

**IN THE HIGH COURT OF SOUTH AFRICA  
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**Case no: 25699/2009**

**FIRSTRAND BANK LIMITED**

Plaintiff

v

**PIETER SWARTS**

First Defendant

**HENDRINA FRANSINA SWARTS**

Second Defendant

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**JUDGMENT DELIVERED THIS MONDAY, 1 MARCH 2010**

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**CLEAVER J**

[1] This is an application for summary judgment. The plaintiff, who is the holder of a first mortgage bond registered by the defendants over a residential property in Wellington, has sued the defendants for

- 1.1 Payment of the sum of R403 725,38 owing under and in terms of the bond, the defendants having failed to make monthly instalments on due date;
- 1.2 An order declaring the property hypothecated by the bond to be executable for the amount claimed;
- 1.3 Interest on the amount claimed.

The defendants are sued jointly and severally.

[2] The application for summary judgment is opposed on two bases, namely

- 2.1 That although not very clearly framed, the defendants' right of access to adequate housing as enshrined in s 26(1) of the constitution is said to have
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been infringed and that it will not be just and equitable “given the scant arrears” to have the property declared executable.

2.2 That the defendants are over-indebted as contemplated by s 85 of the National Credit Act, No 34 of 2005 (“the NCA”).

[3] In amplification of their reliance on s 26 of the constitution, the first defendant says the following in his replying affidavit.

*“In amplification of the afore-going I wish to advise this Honourable Court that my family and I have been living in the said immovable property for more than twenty years. We have known no other home but for the said immovable property. In fact, we have access to no other home but the said immovable property in question. The said immovable property has always been paid up until recently when I applied for a second mortgage bond to assist me with an empowerment contract with Lafarge Construction Company in terms whereof I became an owner-driver and had to purchase certain vehicles as part of my obligations. The deal with Lafarge, however, soured and I was left destitute and could not pay off the second bond. I am aware that the constitutional protection extends mostly to indigent persons who own property. I must inform this Honourable Court that the property is located in Newton Township, a formerly ‘coloured’ township in Wellington and represents a basic residential dwelling.”*

In my view the defendants’ reliance on s 26 of the constitution cannot be sustained. Guidance on this issue is to be found in the judgments of *Jafftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others*<sup>1</sup> and *Standard Bank of South Africa Ltd v Saunderson and Others*<sup>2</sup>. The submission by the defendants that s 26 comes into play whenever it is sought to execute against residential property, irrespective of the nature of the property or the circumstances of the owner, is not correct. This was made clear in the judgment in the *Saunderson* matter where the following was said:

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

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

*"[17] But Jaftha did not decide that the ownership of all residential property is protected by s 26(1); nor could it have done so bearing in mind about what constitutes 'adequate housing' is necessarily a fact-bound enquiry. One need only postulate executing against a luxury home or a holiday home to see that this must be so, for there it cannot be claimed that the process of execution will implicate the right of access to adequate housing at all.*

*[18] The situation this case presents is thus radically different from that before the Constitutional Court in Jaftha. There, the sale in execution deprived the debtor of title to the home a state subsidy enabled her to acquire because she was unable to pay a relatively trifling extraneous debt, and no judicial oversight was interposed to preclude an unjustifiably disproportionate outcome. The judgment creditor in Jaftha was not a mortgagee with rights over the property that derived from agreement with the owner. By contrast, the property owners here have willingly bonded their property to the bank to obtain capital. Their debt is not extraneous, but is fused into the title to the property. The effect of s 26(1) on such cases was not considered in Jaftha. Observations were made in the judgment concerning mortgage bonds, but that was in the context of the kind of interests that might need to be considered once it was shown that s 26(1) was in fact compromised."*<sup>3</sup>

In the present case, the bond which was taken over the immovable property was raised in 2007 and it is clear from the defendants' affidavit that the proceeds were used to finance a commercial transaction. Although the first defendant makes reference to an empowerment contract, no details of the contract are furnished, nor are any details furnished as to why the venture failed and what took place in respect of the vehicles to which he refers. As pointed out in both *Jaftha* and *Saunderson*, it is only a person's right to adequate housing which can be compromised in terms of s 26 of the constitution (my underlining). The case before me is not similar to that in *Jaftha* where the execution deprived the debtor of title to a home a state subsidy had enabled Ms Jaftha to acquire and where the amount she was required to pay was relatively trifling. Although the first defendant alleges that his arrears amount to some R9 841 while the applicant says that at the time of the issue of summons in

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<sup>3</sup> *Standard Bank of South Africa Ltd v Saunderson and Others* (supra) at p274.

December 2009 payment was in arrear to the extent of some R13 663, the defendant offers no explanation as to how he arrives at his figure for the arrears. The outstanding debt at the time of the issue of summons was substantial namely, namely R403 725,38. In this connection the following extract from the judgment in *Jafftha* is instructive:

*"[40] The purpose of the limitation is important, as the Minister contends. However, when the focus is on the trifling nature of the debt the importance of the purpose is diminished. It is difficult to see how the collection of trifling debts in this case can be sufficiently compelling to allow existing access to adequate housing to be totally eradicated, possibly permanently, especially where other methods exist to enable recovery of the debt. This is not to say that every sale in execution to satisfy a trifling debt will be unreasonable and unjustifiable. There are a number of difficulties with such a conclusion. In the first place, it is not easy to adopt a uniform definition of the concept of a 'trifling debt'. What might seem trifling to an affluent observer might not be trifling to a poor creditor reliant on his or her ability to recover debts. Indeed, not all creditors are affluent and to many who use the execution process, it constitutes the only mechanism to recover outstanding debts.*

*[41] Another difficulty is that there may be other factors which militate against a finding that execution is unjustifiable. Such factors will vary according to the facts of each case. It might be that the debtor incurred debts despite the knowledge of his or her inability to repay the money and was reckless as to the consequences of incurring the debt. While it will ordinarily be unjustifiable for a person to be rendered homeless where a small amount of money is owed, and where there are other ways for the creditor to recover the money lent, this will not be the case in every execution of this nature.*

*[42] The interests of creditors must not be overlooked. There might be circumstances where, notwithstanding the relatively small amount of money owed, the creditor's advantage in execution outweighs the harm caused to the debtor. In such circumstances, it may be justifiable to execute. It is in this sense that a consideration of the legitimacy of a sale in execution must be seen as a balancing process."*<sup>4</sup>

[4] Turning now to the defence of over-indebtedness, the case put up by the defendants is simple and very briefly recorded, namely:

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<sup>4</sup> *Jafftha v Schoeman and Others; Van Rooyen v Stoltz and Others (supra)* at 158 paras [40] – [42].

*"The only income presently earned by the Defendants is a pension of R1010,00 that my wife presently receives from the National Government. Our expenditure and income is set out in annexure 'A' attached hereto. My wife and I presently enjoy a frugal lifestyle and manage to survive on our meagre income."*

Annexure "A" reads as follows:

<b><u>INCOME AND EXPENDITURE ACCOUNT</u></b>	
<b><u>Income</u></b>	
Pension	R 1,010.00
<b><u>Expenses</u></b>	
Food	R 300.00
Electricity	R 140.00
Transport	R 100.00
Medical	R 50.00
Clothing	R 100.00
Rates	R 120.00
<b><u>Free residue available for payment towards bond</u></b>	
	R 200.00"

- [5] Counsel for the defendants submitted that the court should find that the first defendant is over-indebted and should make an order in terms of the NCA for *"inter alia that a proposal be structured by a debt counsellor and submitted to the plaintiff and failing an agreement being reached between the parties that the matter be placed before a magistrate for adjudication"*. To start with, the defendants have ignored the provisions of s 79 of the NCA. In this section over-indebtedness is described as follows:

*" (1) A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or will be unable to satisfy in a timely manner all the obligations*

*under all the credit agreements to which the consumer is a party, having regard to that consumer's –*

- (a) financial means, prospects and obligations; and*
- (b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt repayment.*

*(2) When a determination is to be made whether a consumer is over-indebted or not, the person making that determination must apply the criteria set out in subsection (1) as they exist at the time the determination is being made.*

*(3) When making a determination in terms of this section, the value of –*

- (a) any credit facility is the settlement value at that time under that credit facility; and*
- (b) any credit guarantee is -*
  - (i) the settlement value of the credit agreement that it guarantees, if the guarantor has been called upon to honour that guarantee; or*
  - (ii) the settlement value of the credit agreement that it guarantees, discounted by a prescribed factor."*

[6] Section 78(3) of the act contains what may be termed a definition section which is applicable to section 79 and which reads:

*" (3) In this Part, 'financial means, prospects and obligations', with respect to a consumer or prospective consumer, includes –*

- (a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receives, has a right to receive, or holds in trust for another person;*
  - (b) the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily –*
    - (i) share their respective financial means; and*
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- (ii) *mutually bear their respective financial obligations; and*
- (c) *if the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonably estimated future revenue flow from that business purpose."*

All that the first defendant has provided in support of his defence of over-indebtedness is that which I have recorded in para [4] above.

[7] The information proffered by the defendant is the bare minimum. No details are furnished in respect of any of the expenses some of which require amplification, i.e. the amount spent on transportation, clothing and medical expenses. I agree with the view expressed in *Standard Bank of South Africa Ltd v Panayiotts*<sup>5</sup> that the financial means of a consumer will include not only income and expenses, but also assets and liabilities. The first defendant is silent as to the assets and liabilities which he and his wife have and we are asked to infer that the only asset which he has is the immovable asset bonded to the plaintiff and that his only debt is that owing to the plaintiff.

[8] However, should I be wrong in holding that the first defendant has not established his over-indebtedness, I am of the view that his situation does not entitle him to a referral to a debt counsellor or to the magistrates' court for adjudication. The objects of the NCA are recorded in the following manner in a preamble to the act.

*"To promote a fair and non-discriminating marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit*

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<sup>5</sup> 2009 (3) SA 363 (WLD).

*industry; to prohibit certain unfair credit and credit-making practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt re-organisation in cases of over-indebtedness; to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services; to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit;....."*

The portion of the preamble relevant to the defendants is "to provide for debt re-organisation in cases of over-indebtedness". On the defendants' own version, there can be no question of any re-organisation of his debt. His position is simply that he is unable to pay the plaintiff's claim and from the figures submitted by him, there is no prospect of the debt being liquidated in the foreseeable future out of the free residue which he says would be available for payment towards the bond.

[9] In all the circumstances, I conclude, however hard it will be for the defendants, that the plaintiff is entitled to succeed with its claims. The bond provides that costs on the attorney client scale are to be paid in the event of the plaintiff having to recover money owing under the bond from the defendants.

[10] In the result the following order is made:

10.1 Judgment is granted against the defendants jointly and severally, payment of the sum of R403 725.38, together with interest thereon at 9.45% (varying) per annum from 1 November 2009 calculated monthly in advance on the amount owing to plaintiff at the commencement of each month;

- 10.2 An order is granted declaring Erf 5252, Wellington, being the property hypothecated by the bond passed by the defendants in favour of the plaintiff to be executable for the amount set out in 8.1.
- 10.3 Defendants are to pay the plaintiff's costs jointly and severally on the attorney and client scale.

  

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R B CLEAVER