at 773, *Weeks & Another v Amalgamated Agencies Ltd* supra at 236-7, *Aling v De Vries* (1906) 16 CTR 197 and *Van Niekerk v Fortuin* 1913 CPT 457.

<sup>32</sup> Where the property registered in the name of the *peregrinus* was alleged to have been so registered by mistake, the court refused to set aside the attachment in the absence of proof that the registration was the result of error: *Innes v Bissett* (1892) 9 CLJ 57 (O).

property to satisfy the writ, except where the judgment has specifically declared the immovable property executable.<sup>33</sup> Such an order is usually granted if the plaintiff holds a bond over the immovable property concerned.<sup>34</sup> It may also be granted if it has been shown that the defendant does not have sufficient movables to satisfy the writ or possible on other good cause.<sup>35</sup>

In certain circumstances immovable property purchased with a gratuity or benefit paid under the Occupational Diseases in Mines and Works Act<sup>36</sup> is not subject to attachment for a debt (or a novation of it) which arose before the gratuity or benefit was paid to or for the benefit of the judgment debtor. Mortgaged immovable property is not 'disposable' property within the meaning of section 8(b) of the Insolvency Act<sup>37</sup> even though it may be executed against.

## 5. Attachment for extraneous debts

In actions for the payment of a sum of money or actions in which relief in regard to property is sought, the plaintiff may have the property in the defendant's possession attached in order to obtain security for his claim.<sup>38</sup> This would be proper when the debtor is about to abscond or is about to dispose of his property so as to frustrate his creditors, or when money, which is the fruit of a theft, is sought to be attached.<sup>39</sup>

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<sup>33</sup> Uniform Rules of Court 45(1). *Tobacco Exporters & Manufacturers Ltd v Bradbury Road Properties (Pty) Ltd* 1990 2 SA 420 (C) 426.

<sup>34</sup> A party is not entitled to an order declaring property executable unless he provides proof that all prior bond holders who enjoy rights under a non-prejudice clause in the bond have consented to the order. A letter to this effect is sufficient proof.

<sup>35</sup> *Ledlie v Erf 2235 Somerset West (Pty) Ltd* 1992 4 SA 600 (C).

<sup>36</sup> Act 78 of 1973.

<sup>37</sup> Act 24 of 1936.

<sup>38</sup> Paterson at 59

<sup>39</sup> Ibid.

Generally when dealing with an extraneous debt, a judgment debtor is required to execute against the movable property of a debtor first before he is able to execute against immovable property. This is often problematic as, *inter alia*, the value of movable property is not sufficient to realize the full judgment debt.<sup>40</sup>

Furthermore, movable property can, as the name implies, easily be moved from one location to another, thus frustrating the judgment creditor's efforts to execute against it. For these reasons, execution against immovable property is generally preferred. In addition, immovable property is geographically fixed and both its value and owner are relatively easily ascertained.<sup>41</sup>

## 6. Mortgaged property

A mortgage is the pledging of property to a lender as security for a mortgage loan. While a mortgage in itself is not a debt, it is evidence of a debt. It is a transfer of an interest in land, from the owner to the mortgage lender, on the condition that this interest will be returned to the owner of the real estate when the terms of the mortgage have been performed.<sup>42</sup> The mortgage bond is an indispensable tool for spreading home ownership. Few people can buy a home immediately: by providing security for a loan, the mortgage bond enables them to do so.<sup>43</sup> A mortgage bond is an agreement between borrower and lender, binding upon third parties once it is registered against the title of the property that upon default the lender will be entitled to have the property sold in satisfaction of the outstanding debt. Its effect is that the borrower, by his or her own volition, either on acquiring a house or later when

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<sup>40</sup> Steenkamp H and BurrDixon M 'Removing the Immovable' 2006 (August) *De Rebus* 12.

<sup>41</sup> *Ibid.*

<sup>42</sup> <http://en.wikipedia.org/wiki/mortgage> (accessed on 11 June 2008). This article is about the legal mechanism used to secure the performance of obligations, including the payment of debts, with property.

<sup>43</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA).



wishing to raise further capital, compromises his or her rights of ownership until the debt is repaid.<sup>44</sup>

While a mortgagee is entitled to commence proceedings to have the mortgaged property sold in execution as soon as he or she has lawfully called up his or her bond, the mortgagor may at any time before it has actually been sold in execution, tender payment of all sums due under the bond, including the costs of any proceedings then pending, and demand that the mortgagee agree to the cancellation of the bond. Even though the mortgagor authorises the mortgagee to sell the property or otherwise deal with it as he or she may deem fit, the former may revoke such authority at any time against payment of the amounts due under the bond until the property has actually been sold. This right cannot be lost by prescription or other ways for as long as the mortgagor remains the owner of the property.<sup>45</sup>

A mortgage bond is a liquid document. This means that based on the registered bond, the mortgagee can get a provisional sentence against the mortgagor in the High Court. If the mortgagor cannot prove that the principal debt has been paid or that it is not yet claimable or no longer claimable on the return day, the judgment becomes final and a warrant of execution regarding the object is issued by the High Court. After attachment of the object by the sheriff in terms of the warrant of execution, the encumbered property can be sold in execution. Provisional sentence can be granted by the magistrate's court.<sup>46</sup> If the mortgagor is sued in the magistrates' court, a provisional sentence may be obtained against him and thereafter the warrant of execution is issued in terms

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<sup>44</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* at 269 para (2).

<sup>45</sup> Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's the Law of Property* 4<sup>th</sup> ed (2002) at 366.

<sup>46</sup> Pienaar GJ & Van der Walt AJ *Introducton to the Law of Property* 4ed (2002) at 301. See Rule 14A of the Magistrates' Court Rules of Court.

whereof the sheriff attaches the encumbered property and sells it in execution.<sup>47</sup>

It is a long-standing practice of our courts that execution must be directed first against the debtor's movable property and only thereafter, if the movables are insufficient, against immovable property,<sup>48</sup> but a court may alter that sequence. This occurs when the debt is secured by a mortgage bond for the secured creditor will then ordinarily ask the court in advance:

'to dispense with the circumlocution of having to take execution against the movable property first and only on that property failing to realise the money sum, then to have recourse against the immovable property. When an order is granted declaring executable the property specially hypothecated that order permits the grantee, the creditor, to take his execution straightaway against the immovable property.'<sup>49</sup>

## 7. Right of access to housing

Section 26(1) of the Constitution<sup>50</sup> provides a right of access to adequate housing. This is not an unqualified obligation on the State to provide housing on demand. First, the right is one of 'access to' housing.<sup>51</sup> This difference, the Constitutional Court held in *Government of the RSA and Others v Grootboom and Others*<sup>52</sup> 'is significant.' It recognizes that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all these, including the building of the house itself.<sup>53</sup>

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<sup>47</sup> *Firstrand Bank Ltd v Jaypee Properties (Pty) Ltd* 2002 (2) SA 384 (W).

<sup>48</sup> *Gerber v Stolze* 1951 (2) SA 160 (T) 171-173; *Sandton Finance (Pty) Ltd v Clerk of the Magistrate's Court, Johannesburg* 1992 (1) SA 509 (W) 511B-C.

<sup>49</sup> *Gerber v Stolze supra* 172F-G.

<sup>50</sup> Constitution of the Republic of South Africa Act, 1996.

<sup>51</sup> Currie Iain & De Waal Johan *The Bill of Rights* 5<sup>th</sup> ed (2005) at 586.

<sup>52</sup> 2001 (1) SA 46 (CC).

<sup>53</sup> *Government of the RSA and Others v Grootboom and Others supra* at 67 para (37).

In this case Mrs Irene Grootboom and the other respondents were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the Cape High Court for an order requiring the government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief.<sup>54</sup> Mrs Grootboom and most of the other respondents previously lived in an informal squatter settlement called Wallacedene. It lay on the edge of the municipal area of Oostenberg, which in turn was on the eastern fringe of the Cape Metro. The conditions under which most of the residents of Wallacedene lived were lamentable. A quarter of the households of Wallacedene had no income at all, and more than two-thirds earned less than R500 per month. All residents, about half of whom were children lived, in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area was partly waterlogged and lay dangerously close to a main thoroughfare. Mrs. Grootboom lived with her family and her sister's family in a shack about 20 square.

The Constitutional Court held that the State was obliged to take positive actions to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. The interconnectedness of the rights and the Constitution as a whole had to be taken into account in interpreting the socio-economic rights and, in particular, in determining whether the State had met its obligations in terms thereof. The court held that the determination of minimum obligation in the context of the right to have access to adequate housing presented difficult questions because the needs

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<sup>54</sup> *Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46 (CC).

were so diverse: some needed land while others needed both land and houses and still others, financial assistance.<sup>55</sup>

The real question in terms of the Constitution was whether the measures taken by the State to realise the right affordable by section 26 were reasonable. The phrase ‘progressive realization’ showed that it was contemplated that the right contained in section 26 of the Constitution could not be realised immediately. The goal of the Constitution was, however, that the basic needs of all in our society be effectively met and the requirement of progressive realization meant that the State had to take steps to achieve this goal. That meant that accessibility had to be progressively facilitated, involving the examination of legal, administrative, operational and financial hurdles which had to be lowered over time. Housing was not only required to be made accessible to a large number of people but also to a wider range of people over time.

In not requiring the State to do more than its available resources permitted in respect of its obligation to take the requisite measures, both the content of the obligation in relation to the rate at which it was achieved and the reasonableness of the measures employed to achieve the result were governed by the availability of resources. There was therefore a balance between goal and means. The measures had to be calculated to attain the goal expeditiously and effectively but the availability of the resources was an important factor in the determination of what was reasonable.<sup>56</sup> The court also said that the Housing Act<sup>57</sup> made no express provision to facilitate access to temporary relief for people who had no access to land, no

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<sup>55</sup> At 49.

<sup>56</sup> At 50.

<sup>57</sup> Act 107 of 1997.

roof over their heads, living in intolerable conditions and in crisis because of natural disasters. These people were in desperate need.

Accordingly, the court had to decide whether the nationwide housing program was sufficiently flexible to respond to those in desperate need, like the respondents, and cater adequately for immediate and short-term requirements. The court also had to consider whether the absence of a component catering for those in desperate need was reasonable in the circumstances.<sup>58</sup>

It was said that the case showed the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliged the State to act positively to ameliorate those conditions. The obligation was to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The State also had to foster conditions to enable citizens to gain access to land on an equitable basis. Those in need had a corresponding right to demand that this be done.

The court, quoting from *S v Soobramoney*,<sup>59</sup> said that the obligations imposed on the State by sections 26 and 27 were dependent upon the resources available for such purposes and that the corresponding rights were limited by lack of resources.<sup>60</sup>

## 8. Attachment for a small debt not related to the House

In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*<sup>61</sup> the appellants had had their homes sold in execution for debts of R250 and R190 respectively. The houses in question were not the

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<sup>58</sup> At 76 para 56.

<sup>59</sup> 1998 (1) SA 765 (CC) at 766.

<sup>60</sup> At 766.

<sup>61</sup> 2005 (2) SA 140 (CC).

subject of a mortgage bond but were in fact acquired by means of state subsidy. The owners of the properties (the judgment debtors) had become indebted (extraneous debt) to third parties (judgment creditors) in the amount of R250 and R189, 30 respectively before the cost of liquidation. Judgment creditors obtained judgment against the debtors and duly obtained a *null bona* return from the clerk of the court. Judgment creditors then decided to execute against the immovable property of the judgment debtors. This led to an application to the Cape Provincial Division which in turn resulted in an appeal to the Constitutional Court. The appellants applied in the High Court for orders setting aside the sales in execution and interdicting two of the respondents from taking transfer of their homes. The basis of the applications was that the sale in execution process<sup>62</sup> was unconstitutional. The High Court held, in dismissing these contentions, that if the sheriff issued a *nulla bona* return the clerk of the court was obliged in terms of rule 36 of the Magistrates' Courts Rules to issue and sign a warrant of execution against the immovable property of the debtor.

This case was taken to the Constitutional Court where the court was called on to adjudicate on the balancing of a judgment creditor's right to obtain satisfaction of judgment debt with the right of the judgment debtor not to be deprived of his property, particularly where such deprivation would negatively impact on his right to adequate housing as entrenched in the Constitution.<sup>63</sup>

The court said that against the backdrop of apartheid legislation permitting summary eviction of people from their homes and the criminalisation of occupation of land in contravention of that

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<sup>62</sup> As provided for in s66(1)(a) and 67 of the Magistrates' Courts Act 32 of 1944.

<sup>63</sup> Steenkamp H and BurrDixon M 'Removing the Immovable' 2006 (August) *De Rebus* 13.

legislation,<sup>64</sup> it was important to emphasize that section 26 of the Constitution had to be read as a whole. The Constitutional Court held that the interpretation adopted by the High Court failed to take cognizance of the court's various statements that there was a negative content to socio-economic rights. There would be circumstances where it would be unjustifiable to order execution because the advantage that attached to a creditor who sought execution would be far outweighed by the immense prejudice and hardship caused to the debtor. It was clear that section 66(1) (a) was so broad that it permitted sales in execution without judicial intervention even where they were unjustifiable.<sup>65</sup>

The court further said that a blanket prohibition of the kind suggested by the appellants was not appropriate. A blanket prohibition against sales in execution below a particular value might well lead to a poverty trap preventing many poor people from improving their station in life because of incapacity to generate capital of any kind. Section 67 of the Magistrates' Courts Act<sup>66</sup> could not be unconstitutional to the extent that it did not provide for a blanket prohibition against sales in execution of a house below a certain value. Accordingly, the appeal had to succeed and the failure to provide judicial oversight over sales in execution against immovable property of judgment debtors in section 66(1) (a) of the Magistrates Courts Act of 1944 was declared to be unconstitutional.

In dispute was Magistrate's Court rule 66(1), which the court found to be unconstitutional and remedied by finding that it had to be read as if the words 'a court after consideration of all relevant circumstances, may order execution' (i.e. judicial oversight) appeared before the words 'against the immovable property of the

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<sup>64</sup> Magistrates' Courts Act 32 of 1944.

<sup>65</sup> Sally D'Arcy-Donnelly at 2.

<sup>66</sup> Act 32 of 1944.

party'.<sup>67</sup> Consequently, the clerk of the court was precluded from issuing a writ of execution against immovable property as there would be no judicial oversight and this would infringe on the owner's constitutional right to adequate housing.

The Constitutional Court laid down certain factors that should be considered before a house could be attached for an extraneous debt, including but not limited to:

- The circumstances in which the debt was incurred;
- Any attempts made by the debtor to pay off the debt;
- The financial situation of the parties;
- The amount of the debt;
- Whether the debtor is employed or has a source of income to pay off the debt; and
- Any other factor relevant to the particular facts of the case<sup>68</sup>.

Since the *Jaftha* judgment dealt with Magistrate's Court procedure, it created doubt about what the situation would be in the High Court, in particular where the debt sought to be collected was not extraneous.<sup>69</sup>

## 9. Hypothecated immovable property declared executable

In *Standard Bank of South Africa v Snyders and Eight Similar Cases*<sup>70</sup> the creditor (Standard Bank) wanted to execute against immovable property of mortgagers by means of the procedure laid down in Uniform Rule 31. The Cape High Court considered the effect of *Jaftha* on claims forming part of default or summary judgment applications for orders that specific immovable property be declared executable. In doing so it evaluated the powers of the

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<sup>67</sup> Steenkamp H and BurrDixon M 'Removing the Immovable' 2006 (August) *De Rebus* 13.

<sup>68</sup> At 143.

<sup>69</sup> Steenkamp H and BurrDixon M at 13.

<sup>70</sup> 2005 (5) SA 610 (C).



court under rule 31 and came to the conclusion that only the court (and not the registrar) had the power in terms of the rule to deal with the above applications and further, that neither rule 31 nor any part thereof needed to be declared invalid but rather that it be interpreted in a practical and sensible manner ‘to facilitate the work of the courts and enable litigants to resolve their differences’.

The court dealt with the contention that a claim for an order that hypothecated immovable property be declared executable is a claim for a ‘debt or liquidated demand’ within the meaning of rule 31(3) (a) of the Uniform Rules of Court and thus capable of being granted by a registrar. However, in the light of the judgment in *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*<sup>71</sup> it was clear that an order that immovable property, which was the home of a debtor, be declared executable, was subject to the provisions of section 26(3) of the Constitution. In the result, such an order could not be granted by a registrar. Only a court had the power to grant it.

The reasoning that because the registrar could not grant an order that immovable property, which is the home of a debtor, be declared executable and because rule 31 of the Uniform Rules of Court contained no other provision authorising a court to grant default judgment on a claim for ‘a debt or liquidated demand’, could not be sustained. The court held accordingly that in order to comply with the ordinary principles of pleading, a plaintiff’s summons should contain a suitable allegation to the effect that the facts alleged by it (which should be identified) were sufficient to justify an order declaring the property executable.

Another important issue considered by the court was that of notification to the defendants of their rights as entrenched in

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<sup>71</sup> 2005 (2) SA 140 (CC); 2005 (1) BCLR 78.

section 26(3) of the Constitution, it being common cause that no reference was made to this provision in the summons. A creditor for an order declaring specific immovable property executable seeks ejectment. It is indeed as a result of this similarity that the Constitutional Court decided that claims for execution against immovable property were subject to s 26(3) of the Constitution. Construing rule 32(1)(d) in a practical and sensible manner a creditor would be entitled to apply for summary judgment for an order that immovable property be declared executable.<sup>72</sup>

#### 10. The position regarding commercial property specifically hypothecated as security

In the case of *Nedbank Ltd v Mortinson*<sup>73</sup> the Witwatersrand Local Division determined that since the case before it and that of *Jaftha*<sup>74</sup> were clearly distinguishable (the former dealing with the magistrates' courts rules and the latter with those of the High Court), it was not obliged to follow the Constitutional Court's decision.

The court clarified the position regarding commercial property, specifically hypothecated as security, stating that in such cases section 26 of the Constitution would not come into consideration. The registrar's declaration of immovable property to be executable was a limitation in terms of section 36(1) of the Constitution and it thus fell to be determined whether such limitation was reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into consideration all relevant factors.

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<sup>72</sup> At para 29.

<sup>73</sup> 2005 (6) SA 462 (W).

<sup>74</sup> *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

The court also made more noticeable the valuable safeguard contained in rule 31 which provides for the reconsideration by the court, of a judgment or direction given by the registrar, within 20 days after the party concerned has acquired knowledge thereof. Although the court felt that economically active debtors would be aware of this safeguard, it introduced a practice rule that the writ of execution that is presented to the registrar for signature (issuing) must contain a note advising the debtor of this safeguard.

The court concluded that the Cape Provincial Division erred in holding that the registrar of the court did not have the power to declare specially hypothecated property executable.<sup>75</sup> The court's decision was partially motivated by practicality, as it was pointed out that there were about 300 to 400 applications of that nature a week in the Witwatersrand Local Division alone, and that if those cases were to be heard by a court only, one whole court would have to be devoted to them alone.

More importantly the court said that the evil which was being guarded against in *Jaftha* was the abuse of court procedure, and thus established new practice rules for applications for default judgment that would indicate to the registrar whether he had the power to declare the property executable or whether it should be referred to open court. The court also reiterated the *dictum* of the Constitutional Court in *Jaftha*, which stated that where a judgment debtor willingly offered his house as security for a debt, a sale in execution should ordinarily be permitted, in the absence of abuse of court procedure.

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<sup>75</sup> *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others supra.*

11. Is the mortgagee required to justify the constitutionality of the order sought?

In *Standard Bank of South Africa Ltd v Saunderson and Others*<sup>76</sup> the appellant bank issued, in separate actions summonses against the respondents out of a Provincial Division of the High Court. In them the appellant asked for judgment against each of the respondents for the amount of the respective debts and, in accordance with the ordinary procedure, for ancillary orders declaring the mortgaged properties executable. The respondents failed to defend the actions and as a result the appellant approached the registrar for default judgments in terms of rule 31(5).<sup>77</sup> The court *a quo* granted judgment by default in each case, but declined to order the mortgaged properties to be executable. This was because the court was of the opinion that *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*<sup>78</sup> held that section 26 was compromised whenever it was 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 had to be shown that execution was permissible under s 26 of the Constitution.

The SCA held that the way the court *a quo* interpreted the decision in *Jaftha* was misplaced. The situation in the present case was radically different from that in *Jaftha*. There, the sale in execution had deprived the debtor of title to the home because she had been unable to pay a relatively trifling extraneous debt, and no judicial oversight was interposed to preclude an unjustifiable disproportionate outcome. The judgment creditor in *Jaftha* had not been a mortgagee with rights over the property that derived from agreement with the owner. By contrast, the property owners in the

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<sup>76</sup> 2006 (2) SA 264 (SCA).

<sup>77</sup> Of the Uniform Rules of Court.

<sup>78</sup> 2005 (2) SA 140 (CC).

present case had willingly bonded their property to the bank to obtain capital. Their debt was not extraneous, but fused into the title to the property. The effect of section 26(1) on such case was not considered in *Jaftha*. The fact that an execution order was sought in respect of residential property was not sufficient to constitute an infringement of section 26(1), and that since such an infringement had not in *casu* either been alleged or shown, the appellant was not called upon to justify the orders sought. Accordingly, the appeal was upheld and the mortgaged properties declared executable. The court said further that although the issue did not strictly arise in the present case, it was clear that the registrar had been entitled to dispose of the applications for orders of execution by default.

Bearing in mind that in most cases in which orders for execution were sought, the defendant had no defence to the claim for payment and was thus unlikely to seek legal advice, it seemed necessary for defendants to be told that their rights of access to adequate housing might be infringed where an order of execution against their immovable property was being sought.<sup>79</sup> A prospective rule of practice stating that where a plaintiff claimed relief that embraced declaring immovable property executable, the summons had to inform defendants that the order might infringe their right of access to adequate housing was thus required. The defendants, however, have to place information supporting that claim before the court.

According to the case the value of a mortgage bond as an instrument of security (a limitation in title the owner chose to accept) lies in confidence that the law will give effect to its terms. The court distinguished the case from *Jaftha* in that the debt sought to be collected in this case was not extraneous(as it was in the *Jaftha*

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<sup>79</sup> Steenkamp and BurrDixon 13.

case) but was fused into the title to the property. The registrar of the court was therefore empowered to declare such immovable property immediately executable.

The case indicated that the registrar would, however, not be empowered to do so if the defendant objected (perhaps even informally) to the constitutionality of the execution and the plaintiff could not justify the infringement of a constitutionally protected right. In this scenario the matter is to be referred to a judge in open court and the onus is on the defendant to plead that such an order will infringe his constitutional right to housing, resulting in a shift in the onus to the plaintiff to prove the justifiability of the order.<sup>80</sup>

In order to safeguard the rights of the debtor, the court said that the summons initiating the action in which the plaintiff claimed relief that embraced an order declaring immovable property executable should, from the date of this judgment, inform the defendant as follows: ‘The defendant’s attention is drawn to section 26(1) of the Constitution of the Republic of South Africa<sup>81</sup> which accords to everyone the right to have access to adequate housing. Should the defendant claim that the order for execution will infringe that right it is incumbent on the defendant to place information supporting that claim before the court.’

As a result of the above the registrar is, in the absence of a constitutional objection raised by the defendant (and on condition that the practice rule is complied with), empowered to declare all immovable property in question immediately executable.

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<sup>80</sup> At 276.

<sup>81</sup> Act 108 of 1996.

## 12. Proper notice in seeking execution

Another important case is *ABSA Bank Ltd v Xonti and Another*.<sup>82</sup> The case holds that having immovable property which is the defendant's home declared executable is no longer a procedural matter but is, as a result of section 26 of the Constitution, now a matter of substantive law. As a result an application to declare such property executable can no longer be brought on a simple notice of motion in terms of rule 6(11) of the Uniform Rules of Court but has to be brought on the long form of notice of motion, which calls upon the parties to indicate whether they wish to oppose the matter and provides them a time within which to file any affidavits they may wish to file in order to place information before the court, so that the court can discharge its obligation in terms of section 26 of the Constitution, either as a matter of default because the respondent has failed to take advantage of the notice so given, or as a substantive application opposed by the respondent. Accordingly, the court dismissed the plaintiff's application brought on simple notice of motion.

The court held that proper notice must be given in a summons seeking execution. The effect of the procedure used in this matter was to give the notice advising defendants of their right to oppose in the summons not seeking the execution and then to seek the declaration to execute by a simple notice which does not call upon the parties to respond. That is an unacceptable procedure. The court had no option but to refuse the application.

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<sup>82</sup> 2006 (5) SA 289 (C).

### 13. The right to adequate housing v execution against immovable property

In *ABSA Bank Ltd v Ntsane and Another*<sup>83</sup> ABSA Bank sought to obtain default judgment against the defendants on the full amount owing in terms of a mortgage bond and to declare the immovable property of the defendants executable. The bank's claim was for the full amount owing on the bond (R62 042.43) and not just the arrears of monthly payment (R18.46), the agreement having an acceleration clause.

The application was not granted, because of the following:

- In view of *Nedbank Ltd v Mortinson*<sup>84</sup>, the registrar was obliged to refer all cases where a hypothecated property was sought to be declared executable to be heard in the open motion court. The bank's rights to commercial activity and to enforce lawful agreements had to be balanced against the defendant's constitutional adequate housing right, as indicated in the *Jaftha*<sup>85</sup> case;
- Because the outstanding amounts on the mortgage were small relative to the value of the immovable property, it was possible to have them repaid by attaching movable property as opposed to the defendants' immovable property, the attachment of which would deprive them of their section 26 Constitutional rights;<sup>86</sup> and
- Even if the defendants' constitutional rights had not been infringed, the bank's application constituted an abuse of the right to claim an outstanding amount that could easily be obtained by execution against movable assets. Here it was necessary for the plaintiff to show that he had no other

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<sup>83</sup> 2007 (3) SA 554 (T)

<sup>84</sup> 2005 (6) SA 462 (W).

<sup>85</sup> *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).

<sup>86</sup> Sally D'Arcy-Donnelly 'The Right to Adequate Housing v Execution against Immovable Property: The Constitutional Perspective' at 4. <http://www.bowman.co.za> (Accessed on 25 June 2008).



reasonable alternative to enforce his rights other than to proceed with an execution against the immovable property.<sup>87</sup>

The court recommended that the banking and financial services sector should create a compulsory arbitration process to which the courts could refer matters to determine whether execution against immovable property in circumstances where small amounts were in arrears, ought to be granted.<sup>88</sup>

#### 14. Conclusion

The law of civil procedure makes provision for enforcement of judgment, which entails attachment of both movable and immovable property. However, attachment of immovable property which the defendant's residence deprives him/her of roof over his/her head and is potentially contrary to the Constitution which provides for the right of access to housing.

Accordingly, where an order is sought declaring immovable property executable (even on default), the application should set out the relevant factors contained in the *Jaftha* decision and state that the plaintiff has no other reasonable means to secure payment of the outstanding debt, other than through the attachment of immovable property.<sup>89</sup>

Every person has the right to enjoy his/her property peacefully. The property can include things like land, houses, shares, licenses, leases, patents, money, a pension and certain types of welfare benefits. A public authority cannot take away property or place

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<sup>87</sup> At 4 Sally D'Arcy-Donnelly 'The Right to Adequate Housing v Execution against Immovable Property: The Constitutional Perspective'. <http://www.bowman.co.za> accessed on 25 June 2008.

<sup>88</sup> At 4 of the judgment.

<sup>89</sup> Sally D'Arcy-Donnelly at 4.

restrictions on a person's use of his/her property without very good reason. This right applies to companies as well as individuals.

If a public authority plans to build a road over someone's land, it must have laws in place to let it do this. It must also have a procedure to check that a fair balance has been struck between the public interest in building the road and the individual's right to their land.

There are restrictions in some situations where public authorities may interfere with a person's right to peaceful enjoyment of his/her property, for example by restricting his/her use of it or by taking it away. This is only possible where the authority can show that its action has a proper basis in law and is necessary in the public interest. The government must strike a fair balance between an individual's interests and society as a whole. If a person's property is taken away he/she should be entitled to compensation.

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