IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO.: 14070/2013

In the matter between:

CHERINE CAROLINE NEVELING Applicant

and

REICHMANS (PTY) LTD First Respondent

THE SHERIFF OF THE HIGH COURT, DURBAN WEST Second Respondent

J U D G M E N T

KOEN J:

INTRODUCTION:

[1] The central legal issue for determination in this application and counter application is whether in the High Court a writ of execution against immovable property being the residence of a judgment debtor, issued after a return had been made stating that such debtor has insufficient movable property to satisfy the judgment debt, is valid unless a court, having considered all the relevant circumstances, ordered such execution.

[2] Subsidiary legal issues that arise from the papers are:

(a) Whether the relief claimed by the applicant, as phrased in the Notice of Motion, is competent;

(b) Whether, if the primary legal issue in paragraph 1 above is answered in favour of the applicant, the conditional counter application brought by the first respondent was necessary and if necessary, what relief should be granted in respect thereof.

The first subsidiary legal issue fell away as a result of an amendment to the terms of the relief sought in the Notice of Motion.[1]

[3] A material dispute of fact exists as to whether the property in question was the residence of the Applicant.

[4] Various other preliminary matters arose:

(a) The late filing of the First Respondent's replying affidavit to the conditional counter application was condoned;

(b) An order was granted unopposed striking out the unsigned "affidavit" of a deputy sheriff and all references thereto in the main affidavit;

(c) A further supplementary affidavit by Mr Robert Alexander Blyth Elliot, the attorney of the First Respondent dated 22 July 2014 which was sought to be introduced, was, with the agreement of the First Respondent, disallowed.

[5] The second respondent in the present application, the Sheriff of the High Court, Durban West, played no active part in these proceedings.

THE RELIEF CLAIMED:

[1] The initial relief was only for an order seeking the setting aside of the attachment of the immovable property. No order was sought setting aside the default judgment obtained or setting aside the writ of execution issued by the Registrar in respect of the immovable property. This was incompetent in the light of the principle that the invalidity of a writ of execution issued by Registrar does not, in and of itself, invalidate procedures followed pursuant to that writ, such as, for example, an attachment – see *Mkhize v Mvoti Municipality* 2012 (1) SA 1 (SCA) at paragraph 19. The amendment, which was not opposed, provided for the insertion after the word 'attachment' in paragraph 1.1 of the Notice of Motion of the words 'and the writ of execution dated 8 April 2011 in respect'.

[6] In the Notice of application, as amended at the commencement of the argument, the Applicant (hereinafter referred to as the "execution debtor") claims the following relief:

'1.

That the execution creditor/plaintiff and the second respondent and any other interested parties be and they are hereby called upon to show cause to this Honourable Court on the day of 2014 at 9.30 a.m. why an order should not be made:

1.1 ordering that the Execution Creditors/Plaintiff's attachment and a writ of execution dated 8 April 2014 in respect of the immovable property described as:
Erf […], Durban Township registration division KwaZulu-Natal Province extent : 878 square metres held under title deed T[…] in favour of Cherine Caroline Neveling
and being physical address:
14 M[…] P[…]
G[…]
District: Durban West
[hereinafter referred to as 'the property']
be and is hereby set aside:

1.2 interdicting and preventing the Execution Creditor and the Second Respondent from proceeding with any sale and execution of the property pending the finalization of this application;

1.3 ordering the Execution Creditor to pay the costs of this application;

1.4 In the event of the Second Respondent's opposing this application and only in that event, ordering the Second Respondent jointly and severally with the Execution Creditor to pay the costs of this application;

1.5 declaring that the proviso to sub-rule 46(1)(a)(ii) be read and applied to both Rule 46(1)(a)(i) as well as Rule 46(1)(a)(ii).[2]

2.

That the order referred to in prayer 1.1 and the interdict referred to in prayer
1.2 do operate as an interim order and interim interdict respectively pending the return day or any extension thereof.

3.

Granting to applicant further other or alternative relief.'

[7] In the counter application the First Respondent (hereinafter referred to as the 'execution creditor') claims the following relief:

[2] This relief was not persisted with.

'1. conditionally on an order granting the relief sought by the execution debtor, authorising and directing the Registrar to issue a writ of execution to attach the immovable property of the execution debtor situate at 14 M[…] P[…], G[…], Durban and described as Erf […] Durban;
2. Authorising and directing the Registrar to issue a writ of execution to attach the immovable property of the execution debtor situate at 301 P[...] O[…] Road, M[…],[3] Durban and described as Erf […], Durban;
3. Directing the Execution Debtor, Cherine Neveling, to pay the costs of this counter-application;
4. Granting further/ and or alternative relief.'

FACTUAL BACKGROUND:

[8] The following facts are common cause or not seriously in dispute:

(a) The execution creditor obtained judgment against the execution debtor from this court on the 3 February 2014 for:

'1. Payment of R4 124 216,69.
2. Interest on R4 124 216,69 calculated and compounded monthlyin advance from the 01st December 2013 to date of payment, at the announced overdraft prime lending rate of interest charged by Standard Bank of SA Limited from time to time, which is presently 8.5% plus two percentage points per annum.
3. Costs of suit on a scale as between attorney and own client.'

This judgment arose from a surety ship obligation in respect of the debts of Buzzdi Fashions CC in which the execution debtor held half the membership.

(b) Pursuant to that judgment a writ of execution against movable property was issued on the 10 February 2014;

(c) The writ of execution against movable property was served upon the execution debtor personally by the second respondent and an attachment was made and certain movables attached;

(d) The execution debtor conceded that the value of the movables attached do not and will not, satisfy the judgment of over R4 000 000;

(e) Pursuant to the provisions of Rule 46(1)(a)(i) the execution creditor then caused a writ of execution against immovable property to be issued dated the 3 April 2014 and issued on 8 April 2014 against the "property" referred to in the Notice of Application (hereinafter separately identified as the "G[…] property");

[3] This address was incorrect and the parties accepted that the correct address would be 10 A[…] Road, M[….].

(f) Pursuant to that writ the G[…] property was attached and it is to be sold by the second respondent in execution on the 13 August 2014.

THE EXECUTION DEBTOR'S CONTENTIONS:

[9] The execution debtor avers that the G[…] property is her primary residence, albeit that they are forced to live in an outhouse situate at the property but forming part thereof. This factual allegation is hotly contested and took up a large part of the papers. In the light of the conclusion which I have reached, it is not necessary to resolve this factual issue. The execution creditor has asked me to assume and I shall for the purposes of this judgment accept that the G[…] property is the primary residence of the execution debtor.

[10] The execution debtor contends that the writ pursuant to which the G[…] property (her primary residence) was attached, is invalid as a court had not ordered execution against the G[…] property and the attachment thus proceeded without judicial oversight.

THE RELEVANT LEGAL PRINCIPLES:

[11] Section 26 of the Constitution provides as follows:

> '(1) Everyone has the right to access to adequate housing.
> (2) …
> (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.'

[12] The legal position regarding such similar attachments in the Magistrates' Court and its practice, was authoritatively dealt with by the Constitutional Court in *Jaftha v Schoeman; Van Rooyen v Stoltz.*[4] That decision dealt with section 66(1)(a) of the Magistrates' Courts Act.[5] The Court held the section to be unconstitutional to the extent that it permitted sales in execution in unjustifiably circumstances without judicial intervention. The constitutional defect was cured by reading-in a proviso that only a court may order execution against immovable property after considering all

[4] 2005 (2) SA 140 (CC).
[5] No 32 of 1944.

the relevant circumstances[6]. With these words read into section 66(1)(a) it reads as follows:

> '1.(a) Whenever a court gives judgment for the payment of money or makes an order for the payment of money in instalments, such judgment, in case of failure to pay such money forthwith, or such order in case of failure to pay any instalment at the time and in the manner ordered by the court, shall be enforceable by execution against the movable property and, if there is not found sufficient movable property to satisfy the judgment or order, or the court, on good cause shown, so orders, then a court, then against the immovable property of the party against whom such judgment has been given or such order has been made.'

[13] The facts in *Jaftha* and the following subsequent comments on the judgment are instructive:

(a) The two applicants in *Jaftha* were unemployed women occupying homes purchased with the assistance of a state housing subsidy. They owed relatively small debts not related to the purchase of their homes. Their homes were attached and sold in execution in respect of these debts. It was clear that if they were evicted because of the sale in execution they would be left with no adequate accommodation. Based on that "fact bound enquiry", i.e what the position should be in the Magistrates' Court where immovable property was sold in execution when prior execution against movables proved to be unsuccessful;

(b) Du Plessis and Penfold in 'Bill of Rights Jurisprudence'[7] correctly point out:

> 'The real question is whether the defendant is likely to be deprived of "access" to adequate housing should he or she be deprived of the property in question - that is, whether he or she is likely to be left homeless as a result of the execution.'[8]

[14] As regards the position in the High Court, at that stage s 27A of the Supreme Court Act 59 of 1959 provided that the Registrar of the High Court could grant default judgment in certain circumstances, particularly claims for liquidated amounts

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[6] At para 61.
[7] D Du Plessis and G Penfold 'Bill of Rights Jurisprudence' (2005) *Annual Survey of South African Law* at 77 – 81.
[8] Quoted with approval in *Mkhize v Umvoti Municipality* 2012 (1) SA 1 (SCA) at 18; D Du Plessis and G Penfold 'Bill of Rights Jurisprudence' (2006) *Annual Survey of South African Law* at 82.

sounding in money. Such judgments were granted in accordance with the provisions of rule 31(5). Although that rule did not pertinently refer to orders declaring mortgage property especially executable, rule 45(1) providing for the issue of a writ of execution by the office of the Registrar stated in a proviso thereto that

> 'except where immovable property has especially been declared executable by the court or, in the case of a judgment granted in terms of Rule 31(5), by the Registrar, no such process shall issue against the immovable property of any person until a return shall have been made of any process which may have been issued against his movable property, and the Registrar perceives therefrom that the said person has not sufficient movable property to satisfy the writ.'[9]

[15] *Gundwana v Steko Development (supra)* concerned a writ against immovable property issued at the instance of a mortgagee execution creditor against the primary residence of the execution debtor pursuant to an order declaring the property specially executable granted in default of appearance to defend by the Registrar of the High Court under the aforesaid authority.

[16] Before the judgment in the Constitutional Court in *Gundwana* was delivered, rule 46(1) of the High Court Rules was amended, in the light of the decision in *Jaftha* and the position in the Magistrates' Court, in terms of Government Notice R 981 dated 19 November 2010 with effect from 24 December 2010. It henceforth read as follows:

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

[17] The amended Rule 46 has been described as 'in effect a legislative interpretation of *Jaftha* demonstrating the policy of the legislature'.[10]

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[9] See *Gundwana v Steko Development* 2011 (3) SA 608 (CC) at paragraph 35 and 36.

[10] *Mkhize v Mvoti Municipality* supra para 13.

[18] As in *Jaftha*, the execution debtor's constitutional right to adequate housing was impaired or potentially impaired in *Gundwana*. The order issued states:

> 'It is declared unconstitutional for a Registrar of a High Court to declare immovable property specially executable when ordering default judgment under Rule 31(5) of the Uniform Rules of Court to the extent that this permits the sale in execution of the home of a person.'[11]

[19] The order in *Jaftha* operates retrospectively. In *Gundwana* Froneman J stated that this did not entail that all transfers subsequent to invalid sales in execution were automatically invalid. The sale in execution as well as the transfers would still have to be set aside and this required an explanation for not bringing the rescission application earlier. He added:

> 'it follows that a just and equitable remedy following upon a declaration of unconstitutionality should seek to ensure that only deserving past cases benefit from the declaration. I consider that this balance may best be achieved by requiring that aggrieved debtors who seek to set aside past default judgments and execution orders granted against them by the registrar must also show, in addition to the normal requirements for rescission, that a court with full knowledge of all the relevant facts existing at the time of granting default judgment would nevertheless have refused leave to execute against specially hypothecated property that is the debtors home'.[12]

[20] Significant for present purposes is how Froneman J in *Gundwana* dealt with the contention of the mortgagee/execution creditor that neither the person of the applicant nor her property fell within the position in *Jaftha*, which contention he referred to as the 'fact bound argument'. He disposed of it *inter alia* on the basis that 'the constitutional validity of the rule cannot depend on the subjective position of a particular applicant. It is either objectively valid or it is not.'[13]

[21] After *Gundwana* Government Notice R471 of 12 July 2013 introduced a proviso to rule 31(5) which now reads:

> '(5)(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea …
> (b) The registrar may -
> (i) grant judgment as requested;
> (ii) grant judgment for part of the claim only or on amended terms;
> (i) refuse judgment wholly or in part;

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[11] *Gundwana* supra para 65(b).
[12] *Gundwana* supra para 59.
[13] *Gundwana* accordingly overturned the judgment in *Standard Bank of SA Limited v Saunderson and Others* 2006 (2) SA 264 (SCA).

(ii) postpone the application for judgment on such terms as he or she may consider just;
(iii) request or receive oral or written submissions;
(iv) require that the matter be set down for hearing in open court.
Provided that if the application is for an order declaring residential property specially executable, the Registrar must refer such application to court.'

[22] It is thus clear following *Gundwana* that an order declaring the residential home of an execution debtor specially executable requires judicial oversight. The wording in the order in *Gundwana* referring to 'the extent that this permits a sale in execution of the home of a person' nor the words of the proviso to Rule 31(5) requiring judicial oversight whenever an order declaring residential property specially executable is sought, must be interpreted to refer to the 'residential property' of the execution debtor. Any other interpretation would, as was found in respect of the reading-in order in *Jaftha*, unduly extend 'the specific constitutional remedy employed to protect the entrenched right to adequate housing',[14] which it should not do.

[23] The present is however not an instance of the property of the execution debtor being declared specially executable, and to that extent it is in principle distinguishable from *Gundwana*. But although the writ in *casu* is not one issued pursuant to the provisions of the Magistrates' Court Act as in *Jaftha*, the fact bound argument that *Jaftha* is to be confined to the Magistrate's Court's practice, does not mean that the validity of the rule, namely that where an execution debtor's right to housing might be compromised by a writ of attachment against immovables following upon insufficient movables being found to satisfy the claim, should not also apply to the same position in the High Court. The rule cannot depend on the subjective position of a particular applicant; whether as a mortgagor where a declaration of special executability might follow in respect of a debt secured by a mortgage bond, or a debtor whose movable property proved inadequate to settle his indebtedness and that debtor's residence is now sought to be executed against. The same mischief, namely a debtor losing his or her primary residence for insufficient reasons, such as for example where the debtor's home is sold in execution for a trifling or insubstantial debt, could also occur in the High Court, in the context of rule

[14] *Mkhize v Mvoti Municipality* supra para 19.

46(1)(a)(i), where a debtor's movables are attached and sold and a small balance remains for which the debtors residence is then attached and sold in conflict with his or her constitutional right to reasonable housing.

[24] The rule deserving of constitutional protection is that no owner should lose his primary residence for inadequate reasons, whether for an insubstantial debt remaining owing, or whatever other inadequate reason. That is why judicial oversight is required.

DISCUSSION:

[25] Mr *Potgieter* SC, on behalf of the execution debtor, accepted that there was no constitutional challenge to the wording of Rule 46 (1)(a)(i). The papers contain no reference to any direct constitutional challenge; the execution debtor has not joined the Rules Board nor the Minister of Justice as would be required pursuant to the provisions of rule 10A. Nor has rule 16A been complied with. Accordingly rule 46(1)(a)(i) must be taken to be constitutionally valid.[15] As any argument regarding the constitutionality or otherwise of rule 46(1)(a)(i) was not available to the execution debtor, the execution debtor would only be entitled to attack the validity of the writ if she could persuade this court that rule 46(1)(a) must be interpreted in such a way that the proviso requiring judicial oversight applies not only to rule 46(1)(a)(ii) but also to rule 46(1)(a)(i). The issue is accordingly simply one of interpretation.

[26] Recently Wallis JA restated the correct approach to interpretation as follows in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[16]

> '[18]…The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and in the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar in syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those

[15] *S v Dzukuda and others* 2000 (4) SA 1078 (CC) para 5; *Ingledew v Financial Services Board in re: Financial Services Board v Van Der Merwe and Another* 2003 (4) SA 584 (CC) para 20; *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) para 29; *Giddey N O v J C Barnard and Partners* 2007 (5) SA 525 (CC) para 18; *Telcordia Technologies Inc v Telkom SA* 2007 (3) SA 266 (SCA) para 44.
[16] 2012 (4) SA 593 (SCA).

> responsible for its productions. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business-like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contact for the parties other than the one they in fact made. The "inevitable point of departure is the language of the provision itself", read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.'

[27] In *Investigative Directorate: SEO v Hyundai Motor Distributors*[17] Langa DP warned:

> '[o]n the one hand, it is the duty of the judicial officer to interpret legislation in conformity with the constitution so far as this is reasonably possible. On the other hand, the legislature is under a duty to pass legislation that is reasonably clear and precise, enabling citizens and officials to understand what is expected of them…There will be occasions when a judicial officer will find that the legislation, though open to a meaning which would be unconstitutional, is reasonably capable of being read "in conformity with the Constitution". Such an interpretation should not, however, be unduly strained.' (footnotes omitted)

[28] The aforesaid is of course consistent with the provisions of section 39 of the Constitution which enjoins a court in interpreting the law to do so in accordance with the spirit and purport of the Constitution.

[29] Regarding the correct interpretation of rule 46, Mr *Budlender*, with him Mr *Mitchell*, for the execution creditor stressed the structure of rule 46 or its topographical layout.[18] The proviso requiring judicial oversight spatially forms part of sub-paragraph (ii) of rule 46(1)(a) and not sub-paragraph (i). They contended that the Rules Board specifically chose that layout of the provision with full knowledge of the decision in *Jaftha*. That to me, is however the high water mark of the execution creditor's argument and not decisive.

[30] Rule 46, on a proper construction, to a lesser extent based on the language thereof and to a greater extent the context in which the whole of rule 46(1)(a) came to be substituted, consistent with the values enshrined in the Constitution, requires that in all instances where execution is sought against a debtor's private residence

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[17] 2001 (1) SA 545 (CC) para 24.

[18] As originally published in Government Notice R981, Regulation Gazette 9398 in *Government Gazette* 33689 dated 19 November 2010.

that a writ of execution against such residence as a precursor to attachment and a sale in execution should only follow after a court, having considered all the relevant circumstances, ordered execution against such property.

[31] Firstly, as a matter of language construction, it appears to me that the reference to 'the property sought to be attached', refers to an attachment made pursuant to a 'writ of execution' as referred to in rule 46(1)(a) and that there is no reason to confine a reference to 'property sought to be attached' simply to 'immovable property…declared to be specially executable' referred to in rule 46(1)(a)(ii) only. It is not an order declaring property specially executable which results in the attachment thereof. Notwithstanding an order declaring property specially executable being granted, property may never be attached. Attachment only follows upon a 'writ of execution against the immovable property' being issued, which is the event contemplated in the preamble to rule 46(1)(a). Sub-rules (i) and (ii) of rule 46(1)(a) simply provide for the two instances in which a writ of execution may come to be issued. Irrespective of which of the two instances results in the writ being issued, where the writ seeks to attach the primary residence of the judgment debtor, the intention in my view is that it shall not issue 'unless the court, having considered all the relevant circumstances, orders execution against such property.' That interpretation is clearly to be preferred, otherwise unscrupulous mortgagees who cannot obtain a court order authorising the issue of a writ against the debtor's immovable property, could nevertheless execute against the debtor's residence by issuing a writ against movables and follow it shortly thereafter upon receipt of a *nulla bona* return with a writ against immovable property without any judicial scrutiny.

[32] To the extent that the above interpretation might be one of two, possibly more interpretations, the context in which the rule came to be amended and substituted, assumes particular significance. The principle or rule that has come to be recognized in the developing case law is that where a primary residence of an execution debtor is to be attached, the issue of the writ commencing such execution process should be subject to judicial scrutiny in the sense of being ordered by a court, because the constitutional right to housing in terms of section 26 of the Constitution might be compromised. It is against that background that a purposive interpretation must be given to the wording in the amendment to rule 46(1)(a).

[33] Although probably *obiter dicta* in *Nedbank Limited v Fraser*[19] and *Standard Bank of SA Limited v Bekker*[20] a similar interpretation was preferred. In my view the issue of the writ against the G[…] property should have been ordered by a court.

[34] Having concluded that the issue of the writ in respect of the G[…] property should have been considered by the court and execution against such property ordered before such writ against immovable property could be validly issued, it does not necessarily mean that the attachment of the G[…] property falls to be set aside. As pointed out earlier, Froneman J in *Gundwana* confirmed that an equitable remedy should be sought. He concluded that a balance can best be achieved by aggrieved debtors who wish to set aside past default judgments and execution orders (based on the facts of that case) must show

> 'in addition to the normal requirements for rescission, that a court with full knowledge of all the relevant facts existing at the time of granting default judgment would nevertheless have refused leave to execute against especially hypothecated property that is the debtors home'.

[35] Translated to the facts of the present matter and by analogy, the execution debtor who seeks to set aside the writ against immovables issued in the absence of a court order, and the attachment pursuant thereto, must show that a court with full knowledge of all the relevant facts existing at the time when the writ was issued, would nevertheless have refused leave to execute against property that is the debtor's home.

[36] In regard to that enquiry, the judgment debtor would ordinarily be in the best position to advance contentions as to the unjustifiability such execution.[21] Placing that onus on the judgment debtor is similar to the position which applies to applications for eviction pursuant to the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[22] where it has been in regard to the factors to be considered whether an eviction order should be granted that it cannot be expected of an owner to negative and advance facts not known to him

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[19] 2011 (4) SA 363 (GSJ).
[20] 2011 (6) SA 111 (WCC)
[21] *First Rand Bank Limited v Folscher and Another*, *and similar matters* 2011 (4) SA 314 (GNP).
[22] Act 19 of 1998

relevant to a proposed eviction.[23] Accordingly, the evidentiary onus should properly rests on a judgment debtor to show why execution against immovable property would infringe his or her right to adequate housing.[24]

[37] A bifurcated approach is involved:

(a) Firstly, a threshold test must be applied to determine whether the property concerned is the "primary residence" of the judgment debtor; and if so;

(b) Secondly, a qualitative analysis must be undertaken to determine whether execution against the property would be in breach of the execution debtor's rights in terms of section 26 of the Constitution, or any other law, such as whether it would be unjustifiable, disproportionate, or an abuse of process.

[38] For the purposes of this judgment it is assumed that the G[…] property is the primary residence of the execution debtor. The threshold test is accordingly satisfied.

[39] The only question remaining is whether the execution debtor has discharged the onus of proving that execution should be refused.

[40] The reasons for which the issue of such a writ could be refused, do not constitute a *numerus clausus.* The reasons would include considerations as such as whether there are other reasonable means to satisfy a judgment debt, or whether execution would be grossly disproportionate to the debt owing, or whether execution would be an abuse of the execution process. A mere inability to pay a debt is an insufficient reason to ward of execution against the judgment debtors home. There must be a gross disproportionality in the use of execution as a means to satisfy the particular debt. In the absence of any such unusual circumstances execution against the home of the judgment debtor is constitutionally unobjectionable.[25]

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[23] *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA) at para 19.
[24] *Standard Bank of SA Limited v Bekker* 2011 (6) SA 111 (WCC) at para 26.
[25] See *Bekker* supra at para 17.

[41] In assessing whether there is gross disproportionality, the interests of the judgment creditor in obtaining payment and the interests of the judgment debtor in security of tenure need to be balanced, but as held in *Jaftha*,[26] execution is only disproportionate when the creditor's interests in obtaining payment are significantly less than the execution debtor's interest in retaining security of tenure. Relevant considerations listed by the court and to be considered would inert alia include the size of the debt, the prevention of execution as a means to recover trifling debts, the recognised legal and social value that debtors must meet the debts they incur, the circumstances in which the debt arose, that where an asset has been put up as security execution should ordinarily be permitted provided there has not been an abuse of court, alternative means to recover the judgment debt, and, whether the execution debtor is employed or has a source of income.

[42] When no other proportionate means are available, execution may not be avoided.[27]

[43] The only considerations raised by the execution debtor as to why execution against the G[…] property would be unjustifiable, grossly disproportionate, or an abuse of process were:

(a) That the G[…] property is her and her family's primary residence;
(b) That the execution creditor's debt is not based on a mortgage bond and is accordingly extraneous to the property;
(c) That the execution debtor and her family do not have alternative accommodation because the M[…] property is leased and another property referred to as the E[…] property is already fully occupied;
(d) That because the execution debtor is unable to pay a judgment debt of over R4 000 000, she ought to be deemed to be indigent.

[44] Dealing with those issues, those referred to in paragraph (a) above relate to the threshold requirement and are not relevant to the qualitative analysis required at this stage of the inquiry. The consideration in paragraph (b) namely that it is not based on a mortgage bond, is not an exceptional circumstance. The consideration in

[26] At para 57.
[27] *Gundwana* supra para 54.

paragraph (c) is not a relevant consideration. The availability or otherwise of alternative accommodation is not a factor to be considered. It has not been referred to as such a factor in either *Jaftha* or *Gundwana*. The debate at this stage is ownership and whether a writ should be issued which could result in the termination of an ownership. Continued occupation and available alternative accommodation might only become relevant thereafter and could form the basis of a PIE application. The final consideration in paragraph (d) above is also not a relevant one. The peculiar circumstances of the execution debtor do not make her a person falling in the category of indigent. The truly indigent are those such as in *Jaftha* who do not own other properties, as is the case with the execution debtor, but who are often the poorest of the poor and for whom the loss of their residence for a trifling amount would render them entirely homeless. But in the final amalysis, indigency is not the test. More correctly it is disproportionality.

[45] Mr *Potgieter* was constrained to concede that on the execution debtor's allegations, she had not discharged the onus of proving that execution should not follow; that is that if the relevant circumstances she has alluded to had been placed before a court, it would have declined to order execution against the G[…] property.

[46] The execution debtor has been critical of the failure on the part of the execution creditor to put up a valuation of the G[…] property. The practice note in this division dealing with "Default judgments in execution against primary residence" requires *inter alia* that the affidavit in support of an order declaring the primary residence of a debtor specially executable should state:

(a) The circumstances under which the debt was incurred;
(b) The debtors payment history;
(c) Whether any notice in terms of s 129 of the National Credit Act was sent to the debtor prior to the institution of action;
(d) The current estimated value of the property if sold on the open market (not the value of a forced sale);
(e) The number and amount of instalments in arrears when the judgment creditor exercises contractual rights against the mortgagee;
(f) Whether the property is in fact occupied by the owner;

(g) That the court on hearing the application for declaring the primary residence of the judgment debtor executable, may call for further information to enable the court to exercise its discretion whether to order execution or not.

[47] That practice note patently caters more specifically for orders where mortgaged property is sought to be declared specially executable. Its terms are not pertinent to the present instance falling under rule 46(1)(a)(i). Indeed, it might be impossible for the execution creditor to obtain a meaningful valuation of the execution debtor's property. Unlike a financial institution granting a mortgage bond over property sought to be declared specially executable, the execution creditor probably never had the opportunity of entering the property and valuing it for itself, nor does it have the right to insist to do so. Indeed, on the undisputed facts, an opportunity was requested to inspect the property and access to the main dwelling was specifically refused. Non-compliance with the requirements of the "practice note" does not assist the execution debtor.

[48] On the execution debtor's own evidence the G[…] property "is only worth some R2 500 000" and the current balance secured by the mortgage bond registered against the property owing to Nedbank Limited as at 1 June 2014 was R2 019 458,96. The equity in the property is therefore more than R300 000. As opposed to that, the execution debtor, on her own evidence, states that the A[…] Road property has been offered for sale but that she doubts 'that there will be much above the existing bond available'.

[49] Insofar as it might be contended by the execution debtor that no notice has been given to the bond holder, such a failure will not stand in the way of a writ of execution being ordered. Rule 46(5) provides:

'(5) No immovable property which is subject to any claim preferent to that of the execution creditor shall be sold in execution unless –

(a) The execution creditor has caused notice, in writing, of the intended sale to be served by registered post upon the preferent creditor, if his address is known and, if the property is rateable, upon the local authority concerned calling upon them to stipulate within 10 days of a date to be stated a reasonable reserve price or to agree in writing to a sale without reserve, and provided has proof to the Sheriff that the preferent creditor has so stipulated or agreed;' (my underlining).

Notice to Nedbank is simply a prerequisite to the sale, not the order permitting execution against such residential property.

[50] Apart from the execution debtor not having pointed to circumstances which would justify the refusal of execution against the G[…] property, there are indeed compelling reasons that execution against that property should follow, these include *inter alia*:

(a) The debt outstanding is substantial, and certainly beyond trifling;

(b) The execution creditor has otherwise complied fully with the requirements of rule 46(1)(a)(i);

(c) The execution debtor owns two properties and she has an indirect interest to two further properties in the Durban area. One of these, referred to as the Es[…] property, is owned by a trust for the benefit of the execution debtor's family, and there is nothing on the papers to gainsay its availability as alternative accommodation for the family;

(d) An inability to pay a debt of R4 000 000 cannot equate to being indigent;

(e) Both the G[…] (main dwelling) and A[…] Road properties are leased by the execution debtor;

(f) No payments have been made towards the judgment debt at all, neither has there been any attempt to make any payments;

(g) The execution debtor has insufficient movable assets to satisfy the judgment debt;

(h) The execution debtor has chosen not to disclose whether she is employed, and if so, what she earns from employment;

(i) The execution debtor has elected not to place before this court any evidence of her assets and liabilities or income and expenses.

THE APPROPRIATE RELIEF:

[51] On the papers the execution debtor seeks an order in terms of paragraphs 1.1 as amended and 1.3 (ordering the execution creditor to pay the costs of the application). The execution creditor in terms of the counter application seeks an order in terms of paragraphs 1 and 2, being orders directing the registrar to issue writs of execution to attach the immovable properties of the execution debtor situate at respectively 14 M[…] P[…], G[…] and that at 10 A[…] Road, M[…], Durban.

[52] The order authorising and directing the registrar to issue a writ of execution to attach the immovable property at 10 A[…] Road, is not opposed. That property is not on any party's version the primary residence of the judgment debtor. It also does not appear on the papers that the execution creditor's right to obtain a writ against immovable property in respect of 10 A[…] Road, M[…], Durban has ever been disputed, thus necessitating some declaration of rights in regard thereto. It is accordingly unnecessary to grant an order authorising and directing the Registrar to issue a writ in respect of that property. The rules provide for a writ to be issued in respect thereof and for it to be attached without any court order. Accordingly it would be inappropriate to issue an order to that effect.[28] This issue did not feature in argument and does not require any qualification to the costs order I intend issuing.

[53] The more important question is whether an order should be granted in terms of the relief claimed by the execution debtor in the application, simply to be immediately undone by a separate order authorising and directing the registrar to issue a writ of execution against the G[…] property as claimed in the conditional counter application.

[54] Mr Potgieter, in view of the prayer for costs argued that a separate order should be granted in terms of the Notice of Motion.

[55] The appropriate interpretation of rule 46(1), in view of it involving the execution debtor's claim to the right to adequate housing in terms of section 26 of the Constitution, raises a constitutional issue.

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[28] *Entabeni Hospital (Pty) Ltd v Van der Linde\First National Bank of SA Ltd v Puckriah* 1994 (2) SA 822 (N).

[56] Section 172 of the Constitution provides

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[57] Section 173 of the Constitution is also significant in that it confers the power in this court to regulate its processes, which will include the process of execution.

[58] Ultimately it seems to me that the appropriate formulation of the relief claimed must be decided in the context of the statement made by Froneman J in *Gundwana* in commenting that although the order as in *Jaftha* requiring judicial oversight operated retrospectively, this did not entail that all transfers subsequent to invalid sales in execution were automatically invalid. *A fortiori* attachments pursuant to invalid writs in execution are not automatically invalid. As in *Gundwana*[29] the position (with suitable amendments to take account of the facts in this application) would be that 'aggrieved debtors who seek to set aside (writs of execution) granted against them by the Registrar must also show, … that a court with full knowledge of the relevant facts existing at the time … would … have refused (an order) to execute against … hypothecated property that is the debtors home.'

[59] In *Head of Department, Mpumalanga Department of Education and Another v Hoörskool Ermelo and Another*[30] Moseneke DCJ stated:

> '[97] It is clear that s 172(1)(b) confers wide remedial powers on a competent court adjudicating a constitutional matter. The remedial power envisaged in s 172(1)(b) is not available when a court makes an order of constitutional invalidity of a law or conduct under s 172(1)(a). A just and equitable order may be made even in instances where the outcome of a constitutional dispute does not hinge on a constitutional invalidity of legislation or conduct. This ample and flexible remedial jurisdiction in constitutional disputes permits a court to forge an order that would place substance above mere form by identifying the actual underlying dispute between the parties and by requiring the parties to take steps directed at resolving the dispute in a manner consistent with constitutional requirements.'

[60] In *Absa Bank v Pieteren*[31] the court held:

> 'That the judgment against him arguably might not have been lawfully granted does not, by itself and without more, afford good cause for it to be set aside. Compare, for example, the consequences of the Constitutional Court's judgment in *Gundwana v Stekko Development and Others* 2011 (3) SA 608 (CC) (2011) (8) BCLR 792; [2011] ZACC 14)'.

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[29] At para 59
[30] 2010 (2) SA 415 (CC) para 97.
[31] 2013 (1) SA 481 (WCC) para 23.

[61] Litigation is not a game to exploit technical points to secure favourable cost orders. Where a technical deficiency (i.e. the failure to obtain a court order authorising the issue of the writ) is invoked, where what should have happened (in this instance judicial oversight) would, had it been applied for, been granted, the Applicant has failed to prove that she is entitled to the relief claimed in the Notice of Motion.

[62] The appropriate order in my view is therefore that the execution debtor's application be dismissed with costs and that an order be granted in terms of the counter application that the registrar issue a writ of execution to attach the immovable property of the execution debtor situate at 14 M[…] P[…] G[…], Durban and described as Erf […] Durban, with costs.

ORDER:

[63] The following order is granted:

(a) The application is dismissed with costs;
(b) An order is granted that the Registrar issue a writ of execution to attach the immovable property of the execution debtor situate at 14 M[…] P[…] G[…], Durban and described as Erf […] Durban;
(c) The Applicant, Mrs Neveling, is directed to pay the costs of the counter application.

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