REPUBLIC OF SOUTH AFRICA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

....
DATE SIGNATURE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Heard : 28 April 2011
Judgment: 4 May 2011

CASE NO: 2011/00418

In the matter between:

NEDBANK LIMITED Plaintiff

and

WILSON FRASER First Defendant

ANNEMARIE PRASTI Second Defendant

CASE NO: 2011/9315

In the matter between:

NEDBANK LIMITED Plaintiff

and

CHABALALA, BOB VICTOR First Defendant

SETLHAPELO, LOPANG MAGDELINE Second Defendant

CASE NO: 2010/28374

In the matter between:

NEDBANK LIMITED Plaintiff

and

MACHITELE, PONPONYANI ELMON First Defendant

MACHITELE, MOLAKGAKA GLADYS Second Defendant

CASE NO: 2010/31703

In the matter between:

NEDBANK LIMITED Plaintiff

and

MOCCASIN INVESTMENTS (PTY) LIMITED Defendant

CASE NO: 2011/07117

In the matter between:

ABSA BANK LIMITED Plaintiff

and

YOUNG STAR TRADERS CC First Defendant

MOGALE, DAISY DIBUSENG PAULINHA Second Defendant

JUDGMENT

PETER AJ

[1] The issues common to all five of these actions are the relevant circumstances to be considered by a court and the procedure to be employed, for the exercise of such consideration, in deciding whether or not to grant an order declaring immovable property specially executable. There are two actions in which application for default judgment is sought and three in which summary judgment is sought.

[2] These issues arise by reason of a recent amendment to the provisions of rules 45 and 46 of the uniform rules of court and a more recent judgment of the Constitutional Court *Gundwana v Steko Development CC & Others* [2011] ZACC 14 ("*Gundwana"*). The amendment to rules 45 and 46 are contained in GN R918 of 19 November 2010 and came into effect on 24 December 2010. The judgment of the Constitutional Court in *Gundwana* was handed down on 11 April 2011.

[3] In its amended form, rule 46(1)(a) reads as follows:

> "(1)(a) No writ of execution against immovable property of any judgment debtor shall issue until –
>
> (i) a return shall have been made of any process which may have been issued against the immovable property of the judgment debtor from which it appears that the said person has not sufficient immovable property to satisfy the writ; or
>
> (ii) such immovable property shall have been declared specially executable by the court or, in the case of a judgment granted in terms of rule 31(5) by the registrar: Provided that, where the property sought to be attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property."

[4] The history and development of the provisions in rule 46(1), in the former Transvaal, are set out in *Gerber v Stolze & Others* 1951 (2) SA 166 (T) ("Gerber") and *Nedbank Ltd v Mortinson* 2005 (6) SA 462 (W) ("*Mortinson*") and are summarised in *Gundwana* at para 37. In the old South African Republic an order of court was required to have the immovable property declared executable. This was so where there was an attempt to execute against immovable property and immovable property was insufficient to satisfy the judgment debt. In 1902, after annexation and in the first set of rules governing the Colonial courts, this practice was continued except where, by judgment of the court, the immovable property had been declared specially executable. At the end of 1903 the rules were changed and vested the registrar with the authority and discretion to issue a writ against immovable property where an attempt at execution against movable property indicated that the movable property was insufficient to satisfy the judgment debt. This procedure could be adopted by a judgment creditor in the absence of a court order declaring the property specially executable. An order could be obtained declaring the immovable property specially executable at judgment stage where the property was specially hypothecated for the debts in respect of which the money judgment was obtained. This was a short cut to dispense

with the requirement of executing first against movable property before having recourse to the immovable property, *Gerber* at 171 – 172. In 1991 an amendment took place to introduce section 27A into the Supreme Court Act, 1959 and in 1994 an amendment was made to the uniform rules of court in terms whereof rule 31(5) was introduced. The introduction of section 27A came into operation on 21 January 1994 in respect of all the High Courts with the exception of the then Orange Free State Provincial Division. In that division the operation of such section was delayed until 1 September 1995. In terms of section 27A the registrar was empowered to grant and enter judgment by default in the manner and circumstances prescribed by the uniform rules of court. Rule 31(5) regulated the manner and circumstances under which the registrar could grant default judgment and, until the most recent amendment, rule 45(1) made provision for the registrar to declare immovable property specially executable at the time of judgment. Thus from 1903 until 1994, execution could be levied against immovable property in one of two instances. The first was where the court declared such immovable property specially executable; such orders were granted where the immovable property had been hypothecated for the debt in respect of which the money judgment was sought. The second was where there was insufficient realisable movable property to satisfy the judgment; the registrar, without judicial intervention, could cause a writ to be issued in respect of immovable property. Since 1994 execution could be levied against the immovable property in a third instance, where there had been an order declaring the property specially executable by the registrar when granting a default judgment.

[5] In 2005, in *Jaftha v Schoeman & Others; Van Rooyen v Stolz & Others* 2005 (2) SA 140 (CC), the Constitutional Court held that section 66(1)(a) of the Magistrate's Court Act, 1944 violated section 26(1) of The Constitution of the Republic of South Africa, 1996 ("the Constitution"). The violation was to the extent that the relevant statutory provision allowed execution against homes of indigent debtors where they lost security of tenure, on the basis that it did not provide for judicial oversight. The provisions of section 66(1)(a) provided for the issue by the clerk of the Magistrate's Court

of a writ of execution against immovable property where there was an insufficiency of movable property to satisfy the judgment debt. On the strength of *Jaftha* unsuccessful constitutional challenges to the registrar's competence were considered by the full court of this division in *Mortinson* and the Supreme Court of Appeal in *Standard Bank of South Africa Ltd v Saunderson & Others* 2006 (2) SA 264 (SCA). In *Mortinson*, although the full court held that the registrar had the competence to declare specifically hypothecated immovable property executable, a rule of practice was laid down, at 473 D-H, requiring an applicant for default judgment to file an affidavit simultaneously with such application setting forth the following averments:

> [5.1] the amount of the arrears outstanding as at the date of the application for default judgment;
>
> [5.2] whether the immovable property which it is sought to have declared executable was acquired by means of or with assistance of a State subsidy;
>
> [5.3] whether, to the knowledge of the creditor, the immovable property is occupied or not;
>
> [5.4] whether the immovable property is utilised for residential purposes or commercial purposes; and
>
> [5.5] whether the debt which is sought to be enforced was incurred in order to acquire the immovable property sought to be declared executable or not.

[6] This rule of practice was calculated to alert the registrar and assist him or her in determining abuses and referring those applications for consideration by the court, at 473 C-D. A further rule of practice was laid down that the warrant of execution presented to the registrar for issue was

required to contain a note advising the debtor of the provisions of rule 31(5)(d) which provided for the right to set the matter down for reconsideration by the court.

[7] In *Saunderson*, at 277 D-E, yet a further practice directive was issued requiring the defendant's attention to be drawn to the provisions of section 26(1) of the Constitution. The court defined the issue in *Jaftha* as not section 26(3) of the Constitution, but rather section 26(1). Section 26(3) was expressed to become relevant in the event of eviction consequent upon a sale in execution and thus was not an issue in *Jaftha*, *Saunderson* 273 F-G.

[8] The relevant provisions of section 26 of the Constitution reads as follows:

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

[9] The procedure whereby a person may be evicted from his or her home in consequence of execution of a judgment debt generally follows a sequential chain. A judgment or order is made, usually for the payment of money, an order is made declaring the immovable property specially executable, a writ of execution is then issued and an attachment effected by service of the writ on the judgment debtor and the occupant of the property, a sale in execution is held and thereafter registration of transfer is made pursuant to such sale. It is usually only after such transfer that the new owner brings an application for eviction of the person concerned. Although section 26(3) of the Constitution requires judicial oversight for the eviction of a person from his or her home, the effect of the judgment in *Gundwana*, particularly

paragraph 41, is that the execution process is equated with eviction for the purposes of section 26(3) that "*judicial oversight by a court of law of the execution process is a must*". This early judicial interposition permits a mechanism to prevent abuse at an early stage before a *bona fide* purchaser and new owner seeks the eviction of the incumbent at which later time circumstances are different and the scope to remedy a past abuse is much narrower than prior to attachment of the property.

[10] *Gundwana* was decided on the provisions of the rules prior to their amendment although cognisance was taken of the amendment. It was noted that the prospective effect of the order of constitutional invalidity might have been ameliorated by the amendment, paragraphs 33 and 56.

[11] Rule 45 is the rule dealing generally with execution and execution against movable property. Rule 46 is the rule which deals with execution of immovable property. Prior to amendment rule 45(1) regulated the issue of a writ of execution against immovable property. The recent amendment to the rules deleted from rule 45(1), and repeated in rule 46(1), the provisions of the rules as they were prior to amendment. These were that execution against immovable property may issue in three instances; where the immovable property has been declared executable by the court, in the case of a judgment granted in terms of rule 31(5), declared executable by the registrar and where there is a return made of process issued against movable property which indicates that there is an insufficiency of movable property to satisfy the writ. There is one important innovation introduced by the amendment. This is the proviso present at the end of rule 46(1)(a)(ii).

[12] In regard to this proviso, I make two preliminary observations. First this proviso must be read as qualifying both sub-paragraphs (i) and (ii) of paragraph (a) of the sub-rule. To read the proviso as only qualifying sub-paragraph (ii) would be offensive to both *Gundwana* and *Jaftha*; judicial oversight is required irrespective of the insufficiency of movable property to satisfy the debt. Secondly there is to be observed an important difference in

the wording of the proviso and the principle enunciated in *Gundwana.* The proviso makes provision for judicial oversight where the property sought to be attached is "the primary residence of the judgment debtor". The judicial oversight required in terms of the provisions of section 26(3) by *Gundwana* is where the property sought to be attached is "the home of a person". This wording appears to have been carefully chosen in *Gundwana* as appears from paragraphs 1, 18, 23, 34, 49, 50, 55 and 65 of the judgment. This wording is echoed in the words of section 26(3) of the Constitution. Whether or not there is a distinction to be drawn between a person's home and a primary residence is something with which I need not concern myself for present purposes. However, in two of the matters before me, the judgment debtors and the mortgagors of the immovable properties are juristic persons; a company and a close corporation respectively. The properties are nevertheless residential. It is not uncommon for a person's home to be held through the vehicle of a juristic person or trustees in trust for a beneficiary. On my reading of *Gundwana* the relevant jurisdictional fact that enlivens section 26 of the Constitution is not so much the status of the judgment debtor, but rather the fact that the immovable property in respect of which execution is sought is a person's home. Thus in my view, where the home is held through the vehicle of a company, close corporation or trustees, the constitutional protection afforded by the provisions of section 26(3) extends equally to members of such companies and close corporations and beneficiaries of the trusts, who are living in the immovable properties concerned and might be considered as what might loosely be called "beneficial owners", as it does to persons who own the immovable properties in their personal capacities. I do not consider this applicable to the position of an ordinary lessee as the interest of such is not akin to a homeowner and in any event there seems to be sufficient protection of such more limited interest in the application of the common law rule of *huur gaat voor koop* and the statutory provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 1998.

[13] Thus the effect of *Gundwana* is that by reason of section 26(3) of the Constitution - and as repeated in the proviso in rule 46(1)(a) - where an order

is sought to declare immovable property specially executable and that property is the home of a person, the court is enjoined to consider "*all the relevant circumstances*". It no longer suffices merely that the immovable property is specially hypothecated as security for the debt giving rise to the judgment, although this is no way an unimportant consideration.

[14] What is required is an evaluation of the facts of each case, *Gundwana* paragraph 49. It is also unwise to set out all the facts that are relevant to the exercise of judicial oversight, *Jaftha* para 56, *Gundwana* para 54. This is so because, in my view, what circumstances are relevant may vary from case to case; as too the relative weight to be attached and relevance attributed to the various factors.

[15] Neither the Constitution nor the rules of court define or give any content to what are "*all the relevant circumstances*".

[16] I do not consider it particularly useful to succumb to the impulse to fossick about the divergent practice directions of the various High Courts in order to catalogue a check-list of relevant circumstances. Although the effect of *Gundwana* and the amendment to rule 46 requires a consideration of all relevant circumstances which a court is required to consider before making an order declaring immovable property specially executable, there is in my view no urgent need to embark on a search to get some. It is more appropriate first to give consideration to the context and purpose of the judicial oversight requirement provided in section 26(3) of the Constitution. An appreciation of the context and purpose of the judicial oversight requirement is a useful lens with which to bring into focus that which might properly be identified as relevant in the circumstances of any given case.

The context and purpose of the constitutionally required judicial oversight

[17] The context giving rise to the requirement of judicial oversight is an apparent tension between two competing social values. On the one hand there

is a need for people to be housed and the value of having a home. To advance this social value, protection must be afforded for security of tenure of persons in their homes. There is also an appreciation that many in our society have either an insufficiency of means or are too ill-informed to vigorously defend their rights and are thus deserving of a measure of judicial initiative in their protection. This social value, the need to house people and provide security of tenure, finds its expression in section 36 of the Constitution. On the other hand, there is a compelling social value in enforcing contracts and requiring the discharge of debts. In order to promote this social value, court structures exist and this social value finds its expression in section 34 of the Constitution. Judgments are given to enforce the payments of debts to promote this social value. The process of execution is essential to give content and effect to judgments of the courts. It is for this reason, to promote this social value and as a reasonable alternative to self-help that the courts and their execution machinery exist and are available to be utilised by judgment creditors.

[18] However the right to execution is not absolute. It has its limitations. Certain assets necessary for the maintenance and sustenance of a debtor and the means of earning a livelihood are beyond the reach of execution; section 39 of the Supreme Court Act, section 37 of the Magistrate's Court Act, 1944 and section 86(2) of the Insolvency Act, 1936. Similarly there are restrictions relating to certain insurance benefits; section 63 of the Long-Term Insurance Act, 1998. Statutory protection has been given to certain pension benefits; section 79 of the Railways and Harbours Service Act, 1912, section 3 of the General Pensions Act, 1979, section 14 of the Aged Persons' Act, 1967, section 11 of the Blind Persons' Act, 1968 and compensation for work related injuries or illnesses; section 131 of the Occupational Diseases in Mines and Works Act, 1973 and section 102 of the now repealed Workmens' Compensation Act, 1941, section 32 of the Compensation for Occupational Injuries and Diseases Act, 1993. Similarly protection is given to unemployment insurance benefits; section 33 of the Unemployment Insurance Act, 2001.

[19] What is of significance is that a residential home is not placed beyond the process of execution. The Constitutional Court has declined to read into section 67 of the Magistrate's Court Act, a prohibition against the sale in execution of houses of a particular minimum value, *Jaftha* para 51.

[20] Thus on an individual level, in the competition between the rights of the judgment creditor to obtain satisfaction of the judgment debt by execution against immovable property and the rights to housing of a judgment debtor, or person in the position of a beneficial owner occupying through the judgment debtor, the judgment creditor's rights will enjoy relative primacy. If this were not so, it would bring about a situation in which debtors could borrow money to purchase immovable property and defeat their creditors' legitimate claims to repayment by asserting a constitutional right to housing at the expense of the creditor.

[21] Furthermore the conflict between individual judgment creditor's right to execution and the judgment debtor's rights to housing is not the only consideration in the promotion of the social values I have referred to above. Viewing considerations on a macro economic level beyond the parochial concerns of individual litigants, the two social values are not so much juxtaposed as symbiotic. To put residential immovable property which is a person's home into that class of assets beyond the reach of execution would be to sterilise the immovable property from commerce thereby rendering it useless as a means to raise credit. Preventing debtors from using their homes as security to raise credit will create a class of homeless persons; those who are unable to afford the full purchase price of their homes in a cash sale, but could afford to repay a loan for the purchase price. Furthermore it would lock up capital and prevent the home owning entrepreneur from using his or her home as security to finance business initiative. This has been recognised by the Constitutional Court in *Jaftha* at paras 51 and 58. The need for poor communities to take financial responsibility for owning a home, *Jaftha* para 53, will go unfulfilled as members of the poor communities will not be able to obtain finance from banks who will not advance money to purchase

immovable property if the immovable property cannot be used as security for repayment. It is for this reason that the Constitutional Court has held that the constitutional considerations do not challenge the principle that a judgment creditor is entitled to execute upon the assets of a judgment debtor in satisfaction of the judgment debts sounding in money; execution is not in itself an odious thing, it is part and parcel of normal economic life, *Gundwana* paras 53 and 54.

[22] Although execution is necessary and its existence furthers the attainment of the housing social value through facilitating credit, it must nevertheless be appreciated that in certain circumstances resort to execution against immovable property might be abused. When execution is an abuse it is offensive to the attainment of one or both of the social values. Where resort is had to execution against immovable property for a comparatively trifling judgment debt, as illustrated in *Jaftha*, there is a strong indication of the presence of an abuse. A person is dispossessed of the security of residential tenure and a drastic price is paid by the judgment debtor for no corresponding benefit to the judgment creditor. The claim to satisfaction of the judgment debt might easily have been satisfied other than by resort to the drastic procedure of execution against the residential home. In such a case the social value of ensuring a debt is paid could easily be met without the dispossession of the judgment debtor of the residential property. In such a case, the execution against the immovable property would be unjustifiable, *Jaftha* para 55. There also be instances in which a judgment creditor insists on rights of execution not so much to obtain satisfaction of the judgment debt, but rather to acquire the judgment debtor's property either directly or in collusion with another at an amount significantly lower than its true value through a sale in execution. Although extremely difficult to establish, scope for this type of abuse exists where the judgment debt is disproportionately small to the value of the property.

[23] The context of the judicial oversight provided in section 26(3) of the Constitution is a matrix of factors. There are: the existence of the social need

for housing, the constitutional right to access to adequate housing embodied in section 26(1), the need for people to honour their debts, the need for debts to be enforced by a court process and the need for execution, all of which serve the housing need, as well as the drastic nature and far reaching consequences of executing against a person's home and the scope for the abuse of the process of execution.

[24] Seen in this context, the purpose of the judicial function required in section 26(3) is to act as a filter or check on execution that does not serve the social interests and which is an abuse. Expressed simply, the function of the court is to safeguard against abuse of the execution process. It is with the consideration of this context and purpose that a determination is made whether or not to declare a person's home executable.

[25] As mentioned earlier there is no definition in either the Constitution or the rules of court as to what are *"all the relevant circumstances"*. Some guidance is given in *Jaftha*; paras 56 to 60, which in my view is the most valuable and authoritative starting point. Although *Saunderson* and *Mortinson* have been overturned on the question of the registrar's competence to declare specially executable property constituting a person's home, the guidance that those judgments give and their practical directions nevertheless remain intact, *Gundwana* para 52. In my view this guidance should be applied having regard to the context and purpose referred to above. Above all each case should be decided on its facts; flexibility should be retained in what is required to satisfy the threshold rather than demanding adherence to an inflexible procedure or list of prescripts before an order of execution is made.

The relevant circumstances

[26] To my mind, the first and most important consideration, and the one which calibrates the perspective of the other considerations, is the circumstances in which the debt was incurred, *Jaftha* paras 58 and 60; in particular, whether or not the immovable property was specially hypothecated

as security for the judgment debt. Where this is so, the mortgage bond may constitute a purchase money mortgage bond, known in our law as a *kustingbrief*. This is registered against the title of the property at the time it was acquired by the judgment debtor as security for credit afforded to the judgment debtor to discharge the obligation of the purchase price of the property. Such may be registered in favour of the seller of the property at the time it was acquired by the judgment debtor or as is more common place in modern times, by a bank or lending institution, in re *Insolvent Estate of Buissinne; Van der Byl and Meyer v Sequestrator and Attorney-General* (1829) 1 Menz 318 at 327*; Meyer v Hessling* 1993 (3) SA 851 (NmS) and 1992 (4) SA 286 (NmS). A *kustingbrief*, provided it is registered simultaneously with registration of ownership into the name of the mortgagor, has long been recognised as a superior front-ranking form of security *In re Insolvent Estate of Buissinne, Croeser v Sequestrator and Attorney-General* (1829) 1 Menz 330 and currently finds recognition in section 88 of the Insolvency Act, 1936. Whether or not the priority given to a purchase money mortgage bond registered at the time of transfer was correctly received in our law as a "*kustingbrief*" as contemplated in section 88 of the Insolvency Act, see Denoon, *The Kustingbrief* (1944) 61 *SALJ* 272, is not something upon which I need to dwell. I use the expression "*kustingbrief*" as opposed to "*kustingsbrief*" as the former is the form in which the expression is used in the English version of the Insolvency Act and received into South African English in the two *Buissinne* reported decisions, see also the entry in Oxford, *A Dictionary of South African English on Historical Principles*, 1996.

[27] In the context of safeguarding against abuse, it can hardly be said, in the ordinary course, that there is an abuse of process where a judgment creditor seeks to execute against a person's home where the debt arose from providing the funds to purchase the property, the property was specially hypothecated as security for such credit and there has been a default on the debt. Similarly where the property has been hypothecated for some other debt, possibly improvements to the property or the provision of working capital for the conduct of a business which has failed, there will, in the ordinary course,

be less scope for an abuse of procedure than where the property is not hypothecated as security for the judgment debt. In the absence of an indication of abuse to alert the court to a more vigilant enquiry, execution ought normally to follow; *Jaftha* para 58. Where the judgment debt has arisen independently and without hypothecation of the property, the court will be more astute to enquire into the need to execute against the immovable property in coming to a determination whether or not to make an order as contemplated in section 26(3) of the Constitution.

[28] The next factor to be considered is the amount of the judgment debt; *Jaftha* paras 57 and 60. The amount of the arrears may equate to the judgment debt but this is not necessarily so. It is very common, and almost universal in my experience in relation to purchase money and covering mortgage bonds, for there to be an acceleration clause entitling the judgment creditor to demand the full balance of the indebtedness outstanding where the debt was to be repaid in instalments and there has been a default by the debtor. In the analysis when giving consideration to whether or not execution should be granted to enforce a judgment debt, it is the size of the indebtedness due and owing to the creditor, sought to be enforced by means of a judgment, which is more important than the size of the arrears which represent the default giving rise to an accelerated balance. These two amounts are conceptually distinct and should not be confused.

[29] As a general proposition in our law where a debtor has a contractual performance obligation which is staggered in instalments, the failure to pay a particular instalment does not in itself justify the creditor to claim the whole amount of the performance or to cancel the contract. In a lease of immovable property, in the absence of a *lex commissoria*, the failure to pay rent in itself does not entitle the lessor to cancel the agreement; reasonable notice must be given before a cancellation may be effected, *Goldberg v Buytendag Boerdery Beleggings (Edms) Bpk* 1980 (4) SA 775 (A). In the context of a sale, default in payment of one instalment of the purchase price does not permit the seller to claim the whole amount of the purchase price, *Hiddingh v Van Schade*

(1899) 16 SC 128, *Wessel's Law of Contract in South Africa*, 2 ed 1951 paras 3032 and 4881. In respect of an obligation to repay a loan by way of instalments, there seems to be authority, which deviates from the general principle, in that although not expressed, a right to accelerate the full balance outstanding might be implied, *Scott v Holmes* 1916 NPD 33. Whether or not this is a correct deviation from general the principle is not something which I need to consider as all the cases before me are founded on mortgage bonds with acceleration clauses.

[30] In *ABSA Bank Ltd v Ntsane & another* 2007 (3) SA 554 (T) ("*Ntsane*"), an application was made by a bank for default judgment for the outstanding balance due and payable under a mortgage bond over residential property specially hypothecated as security for the purchase money. The history of the matter had indicated that the defendants had repeatedly been in arrears and defaulted on their monthly instalments. As a result of these defaults, the bank decided to exercise its right to accelerate repayment of the outstanding balance owing at the time. Application was made for default judgment in the sum of R62 042,43. The amount of the arrears at the time that the plaintiff bank made its decision to accelerate the repayment of the full outstanding debt and the amount of the arrears at that date does not appear from the judgment nor does same appear to have been disclosed to the court; *Ntsane* at 558 para 19. What is clear is that at the date of the application for default judgment, the amount of the arrears stood at R18,46. The court posed a number of questions including whether or not enforcement of the plaintiff's rights in terms of the bond for the sum of R18,46 would be unconscionable, p 559 para 26.3 and whether or not enforcement of the provisions of the bond entitling the plaintiff to declare the property executable for the sum of R18,46, would be in conflict with the provisions of section 26 of the Constitution and the right of access to housing, p 558 para 26.5. Other questions of current relevance posed were, given the plaintiff's rights, whether or not the court retained a discretion to grant or refuse default judgment prayed for, p 560 para 26.7, once the debtor had fallen into arrears and elected to accelerate payment of the capital owing would a court be entitled to enforce

the plaintiff to reinstate the repayment provisions of the bond by refusing to enforce an order that the full amount of the liability that has become owing and due should be paid, p 560 para 26.11 and whether or not the refusal on the part of the court to enforce the bond amounted to dictating a new contract to the parties p 260 para 26.12.

[31] In deciding whether or not immovable property should be declared executable for the paltry sum of R18,46 is a fairly simple question. Clearly not. Execution against immovable property for the sum of R62 042,43 does not present such an easy, clear or straightforward answer.

[32] The sum of R18,46 was not the amount of arrears outstanding at the time the decision was made by the bank to exercise its rights of acceleration to claim payment of the full outstanding balance. This amount was the outstanding balance of the arrears after payments had been made after commencement of the proceedings. The judgment presumed, at p 558 para 19 that the decision taken to accelerate was not made on arrears that had only amounted to R18,46. In stating the question posed in paragraph 26.3 of the judgment relating to the unconscionability of the enforcement of the plaintiff's rights in terms of the bond for the sum of only R18,46 is with respect a misstatement of the issue. There were two distinct rights of the plaintiff in terms of the mortgage bond. The first was to accelerate and ask for judgment for the full balance of the debt outstanding. The second was the procedural right to execute against the hypothecated immovable property for that judgment sum. It is this latter procedural right which is required to be judicially overseen in terms of the provisions of section 26(3), notwithstanding the wording of same refers to "eviction" as opposed to "execution". As set out above, defining the issue in paragraph 26.5 with reference to the outstanding amount of the arrears at the date upon which default judgment is asked, as opposed to the full outstanding balance, presents an easy answer but avoids true definition of the issues. A better definition is given in the question posed in paragraph 26.7 referred to above as to whether or not the court retained a discretion to refuse the judgment prayed for and on what grounds. This

question and the questions posed in paragraphs 26.11 and 26.12 of the judgment, which I have referred to above, all relate to the question as to whether or not there can be an interference with the creditor's common law contractual right to claim acceleration, where same are provided for expressly in terms of the underlying agreement defining the rights and obligations of the parties.

[33] In paragraph 67 of *Ntsane*, the Court appreciated that neither *Jaftha* nor *Saunderson* dealt with the question of judicial interference with the creditor's decision to exercise rights of acceleration on a debtor's default. It is acknowledged, *Ntsane* para 68, that it is difficult to imagine a ground upon which such a decision of the creditor could be held to be unlawful. The ensuing discussion in the judgment from page 565 para 69 to page 567 para 82, appreciates that such a discretion by the court might deny the plaintiff the right to enforce a covenant properly and lawfully entered into and create uncertainty and distrust in commercial activities and investment in the economy, p 566 para 72 and appreciates, correctly in my view, that even if there is an acceleration of the bond on non-payment, there is a discretion to refuse to grant execution against a residential property when enforcement of the full rights to execution amount to an abuse of the system pp 566 – 567 para 79. The judgment proceeds at p 567 C:

> "*[81] This leaves the question unanswered whether s 26 of the Constitution could be infringed if a bond holder calls up the bond because the mortgagor has fallen into arrears while the unpaid amount is as minute as in this case.*
>
> *[82] It is clear that it would be in conflict with s 26 of the Constitution to enforce the right to execute against immovable property and thereby terminate the defendants' right to adequate housing in the present instance*".

[34] The result is that default judgment was granted in the sum of R18,46 together with interest. The effect of the judgment was to recognise only the creditor's claim to payment of the arrears and not to the payment of the outstanding balance. That being so, it was inappropriate and an abuse to grant

an order permitting execution against the immovable property for the trifling judgment debt.

[35] With the greatest respect I am unable to agree with the judgment to the extent that it lays down a rule that the constitutional imperative of judicial oversight of execution, to prevent abuse in relation to execution against a person's home in satisfaction of a judgment debt, extends a power to the court to redefine the creditor's contractual entitlement to a judgment debt, in terms where executing against immovable property for such a redefined judgment debt is an unconscionable abuse. It appears to me that to follow this rule would be to endorse a line of reasoning that commences with its first premise that the arrears, for the exercise of a right of acceleration, are relatively insignificant and do not in themselves justify execution against immovable property. The second premise is that the exercise of the creditor of a right of acceleration results in a balance outstanding of a significantly larger amount which would justify execution against a person's home in satisfaction of that debt and would not be an abuse of the court procedure. The conclusion is then to ignore the creditor's lawful right to claim acceleration so as to answer the enquiry required by the considerations of section 26(3) of the Constitution with reference only to the amount of arrears and not to the true amount in respect of which the judgment creditor is entitled to judgment. This reasoning and conclusion is calculated to result in an answer adverse to the creditor in favour of the debtor. In my view this is the incorrect approach.

[36] What must first be ascertained is the amount in which the creditor is entitled to judgment. This enquiry into contractual rights is independent of the question whether or not execution against a person's home should be permitted in satisfaction of that judgment debt. As I understand the position at common law, where there is in a contact an express right of acceleration, which might be exercised when there is a default in payment, this right might be exercised notwithstanding the default is for a relatively small amount or is subsequently purged. There is in my view no scope for a court to introduce a new rule that a right of acceleration cannot be exercised where the default is

for a relatively small sum if execution against a person's home is sought for that small sum, but judgment for a more substantial accelerated balance would justify such execution. Similarly it raises the question of an entitlement to judgment of an accelerated balance, in the same circumstances except that no order for execution is sought at the time of judgment. The logical result of this rule is that judgment should be refused for the substantial balance which would justify a later order for execution because the arrears that triggered the right were not so substantial. A further complication is that the registrar is competent to grant such a money judgment. This in turn raises the spectre that a court will be required to overturn a legitimate judgment for a duly accelerated balance which justifies execution.

[37] To interfere with a creditor's contractual right to accelerate the discharge of obligations to be made in instalments cannot be justified in my view, in the light of the purpose and function of the judicial oversight which emerges from *Jaftha* and *Gundwana*.

[38] To deny a creditor the contractual right to accelerate payment of an outstanding debt on account of either the size of the default or period of default, is a function of the legislature, however urgent the need for such legislation might be. There was a restriction in section 11 of the now repealed Credit Agreements Act, 1980 which limited the rights of a creditor to cancel a credit agreement to which the Act applied. The creditor was required to give or deliver a notice to the debtor calling for payment of arrears and affording the debtor a period of 30 days grace in which to do so. This was a legislative alteration to the position at common law.

[39] To some extent, an answer may be had to the difficulties which made *Ntsane* such a hard case. This may lie in the provisions of sections 129(3) and (4) of the National Credit Act ("NCA") which were not in force at the time of *Ntsane*. Section 129(3) of the NCA makes provision for a debtor to reinstate a credit agreement that is in default by paying all the amounts overdue together with permitted default charges and reasonable costs of enforcing the

agreement up to the time of reinstatement. This right is limited to its exercise prior to cancellation of the agreement by the creditor and termination thereof in accordance with the provisions of section 123 of the NCA and prior to the sale of the property pursuant to an attachment order or surrender, and cannot be exercised after execution of any other court order enforcing the agreement. Surrender of goods and attachment orders appear to relate to movable property and need not be considered any further. It would appear that the effect of section 129(3) of the NCA is to permit a right of reinstatement even after default judgment or summary judgment has been given by making payment of the amount of the arrears, charges and costs, provided that such is done within the time period provided in section 129(3) of the NCA; see also Scholtz *et al, Guide to the National Credit Act*, para 12.10. In this sense a judgment may be overtaken by a reinstatement.

[40] Section 129(4) of the NCA does not permit reinstatement "*after execution*" of a court order enforcing the agreement. In this context, my view is that execution contemplates both the sale and registration of transfer of ownership of the immovable property into the name of the purchaser at a sale in execution of the property. Parallels may be drawn between this statutory right of reinstatement and the common law right of a judgment debtor to redeem property attached in the process of execution. Once property is attached, the judgment debtor can redeem the attached property for so long as the judgment debtor remains the owner. In the case of movable property, the right of redemption is extinguished on the sale when delivery and payment take place. In the case of immovable property, the right of redemption is extinguished only when registration takes place into the name of the purchaser after the sale in execution, *Liquidators Union and Rhodesia Wholesale Ltd v Brown & Co* 1922 AD 459 at 558-559, *Simpson v Klein NO & others* 1987 (1) SA 405 (W) at 409 – 11, *Shalala v Bowman NO & others* 1989 (4) SA 900 (W) at 905. The view that the right of redemption persists beyond the sale in execution to the point of delivery of ownership has been criticised and departed from in an *obiter dictum* of another division in the case of *Syfrets Bank Ltd & others v Sheriff of the Supreme Court, Durban Central* 1987 (1)

SA 764 (D). Although it is not necessary for me to attempt to resolve this difference, I am not at all persuaded that the decisions in *Simpson's* case and *Shalala's* case are wrong. Should a sale in execution be cancelled on account of a redemption by the judgment debtor, the aggrieved purchaser has no recourse against the judgment debtor; for it is the sheriff and not the judgment debtor with whom the contractual nexus is formed, *Sedibe & another v United Building Society & another* 1993 (3) SA 671 (T). As such, allowing the right of redemption after sale and before transfer makes it impossible for the sheriff to pass registration of transfer of ownership. An action for damages against the sheriff or the judgment creditor must yield in policy to the loss falling on the purchaser at the sale in execution. The answer is that such a purchaser purchases at a sale in execution subject to the judgment debtor's right of redemption, which if properly exercised, would be resolutive of the sale. The purchaser at such a sale acquires a clouded, as opposed to a clear, right to receive transfer of ownership. The purpose of execution is primarily a compulsive procedure aimed at ensuring that court orders are given effect and judgment debts are paid, not the promotion of sales by public auction. Where the primary purpose of execution may be achieved through the exercise of a right of redemption, the public sale by auction should be allowed to fail.

[41] Similarly in my view, where the provisions of the NCA are applicable it is open to a debtor to exercise the rights conferred in section 129(3) of the NCA within the time period therein provided and redeem the immovable property from the execution process by making payment not of the full sum of the judgment debt, interest and costs, but of the overdue amounts of the arrears together with default charges and legal costs of enforcing the agreement up to the time of reinstatement. A purchaser at a sale in execution in such circumstances similarly acquires a clouded right to transfer subject to the statutory right of reinstatement.

[42] Where there has been an acceleration and the judgment debt is for a significant sum which justifies execution against immovable property, but there exists the possibility that payment of the arrears might reasonably be

made to facilitate the reinstatement of the underlying loan agreement, the provisions of sections 129(3) and (4) of the NCA ought to be brought to the attention of the judgment debtor. This can be enforced by requiring same to be embodied in the order declaring the immovable property executable.

[43] The other relevant circumstances flowing from an appreciation of the circumstances in which the debt was incurred and the amount of the debt would be the existence of reasonable alternatives to the satisfaction of the judgment debt without resort to execution, *Jaftha* para 56. The existence of these reasonable alternatives will be determined with regard being had to attempts by the debtor to pay off the debt and the debtor's resources, *Jaftha* para 60.

[44] Where the matter is contested, a determination of these considerations is made much easier by the ability of the debtor to disclose resources, employment status and any other factor which might militate against an order that execution be levied against the immovable property. However the great majority of cases are undefended. Although the court's purpose is to act as a safeguard against abuse, it should at the same time take care not to impose too great a burden on an execution creditor to go out and obtain evidence of matters more readily within the knowledge of the judgment debtor. Where the property has been specially hypothecated to secure the judgment debt the scope of a judicial enquiry would be less than where the property has not been so hypothecated, unless there are on the facts before court, reasonable grounds to suspect an abuse, *Jaftha* para 58 The financial information of the judgment debtor taken by the creditor at the time of the granting of the credit would suggest an ability to pay. The change of circumstances and reasons why default has been made would ordinarily be within the knowledge of the judgment debtor. Similarly an indication by the judgment creditor of the amount of the arrears and the number of months represented by such amount are relevant in indicating whether or not the judgment debtor could facilitate a satisfaction of the judgment debt without recourse to the immovable property.

[45] Where property has been specially hypothecated for a debt, a court should take care not to insist inflexibly on execution against movables as a prerequisite to execution against the immovable property. It often may be that the movable property is insufficient to satisfy the judgment debt and that movable property and personal effects are attached and sold in execution and thereafter the judgment debtor loses the immovable property creating a worse position than if execution were simply levied against the asset provided as security for the debt. Care should be taken not to place too high a duty on the judgment creditor to provide further information in instances of default which occasions additional and unreasonable effort and expense. This would drive up the cost of collection which is ultimately borne by the judgment debtor and other borrowers from the financial institutions; such costs would be factored into the cost of lending. Furthermore these additional burdens on a creditor create an additional disincentive to make available the provision of credit which frustrates the attainment of the social value of housing people promoted in section 26 of the Constitution.

[46] Where the judgment debt is unrelated to the property, or the amount is relatively insignificant, a greater degree of enquiry and closer scrutiny is called for. In such event consideration might be given to postponing the request or application for execution until after the creditor might first have had resort to section 65A read with section 65M of the Magistrates Court Act, in which the financial circumstances of the judgment debtor might fully be ventilated whereafter the grant of an order might then be reconsidered.

Procedure

[47] By far the vast majority of judgments to enforce debts are unopposed going by default judgment or unopposed summary judgment. To obtain a money judgment, a plaintiff is put to a threshold of simply disclosing a proper cause of action in the summons. Accordingly deciding whether or not to grant judgment requires an evaluation of checking the summons to determine whether or not it discloses a proper cause of action, something which can be

done by the registrar. The judicial oversight required by section 26(3) of the Constitution requires something more, *Gundwana* para 43. The provisions of rule 31(2)(a) permits a court to hear evidence. This procedure has been extended to permit the court to receive evidence on affidavit; *New Zealand Insurance Co Ltd v Du Toit* 1965 (4) SA 136 (T)*; Havenga v Parker* 1993 (3) SA 724 (T). Rule 31(5) permits the registrar to request and receive written and oral submissions. Accordingly there is scope in the procedure for default judgment for the reception of additional evidence in relation to the claim for the money judgment in which procedure additional information may be provided concerning the factors which are relevant to the grant of an order of executability against immovable property constituting a person's home.

[48] Section 130(3) of the NCA permits a court to determine a matter in respect of a credit agreement to which the NCA applies only if it is satisfied of various matters including compliance with the provisions of the Constitution. This too has placed a requirement of providing information in greater detail than the statement of cause of action in a simple summons that had hitherto not been required to be little more than a label, *Emdon and another v Margau* 1926 WLD 159 at 162*; Standard Bank of South Africa Ltd v Oneanate Investments (Pty) Ltd (in liquidation)* 1998 (1) SA 811 (SCA) at 825 B – F.

[49] In default judgment proceedings the procedure allows for the flexibility of furnishing additional evidence by way of affidavit of proving compliance with the statutory requirements. However with summary judgment the position is different. In *Rossouw & another v First Rand Bank Ltd* 2010 (6) SCA 439 (SCA) ("*Rossouw*"), a plaintiff was held not to be permitted in summary judgment proceedings, by reason of the provisions of rule 32(4), to place additional evidence before the court proving compliance and giving content to the label type allegations that the plaintiff had complied with the relevant provisions of the NCA; *Rossouw* paras 34, 36, 47 and 54. Documents handed up at the summary judgment hearing without opposition were ignored on appeal.

[50] Where more information and a greater level of detail is required than would suffice for a simple summons, in order to overcome the problem at summary judgment there are several potential procedural avenues to bring this information before the court. The first is to plead the circumstances and facts more fully in the summons which can then be verified by the formulary affidavit required in rule 32(2). Secondly the claim for executability might not be asked simultaneously with the claim for judgment in which case a second proceeding in the nature of an application in terms of the provisions of rule 46(1) could be made in which all the relevant facts and circumstances be set out on affidavit. Thirdly the court can, in the exercise of its inherent jurisdiction to regulate its own process and in terms of the provisions of rule 27(3) condone the provision of the additional information and receive same outside the four corners of the provisions of rule 32. Lastly it may be that the provisions of rule 32 require the attention of the Rules Board so that an amendment might be effected thereto to permit the reception of additional evidence relating to the request for the order of execution against immovable property where such constitutes a person's home or primary residence. Convenience and a desire to reduce unnecessary costs supports the dealing with both issues simultaneously at the summary judgment stage and thereby avoiding an additional application thereafter being brought in terms of the provisions of rule 46(1). No violence would be done to the rule as in *Rossouw* as the request for an order declaring immovable property executable is not one of the four claims contemplated in rule 32(1). It is simply an adjunct ancillary to the money judgment.

I turn to consider the individual matters.

Nedbank Limited v Wilson Fraser & another – Case No 2011/418

[51] This is an application for default judgment payment in the sum of R986 853,87. The claim is for the outstanding balance due and owing under a mortgage bond by reason of the defendants' failure to pay punctually the instalments. The summons complies with the practice directive in *Saunderson*

and an affidavit has been furnished by a manager of the plaintiff detailing and proving compliance with the provisions of section 129 of the NCA, and furnishing the *Mortinson* requirements detailing that the property was not acquired with State assistance, is currently occupied by the defendants and utilised for residential purposes and that the debt due to the plaintiff was a debt incurred in order to acquire the immovable property which was not hypothecated as security for any other debt. The letter sent in terms of section 129 of the NCA details the arrears in the sum of R95 888,95 and a monthly instalment obligation of R8 420,07. The amount of the arrears was that outstanding on 1 October 2010. The arrears represent more than eleven months of instalments.

[52] Having regard to these circumstances I am satisfied a proper case has been made out for the grant of default judgment and that the prayer seeking an order that the property be declared executable for the judgment debt is not an abuse.

Nedbank Limited v Chabalala, Bob Victor & another– Case No 2011/9315

[53] This is an application for default judgment for payment of the sum of R430 068,20 being the balance due and owing under a mortgage bond over a sectional title unit. Similarly the summons complies with the practice directive in *Saunderson* and an affidavit has been provided setting out proof of compliance with the NCA that the immovable property was not acquired with the assistance of a State subsidy, the property was a residential home occupied by the defendants and the debt was incurred in order to acquire the immovable property. The notice of default in terms of section 129 of the NCA detailed arrears in the sum of R51 102,48 at 31 January 2011 and a monthly instalment obligation of R2 910,72. The arrear amount represents more than seventeen months of instalments.

[54] In this matter I am of the view that a case has properly been made out for default judgment and that the request for an order permitting execution against the immovable property is not an abuse.

Nedbank Limited v Machitele, Ponponyani Elmon & another – Case No 2010/28374

[55] This is an application for summary judgment on a simple summons for payment of the sum of R269 482,42 being the balance due and owing under a mortgage bond attached to the simple summons together with interest thereon and an order declaring the property executable for the judgment debt. The defendants entered an appearance to defend and application was made for summary judgment.

[56] The summons complied with the practice directive of *Saunderson* and that the first defendant applied to be placed under debt review which was terminated by the plaintiff giving notice in terms of section 86(10) of the NCA. The essential contents of the notice were repeated and an allegation was made that ten days after delivery of the section 86(10) notice had elapsed and that the defendant had not raised a dispute nor surrendered the relevant property nor brought the payments due under the mortgage bond up to date. Attached to the summons was a covering mortgage bond hypothecating the immovable property and declaring the mortgagor indebted to the mortgagee in a capital amount whether such "*indebtedness be a direct or indirect liability incurred to the Mortgagor individually or jointly with others, and whether such an indebtedness arises from monies lent and advanced, bills of draft or bills of exchange by reason of any suretyship, guarantee or indemnity signed by the Mortgagor in favour of the mortgagee, or given to the Mortgagee for and on behalf of the Mortgagor and any payment made pursuant to the bond, including future debts generally from whatsoever cause arising but not exceeding a stipulated capital sum together with interest thereon and an additional sum*". The bond was stipulated to be continuing covering security for all and any sum or sums of money which were then or in the future to be owing or claimable from any aforementioned cause. Interest was agreed to be

"*be reckoned at the current rate charged by the mortgagee from time to time in respect of the relevant facility*". In addition to alleging the sum of R269 482,40 being the balance due and owing under the mortgage bond, the summons alleged a rate of interest due and payable under the mortgage bond and that the said sum and interest was due and payable in terms of the mortgage bond by reason of the defendants' failure to pay punctually the instalments provided for therein notwithstanding demand.

[57] A mortgage bond is primarily an instrument of hypothecation. In addition it can serve as an acknowledgement of debt and contain the terms of the obligation it secures, *Oliff v Minnie* 1953 (1) SA 1 (A); *Lief NO v Dettmann* 1964 (2) SA 252 (A); *Thienhaus NO v Metje & Ziegler Ltd & another* 1965 (3) SA 25. In the present case, the mortgage bond serves both the purpose of an instrument of hypothecation and an acknowledgment of debt. It does not however contain the terms governing the interest rate of the specific debt nor the terms for its repayment. It has an acceleration clause providing the full capital or balance and all other monies which may be claimable or secured under the bond were to become due and payable in the event of a failure by the mortgagor to timeously make payment or perform any obligation in terms of the bond. The format of the bond as a covering bond of necessity would require to be construed in conjunction with other instruments of debt or other evidence proving an underlying indebtedness and the terms thereof covered by the general description in the mortgage bond. The mortgage bond itself did not detail amounts or dates for payment by reference to which a conclusion might be made that there had been a default.

[58] The allegations in the summons relating to the underlying loan are not found in, nor supported by, the mortgage bond. Accompanying the application for summary judgment was an additional affidavit in which it was sought to prove compliance with the provisions of section 129 of the NCA and delivery of the notice in terms of section 86(10). On the strength of *Rossouw*, the submission of this additional evidence, together with evidence to prove the underlying loan agreement, this is impermissible and outside the provisions of

rule 32(4). Had the plaintiff wished merely to introduce additional evidence relating only to the exercise of a discretion whether or not to declare the property executable, I would have been more inclined to receive same. That being the case, summary judgment ought to be refused.

Nedbank Limited v Moccasin Investments (Pty) Limited – Case No 2010/31703

[59] This was an application for summary judgment based on a cause of action for payment of the sum of R1 047 684,88 being the balance due, owing and payable under a mortgage bond by reason of the defendant's failure to pay punctually the instalments provided for in the mortgage bond. The summons alleges compliance with the provisions of section 129 of the NCA and contains the note in compliance with the practice directive in *Saunderson*. The mortgage bond contained a clause appointing an address in La Lucia at which notices must be delivered if the plaintiff wished to give legal notice contemplated in the bond.

[60] At the hearing, a Ms Stojakovic who represented herself as a director of the defendant appeared. An affidavit deposed to by Ms Stojakovic was handed up to me. Ms Strydom who appeared for the plaintiff, submitted to me that Ms Stojakovic should not be permitted to represent the defendant and in support thereof cited to me the case of *Hallowes v The Yacht Sweet Waters* 1995 (2) SA 270 (D). This case is an application of the principle that a juristic person may be represented in the High Court in legal proceedings only by a qualified legal practitioner, *Yates Investments (Pty) Ltd v Commissioner for Inland Revenue* 1956 (1) SA 364 (A) ("*Yates Investments*"). The *Yates Investments* principle has recently been reconsidered and qualified by the Supreme Court of Appeal in *Manong & Associates (Pty) Ltd v Minister of Public Works & another* 2010 (2) SA 167 (SCA). The *Yates Investments* principle was restated but qualified on the basis that a court has an inherent jurisdiction to regulate its own proceedings both in the pre-constitutional era and deriving from section 173 of the Constitution, that this power was of a discretionary nature and a discretionary audience ought to be regarded as

reserve or occasional expedient and it should be borne in mind that an unqualified or inexperienced persons may do more harm than good to the corporate litigant.

[61] A brief review of the affidavit indicated to me that it was manifest that the affidavit had not been drawn or settled by a qualified legal professional person and it was difficult to follow. I was not minded to exercise my discretion to grant Ms Stojakovic an audience to represent the defendant in the manner of a legal representative. However, the provisions of rule 32(3)(b) permits, with the leave of the court, the oral evidence of a person who can swear positively to the fact that the defendant has a *bona fide* defence to the action. I accordingly granted Ms Stojakovic a right of audience as a witness to elaborate on the contents of her affidavit. Ms Stojakovic testified that the hypothecated immovable property was her home and residence in which she had been living but which she temporarily vacated while it was being renovated and repaired for fire damage. Ms Stojakovic was residing at another property as the beneficiary of a trust of which the residence was an asset. I do not intend to deal with the grounds of defence nor whether or not the hypothecated property is Ms Stojakovic's primary residence or home for the purposes of section 26 of the Constitution, by reason of the fact that the plaintiff's summons suffers from the same defects as in the *Machitele* matter. Ms Stojakovic expressed a preference on behalf of the defendant that legal notices should be served at an address in Bedfordview. The appearance to defend did not set forth an address within eight kilometres of the office of the registrar as required in terms of the provisions of rule 19(3). An affidavit was filed by the plaintiff's attorney detailing the requests made by the attorney to Ms Stojakovic for a change of an address for service to be recorded in writing which caused some measure of frustration.

[62] Having regard to the provisions of rule 32(4) I was not inclined to receive additional evidence to supplement the cause of action for the same reasons relating to the *Machitele* case. Accordingly in this matter I am inclined to refuse the application for summary judgment. That being so, the

question of whether an order should be made declaring the property specially executable does not arise.

ABSA Bank v Young Star Traders CC & another – Case No 2011/07117

[63] In this matter an application is made for summary judgment against the first defendant close corporation and second defendant as surety for payment of the sum of R3 805 761,82 being the balance outstanding in terms of a written agreement of loan, a copy of which was not annexed to the summons. A copy of the mortgage bond was however annexed to the summons. The mortgage bond was similarly a covering mortgage bond which had an acceleration clause being triggered by a default in the performance of the terms and conditions of any written agreement or agreements between the first defendant and the plaintiff which were secured under the bond and which served as a hypothecation for any amount that might from time to time be owing arising from any cause whatsoever. The simple summons however alleges an underlying agreement of loan and a cause of action based thereon which is secured by the mortgage bond. The loan agreement fell outside the provisions of the NCA.

[64] The claim against the second defendant was based on a suretyship executed in favour of the plaintiff in respect of the debts of the first defendant.

[65] Filed together with the application for summary judgment was an affidavit setting out facts in accordance with the *Mortinson* directive. As the affidavit was not used to support the claim for summary judgment but only for the purposes of putting the *Mortinson* facts before me for the purposes of exercising a discretion as to whether or not to make an order declaring the property executable, I was inclined to exercise a discretion to receive it for that purpose. The affidavit disclosed that the indebtedness arose from a loan granted to the first defendant to acquire the immovable property and that the amount of the arrears at the end of 18 March 2011 stood at R392 471,55. The affidavit disclosed that the immovable property was utilised for residential

purposes from the mortgage application and credit selection process in a manner which it was classified in the plaintiff's records. The deponent was unable to state whether the property was occupied by the "*defendant or any other person or persons in terms of a lease or otherwise*". For the present purposes I shall assume that the property is occupied by the director of the first defendant as her home and primary residence. The affidavit does not disclose to me the amount of the instalments or whether same were to be paid monthly and for what period of arrears the arrear balance represents. Had this been an application for default judgment I would have been inclined to request further information relating to the period of the default and a print out of a recent statement of account in respect of the loan agreement. However this being summary judgment proceedings and the defendants being represented by attorneys, there is less scope for abuse than would have been the case had this been an application for default judgment.

[66] On this evidence I am inclined to the view that the application for an order declaring the property executable does not constitute an abuse, particularly in the light of the fact that the balance outstanding represents an amount in excess of the capital amount of R3 350 000,00 acknowledged in the mortgage bond.

[67] In the premises I make the following orders:

In the matter of *Nedbank Limited v Wilson Fraser & another – Case No 2011/418* judgment is granted for*:*

1 Payment of the sum of R986 853,87.

2 Interest on the sum of R986 853,87 at the rate of 7% per annum compounded monthly from 1 October 2010 to date of payment.

3 The following property is declared executable:

Erf 351 Sandringham Township, registration Division IR, the Province of Gauteng.

4 Any warrant of execution which is presented to the registrar for issue, pursuant to this order shall contain a note advising the debtors of the provisions of sections 129(3) and (4) of the National Credit Act, 34 of 2005.

5 Costs on the scale as between attorney and client.

In the matter of *Nedbank Limited v Chabalala, Bob Victor & another– Case No 2011/9315* judgement is granted for*:*

1 Payment of the sum of R430 068,20.

2 Interest on the sum of R430 068,20 at the rate of 8,1% per annum compounded monthly from 31 January 2011 to date of payment.

3 The following property is declared executable:

Section 10 as shown and more fully described on sectional plan NO SS 42/1998 in the scheme known as Kew Heights in respect of the land or buildings situate at Kew Township, local authority, City of Johannesburg; and an undivided share in the common property in the scheme apportioned to the said section in accordance with the participation quota as endorsed on the sectional plan.

4 Any warrant of execution which is presented to the registrar for issue, pursuant to this order shall contain a note advising the debtors of the provisions of sections 129(3) and (4) of the National Credit Act, 34 of 2005.

5 Costs on the scale as between attorney and client.

In the matter of *Nedbank Limited v Machitele, Ponponyani Elmon & another – Case No 2010/28374*:

1 The application for summary judgment is refused and the defendants are granted leave to defend the action.

2 There is no order as to costs.

In the matter of *Nedbank Limited v Moccasin Investments (Pty) Limited – Case No 2010/31703*:

1 The application for summary judgment is refused and the defendant is granted leave to defend the action.

2 The plaintiff is given leave, until such time as a notice in terms of rule 16(1) is received, given by or on behalf of the defendant appointing another address, to serve all process and documents in the action on the defendant at Unit 45, Bedford Boulevard, River Road, Morninghill, Bedfordview.

3 There is no order as to costs.

In the matter of *ABSA Bank v Young Star Traders CC & another – Case No 2011/7117* summary judgement is granted for:

1 Payment of the sum of R3 805 761,82.

2 Interest on the sum of R3 805 761,82 at the rate of 7% per annum calculated and capitalised monthly in arrears from 29 December 2010 to date of payment.

3 The following property is declared executable:

Erf 3518 Northcliff Extension 25 Township, Registration Division IQ, the Province of Gauteng, held by deed of transfer T63477/07.

4 Costs on the attorney and client scale.

_____

J R PETER
ACTING JUDGE OF THE HIGH COURT
4 May 2011

APPEARANCES

D Strydom instructed by Rossouws Leslie Incorporated, Johannesburg, for the plaintiff in the Nedbank matters.

N N Felgate instructed by Smit Sewgoolam Inc, Johannesburg, for the plaintiff in the ABSA Bank matter.

No appearance for the defendants.